

Compliance Committee to the Convention on  
Access to Information, Public Participation  
in Decision-making and Access to Justice  
in Environmental Matters (Aarhus Convention)

**First progress review of developments relating to request  
ACCC/M/2021/4 on compliance by the European Union with its  
obligations under the Convention**

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## I. Introduction

1. At its seventh session (Geneva, Switzerland, 18-21 October 2021), 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 seventh session:

In a spirit of reaching consensus, 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)<sup>1</sup> to the next ordinary session of the Meeting of the Parties to be held in 2025. The Meeting of the Parties stresses that this exceptional decision shall in no way establish a practice under the Convention.<sup>2</sup>

2. Through paragraph 58 of its report of the seventh 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 reaffirmed its commitment to implement its obligations under the Convention.<sup>3</sup>

## II. Summary of follow-up

3. At its seventy-third meeting (Geneva, 13-16 December 2021), the Committee held an open session to provide guidance on preparing the plan of action that each Party subject to a decision or request of the Meeting of the Parties was requested to submit by 1 July 2022. Representatives of the Party concerned and the communicant of communication ACCC/C/2015/128 took part in the open session at the seventy-third meeting.

4. On 11 February 2022, on the Committee's instructions, the secretariat sent an information note and a template for its plan of action to the Party concerned to assist it to prepare its plan of action.

5. At its seventy-fourth meeting (Geneva, 15-16 March 2022), the Committee held a further open session on the preparation of Parties' plans of action. The purpose of the session was to answer any specific questions from Parties regarding the format or content of their plan of action. Representatives of the Party concerned and the communicant of communication ACCC/C/2015/128 participated in that session. The observers ClientEarth and Mr. Alistair McGlone also took part in that session.

6. On 29 March 2022, the Party concerned sent its draft plan of action to the communicant of communication ACCC/C/2015/128 and registered observers.

7. On 1 July 2022, the Party concerned submitted a draft of its plan of action to the Committee and on 15 July 2022 provided an update.

8. On 31 July 2022, the Party concerned submitted the final version of its plan of action to the Committee.

9. On 29 August 2022, the secretariat forwarded the Party concerned's plan of action to communicant of communication ACCC/C/2015/128 and registered observers, inviting their comments by 26 September 2022.

10. On 22 September 2022, the observer Mr. Alistair McGlone provided his comments on the plan of action.

11. On 26 September 2022, the communicant of communication ACCC/C/2015/128 and the observer ClientEarth separately each provided their comments on the plan of action.

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<sup>1</sup> ECE/MP.PP/C.1/2021/21.

<sup>2</sup> ECE/MP.PP/2021/2, para. 58.

<sup>3</sup> Ibid.

12. At its virtual meeting on 17 November 2022, the Committee reviewed the plan of action of the Party concerned, together with the comments from the communicants received thereon.

13. On 5 December 2022, the secretariat wrote to the Party concerned to inform it that, having reviewed its plan of action, the Committee had concluded that the European Union's plan of action did not appear to be appropriate. The Committee therefore invited the Party concerned to attend an open session at its seventy-seventh meeting (Geneva, 13-16 December 2022), to discuss its plan of action.

14. On 8 December 2022, the secretariat wrote to the Party concerned, providing it with a brief summary of the Committee's concerns on its plan of action.

15. At its seventy-seventh meeting, the Committee held an open session to discuss the Party concerned's plan of action with the participation of representatives of the Party concerned, the communicant of communication ACCC/C/2015/128, and the observers ClientEarth and Mr. Alistair McGlone.

16. On 26 September 2023, the Party concerned submitted its first progress report on request ACCC/M/2021/4, on time.

17. On 28 September 2023, the secretariat forwarded the Party concerned's first progress report to the communicant of communication ACCC/C/2015/128, and registered observers, inviting their comments by 26 October 2023.

18. On 26 October 2023, the observers Justice and Environment and ClientEarth submitted their joint comments on the Party concerned's first progress report.

19. On 27 October 2022, the observer Environmental Justice Network Ireland submitted its comments on the Party concerned's first progress report.

