

Comments on the draft Plan of Action for decision VII.8f (European Union)

1. On 29 March 2022, the European Union sent its draft Plan of Action for decision VII.8f for comment by communicants and observers
2. As an interested observer in the implementation of this decision, ClientEarth would like to make the following comments on this draft plan.

Overarching comment on the draft plan

3. ClientEarth notes that a number of the identified actions depend on decisions by the European co-legislator, i.e. the European Parliament and the Council of the EU. This is not problematic in itself but rather a reflection of the principle of conferral of power under EU law. Nonetheless, this constellation deserves special attention.
4. First, it requires active engagement from the European Commission not only when making the legislative proposal but also in its contacts with the other EU institutions. It is crucial that the legislative amendments proposed to implement decision VII.8f presented as necessary to comply with international law in order to signal their importance to the co-legislator, in particular in the explanatory memorandum accompanying the legislative proposal. It is equally important that the Commission makes this point public when presenting the legislative proposal to both institutions as well as during the trilogue negotiations.
5. Second, it is of central importance that the Presidency of the Council follows the present procedure on the implementation of decision VII.8f closely. It was therefore very welcome to see that the National Focal Points for both of the Aarhus and the Espoo Convention of France, which currently holds the Presidency, were present at the stakeholder meeting of 25 April 2022. We hope that this close engagement will continue through this process, also from the following Presidencies.
6. ClientEarth includes some more specific comments on certain issues below. These comments are structured in accordance with the findings of the Aarhus Convention Compliance Committee ('the Committee') to which the recommendations in decision VII/8f relate.

Findings on communication ACCC/C/2010/54

7. Para. 2 of Decision VII/8f relates to the recommendations of the Committee in relation to its findings on communication ACCC/C/2010/54. ClientEarth made two sets of comments during the stakeholder meeting of 25 April 2022 and indicated that it would also elaborate on these in writing after the meeting.

The description of the legal situation by the Party concerned

8. First, ClientEarth would like to make two observations as to how the Party concerned describes the legal situation under international law.
9. During the stakeholder meeting of 25 April 2022, a representative of the Party concerned described the present follow-up as relating to an “alleged” non-compliance of the Aarhus Convention. As was essentially also pointed out by the communicant of communication ACCC/C/2010/54 during the meeting, it is important that the Party concerned makes sure that it is clear in all its internal and external communication that the non-compliance of the Convention has been established by a binding decision of the Meeting of the Parties by consensus, i.e. including with the agreement of the Party concerned itself.
10. Another related issue can be found in the draft plan of action. On pages 4, 5 and 6, the Party concerned proposes that it will “remind that Member States are themselves parties to the Aarhus Convention” and therefore need to comply with various provisions of the Convention. It is of course correct that all of the EU Member States are also Parties to the Convention. However, the present decision VII/8f relates to the compliance by the European Union with the Convention. This is because when the EU adopts legislation, such as the EU Governance Regulation, it assumes responsibility to ensure compliance with the Convention. This is at the heart of the findings of communication ACCC/C/2010/54 as otherwise the EU could not have been found to be in non-compliance with the Convention in case it would have been the responsibility of each individual Member State to ensure compliance. The Member States have an important role to play, both when acting through the Council in the legislative process (see paras 3-5 above) and when preparing their National Energy and Climate Plans (NECPs). However, it needs to be clarified that the competent, Member State authority which prepares the NECP is under an obligation to comply with the Aarhus Convention as a matter of EU law, namely based on Art. 216(2) TFEU which makes Art. 7 Aarhus Convention binding on the EU Member States. This is also necessary to clarify the European Commission’s competence to act on the matter.

The proposed actions as compared to the actions undertaken during the last inter-sessional period

11. As to the proposed steps in the draft plan of action, ClientEarth considers that it will depend on how these actions are implemented in practice.
12. ClientEarth recalls that, as set out in the draft plan of action, the Party concerned has undertaken certain steps during the last inter-sessional period in order to ensure compliance with these same recommendations (see points (i)-(vi) on pp. 2-3). In its report to the seventh Meeting of the Parties, the Committee explained why these steps had been insufficient to fulfil the recommendations concerned. The Meeting of the Parties accordingly adopted the present decision.
13. ClientEarth therefore considers that the actions during this intersessional period, in particular as regards the decision-making on the draft updated NECPs, which the Member States need to submit by 30 June 2023, would, at the very least, need to be more targeted and specific in emphasising the importance of public participation and in following up, within the procedures as described in the draft plan of action, on possible failures to conduct adequate public participation.


Findings on communication ACCC/C/2013/96

14. As also indicated during the stakeholder meeting on 25 April 2022, the proposed measures in the draft plan of action related to para. 8 of decision VII/8f took ClientEarth somewhat by surprise. Based on ClientEarth's reading of the Committee's findings, a clear distinction is drawn between the public consultation carried out in accordance with Art. 9(4) and Annex III.5 TEN-E Regulation and the public consultation undertaken by the European Commission on its "Have Your Say" portal. Under Art. 9(4) TEN-E Regulation, the project promotor or, depending on Member State law, a Member State competent authority are required to consult "relevant stakeholders" before the submission of the application file for a candidate project (from now on referred to as "pre-submission consultation"). Under point 5 of Annex III, the regional groups are responsible for consulting organisations representing relevant stakeholders, as reflected in para. 21 of the findings (from now on referred to as the "regional group consultation). Separately from and additionally to this process, the European Commission conducts a public participation on the "Have Your Say" portal for (almost) all proposed EU delegated acts, such as the one establishing the PCI list (from now on referred to as "European Commission consultation"). It is our understanding that the Committee's recommendations related to the latter, European Commission consultation. To be clear, all these consultations are independent from later public participation requirements at the Member State level related to permitting. It is therefore surprising that the identified actions appear to relate to the first, "pre-submission consultation", creating a clear mismatch between the draft plan of action and the recommendations.
15. In its findings, the Committee has already taken into account the multi-stage nature of the public participation procedure related to the preparation of the PCI list. For instance, the Committee considered that it was not necessary at the stage of the EU level consultation to identify every member of the public potentially concerned because of the existence of other stages of consultation. However, with regard to the two recommendations eventually made, the Committee did not consider that these elements were compensated by earlier (or later) stages of public participation.
16. It may be possible for the European Commission to provide links to the relevant information in the local language to national websites (p. 9 of the draft plan), rather than hosting that information themselves. However, the Committee's finding on Art. 7 in conjunction with Art. 6(8) Convention related to the manner in which the outcome of the European Commission consultation was taken into account in the final delegated act and any action to address this point must therefore also concern the Commission's process in how it deals with the comments received. An amendment to Art. 9(4) TEN-E Regulation, as currently being agreed as part of the trilogue negotiations and as reflected in the draft plan of action, would therefore not address the associated recommendation under para. 8(b) of decision VII/8f.
17. ClientEarth would like to emphasise that it is also not always clear in other European Commission consultation how the feedback received during the public consultation is taken into due account. This therefore constitutes a more systemic issue.

We would like to thank the Committee members and the members of the secretariat for their continued consideration of and engagement on this decision.



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