20. At its eight-first meeting (Geneva, 12–15 December 2023), the Committee prepared its first progress review on request ACCC/M/2021/4, taking into account the information received, and adopted it through its electronic decision-making procedure on 19 February 2024. The Committee thereafter requested the secretariat to forward the first progress review to the Party concerned, the communicant of communication ACCC/C/2015/128, and registered observers.

### **III. Considerations and evaluation by the Committee**

21. In order to fulfil request ACCC/M/2021/4, concerning paragraph 131 of the Committee's findings on communication ACCC/C/2015/128 (European Union), the Party concerned would need to provide the Committee with evidence that it had taken the necessary legislative, regulatory and other measures to ensure that the Aarhus Regulation<sup>4</sup> 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.

#### **Party concerned's first progress report**

22. In its first progress report, the Party concerned reports that, on 17 May 2023, it adopted a Communication "on the findings adopted by the Aarhus Convention Compliance Committee in case ACCC/C/2015/128 as regards state aid: Analysing the implications of the

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<sup>4</sup> Regulation (EC) No 1367/2006 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 (OJ L 264, 25.9.2006), p. 13, as amended by Regulation (EU) 2021/1767 of the European Parliament and of the Council of 6 October 2021, OJ L356 8 10 2021.

findings and assessing the options available”<sup>5</sup> (the Communication). This was accompanied by a Commission Staff Working Document containing a synopsis report of the stakeholder consultation. The Communication: (i) sets out the Commission’s assessment of the implications of the Committee’s findings; (ii) reports on the public consultation organized by the Commission to explore options available to address the findings; and (iii) elaborates on different options to address the Committee’s findings, including a combination of options, and confirms that maintaining the status quo would raise issues of compliance with the Convention. The Party concerned reports that, in term of next steps, the Commission will analyse the impacts, including costs and benefits of the possible options in light of its obligations under the Convention, while also ensuring the full functioning of the internal market and a fast and effective state aid control mechanism. The Party concerned further reports that it has set up an Inter-Service Group to work closely on the follow-up of the Communication. Finally, the Party concerned submits that subsequent action will be based on the outcome of ongoing consultations and further analysis and that, while it aims at meeting the deadline of 1 October 2024, it is not in a position at this point to identify a date by which implementation would be complete.<sup>6</sup>

### **Comments from observers**

23. The observers ClientEarth and Justice and Environment commend the Party concerned for its engagement with non-governmental organizations and other stakeholders in the MOP follow-up process, which they consider can serve as a model for other Parties. However, the observers deeply regret that the Party concerned’s first progress report fails to demonstrate any meaningful progress since it submitted its plan of action to the Committee on 31 July 2022. They also express concern at the lack of a clear timeline regarding the Party concerned’s stated next steps.<sup>7</sup>

24. The observer Environmental Justice Network Ireland likewise welcomes the efforts taken by the Party concerned to date, including that the Commission’s Communication no longer proposes maintenance of the status quo as a course of action. The observer however expresses its concern that the progress report provides no evidence of any substantial progress since the Commission’s Communication was published in May 2023. It considers that, at this stage, the absence of any detailed proposals for the three tabled options is extremely worrying.<sup>8</sup>

### **Committee’s evaluation**

25. The Committee welcomes the Party concerned’s first progress report, which was received on time, as well as the comments from observers received thereon.

26. The Committee also welcomes the clear engagement demonstrated by the Party concerned in the Committee’s follow-up on request ACCC/M/2021/4, including the statement by the Commission in its Communication that the “EU is fully committed to compliance with the Aarhus Convention”.<sup>9</sup> Likewise the Committee commends the wide public consultation process carried out by the Commission, including its conclusion that there is “broad consensus” that “the EU must be fully compliant with the Convention”.<sup>10</sup>

27. The Committee, however, expresses its serious concern that, as at the date of the first progress report, a bare 12 months out from the final deadline of 1 October 2024 for the Party concerned to demonstrate that it has fully met the requirements of paragraph 131 of the

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<sup>5</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the findings adopted by the Aarhus Convention Compliance Committee in case ACCC/C/2015/128 as regards state aid: Analysing the implications of the findings and assessing the options available, 17 May 2023.

<sup>6</sup> Party’s first progress report, 26 September 2023, pp. 2-3.

<sup>7</sup> Comments on first progress report, from observers Justice and Environment and ClientEarth, 26 October 2023, pp. 1-2.

<sup>8</sup> Comments on first progress report, from Environmental Justice Network Ireland, 27 October 2023, p. 2.

<sup>9</sup> Commission Communication, p. 1.

<sup>10</sup> Commission Communication, p. 12.

findings on communication ACCC/C/2015/128, the Party concerned is still only at the stage of considering which of the three options to pursue.

28. In this regard, the Committee also regrets that the Party concerned has not provided a timetable for its next steps, and at least a tentative timeline for it to conduct an impact assessment on the options proposed and present its final proposal on the measures to be taken.

29. Having reviewed the text of the Commission's Communication, which was helpfully submitted to the Committee by the observers, albeit not by the Party concerned, the Committee notes that the Communication proposes three options to implement the Committee's recommendations:

- (a) Option 1 proposes to amend the Aarhus Regulation, as a result of which state aid decisions adopted by the Commission would be subject to the same review procedures as any other administrative act contravening European Union environmental law.
- (b) Option 2 proposes to amend the Best Practices Code for the conduct of state aid procedures to introduce an internal review mechanism similar to the one applicable under the Aarhus Regulation but adapted to the specificities of state aid control, such as shorter deadlines for review requests and replies by the Commission. This would be coupled with a review of the State Aid Implementing Regulation on State Aid Notification.
- (c) Option 3 proposes to amend the Council State Aid Procedural Regulation to introduce an internal review mechanism similar to the one under the Aarhus Regulation. According to the Party concerned, this option would have similar parameters to Option 2 in so far as it would include an internal review mechanism with shorter deadlines for review requests and replies by the Commission.<sup>11</sup>

30. Regarding option 1, the Committee considers that, if the Party concerned takes this option, this would cleanly and clearly meet the recommendation in paragraph 131 of its findings on communication ACCC/C/2015/128.

31. Regarding options 2 and 3, given the lack of detail provided, the Committee is not in a position to properly assess them in the present progress review. The Committee notes that, with respect to option 2, the observers Justice and Environment and ClientEarth contend that the Best Practices Code is not an instrument capable of creating an access to justice regime that would result in a Commission decision with legal effects that members of the public could then challenge before the Court of Justice of the European Union. With respect to option 3, they submit that the proposed shorter deadlines would need to be carefully assessed in light of the requirements under article 9 (4) of the Convention to provide for adequate and effective remedies, given the importance of adequate procedural time-limits in state aid matters.<sup>12</sup>

32. The Committee emphasizes that, whichever option is taken, the resulting measures will need to provide members of the public with clear access to administrative or judicial procedures to challenge Commission decisions on State aid measures that contravene European Union law relating to the environment, in accordance with article 9 (3) and (4) of the Convention.

33. The Committee reminds the Party concerned that, in order to be taken into account in the Committee's report to the eighth session of the Meeting of the Parties, the final deadline for the European Union to put in place any measures to fulfil paragraph 131 of the Committee's findings on communication ACCC/C/2015/128 will be 1 October 2024.

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<sup>11</sup> Comments on first progress report, from observers Justice and Environment and ClientEarth, 26 October 2023, annex 1, p. 3; comments on first progress report, from Environmental Justice Network Ireland, 27 October 2023, p. 3.

<sup>12</sup> Comments on first progress report, from observers Justice and Environment and ClientEarth, 26 October 2023, pp. 3-4.

## IV. Conclusions

34. The Committee welcomes the first progress report of the European Union, which was submitted on time.

35. The Committee however expresses its serious concern that, as at the date of its first progress report, a bare 12 months out from the final deadline of 1 October 2024, the Party concerned was still only at the stage of considering which of the three proposed options to pursue.

36. The Committee invites the Party concerned to provide, as soon as possible, and at the latest together with its final progress report, the text of any legislative, regulatory and other measure that it has by then taken to fulfil paragraph 131 of the Committee's findings on communication ACCC/C/2015/128.

37. The Committee reminds the Party concerned that all measures necessary to implement request ACCC/M/2021/4 must be completed by, and reported upon, by no later than 1 October 2024, as that will be the final opportunity for the Party concerned to demonstrate to the Committee that it has fully met the requirements of paragraph 131 of the Committee's findings on communication ACCC/C/2015/128.

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