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**ECONOMIC COMMISSION FOR EUROPE**

**EXECUTIVE BODY FOR THE CONVENTION ON LONG-RANGE  
TRANSBOUNDARY AIR POLLUTION**

Working Group on Strategies and Review

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Geneva, 17–20 September 2007  
Item 7 of the provisional agenda

**LEGAL STANDING OF THE DRAFT REVISED EMISSION REPORTING  
GUIDELINES**

Report by the Chairman of the Group of Legal Experts on the Legal Standing of the Emission  
Reporting Guidelines

1. At its thirty-ninth session, the Working Group on Strategies and Review agreed on the need to strengthen the Emission Reporting Guidelines that had been drafted by the Task Force on Emission Inventories and Projections (ECE/EB.AIR/GE.1/2007/15). It decided to set up an ad hoc group of legal experts to review the legal standing of the Guidelines. The terms of reference for the Group of Legal Experts, as agreed by the Working Group on Strategies and Review, is reproduced as annex I to the present report; the Group was requested to provide a report for presentation to the fortieth session of the Working Group in September 2007.

2. The Group of Legal Experts met on 18 to 19 June 2007, in Geneva. Mr. M. Goote (the Netherlands) chaired the meeting which was attended by Ms. C. Hamilton (United Kingdom) and Mr. D. Langlois (Canada). The UNECE secretariat was also present. Ms. M. Doppelhammer (European Commission), Mr. J. Klein (United States), Mr. C. Lindemann (Germany), Mr. S. Michel (Switzerland) and Mr. M. Schroeder (Germany) communicated on the issue with the Chair by e-mail.

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## I. GENERAL LEGAL REMARKS

3. In the opening discussion, the Group of Legal Experts recalled document EB.AIR/GE.1/2002/13 on the legal status of guidelines for estimating and reporting emissions data, which included advice from the Implementation Committee. In concurring with the analysis contained in that document, the Group re-emphasized paragraphs 3(a) and 3(b):

“3(a) Legally binding obligations are generally found in treaties themselves, not in guidelines or other decisions adopted outside the treaty. However, a treaty can provide for a guideline or decision to have legally binding effect. Specifically, sometimes a treaty contains a legally binding obligation that refers to guidelines or other decisions of a designated body. The legal obligation derives from the treaty provision, not from the guidelines themselves; at the same time, the guidelines end up having binding effect by virtue of the treaty provision that gives them such effect.

“3(b) The Convention and its protocols contain a number of provisions requiring Parties to follow guidelines or other rules that are not set out in the treaties themselves, but are rather to be decided upon by a designated body, i.e. the Executive Body or the EMEP<sup>1</sup> Steering Body. Should, at any time, the Executive Body or the EMEP Steering Body decide that it wishes to implement one or more of the authorities designated to it, it must do so expressly (such as “for purposes of the timing requirement in article X of Protocol Y, the Executive Body decided...”), so that its intention is clear”;

4. Therefore, the Group considered it useful to summarize and highlight the following general notions:

(a) Guidelines are a useful policy tool and provide practical guidance to Parties. However, they do not have a legally binding status nor are they intended to create legal obligations;

(b) Certain elements or parts of guidelines can have a legally binding effect, but only by virtue of a specific treaty provision that gives them such effect. Put differently, a guideline can have legally binding effect only where there is a clear textual basis in the Convention or in a

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<sup>1</sup> The Cooperative Programme for Monitoring and Evaluation of the Long-range Transmission of Air Pollutants in Europe.

protocol. In those instances, the relevant guideline can be considered an articulation of the legally binding provision on which it is based.

(c) In certain limited instances the Convention and the protocols expressly authorize the Executive Body or the EMEP Steering Body to take decisions (on reporting) which may have legally binding effect. An overview of those limited instances is contained in document EB.AIR/GE.1/2002/13, covering the Convention, the 1991 Protocol on Volatile Organic Compounds (VOCs) and the 1994 Sulphur Protocol. That overview was consequently reflected in Executive Body decision 2002/10. A comparable approach was taken for the Protocol on Heavy Metals, the Protocol on Persistent Organic Pollutants (POPs) and the 1999 Gothenburg Protocol, as reflected in Executive Body decision 2005/1. Moreover, annex II to the present report provides a table that lists the relevant reporting obligations and, where applicable, the accompanying authority of the Executive Body.

5. It should be added that the Executive Body has already embraced the analysis set out above and has acted accordingly on two occasions, as reflected in its decisions 2002/10 and 2005/1.

6. This analysis also leads to the general, and widely accepted, conclusion on terminology used in guidelines. The verb “should” is the appropriate term for guidelines. The verb “shall” can only be used for a guideline that has a legally binding effect in accordance with the conditions set out above. Hence, changing the verb “should” in the existing guidelines into “shall” is legally inappropriate and will not achieve the desired result of strengthening the guidelines.

7. A further general conclusion relates to the position of non-Parties. Save for some exceptions that are not applicable or relevant here, it is well accepted in international law that treaty obligations cannot be imposed on a State that is not a Party to that treaty. Similarly, guidelines, regardless of their legal status, are not applicable to a State that is not a Party to the legal instruments under which those guidelines were elaborated. Therefore, in the present case, the guidelines are only applicable to those States and regional economic integration organizations that have ratified the Convention and the protocol(s) to which the provisions of the guidelines relate.

## **II. THE QUESTIONS IN THE TERMS OF REFERENCE**

8. Under paragraph 1(a) of its terms of reference, the Group was asked to explain “whether and how a document could be made legally binding through a decision of the Executive Body”. This question has already been addressed in section I above. It was concluded that the Executive

Body can only take a decision with legally binding effect if a clear authority to do so is specifically provided in the Convention or protocol itself.

9. Under paragraph 1(b) of its terms of reference, the Group was asked to explain “the practical implications of making any document legally binding”. At the outset, it should be noted that a general analysis of the pros and cons of making a document legally binding is difficult to provide, as it would very much depend on the specific context and circumstances. Therefore, in answering this question, the Group has focused on the practical implications of making technical and detailed reporting guidelines legally binding. Such practical implications relate to both implementation by the Parties, and to the process of (ensuring) compliance. The issues to be taken into account include the following:

(a) When a document is made legally binding, obviously the body of obligations for a Party is extended and will become more detailed;

(b) A legally binding format may lead to the improvement of quality data and comparability;

(c) With the prospect of it becoming legally binding, Parties may want to revisit the wording of the original document – any such redrafting could result in a “lowest common denominator” effect, or could prevent or complicate acceptance of more stringent standards;

(d) Highly technical and detailed standards of a binding nature may act as a barrier to ratification;

(e) Compliance status will be assessed against more detailed obligations, and failure to fulfil the obligations in the document thus would become an issue for the Implementation Committee; and would have implications for the workload and working methods of the Committee;

(f) Bearing in mind the need for legal certainty and predictability, frequent changes to a legally binding document would not be prudent.

10. Under paragraph 1(c) of its terms of reference, the Group was asked to consider “the legal ways in which use of the draft Emission Reporting Guidelines could be strengthened without making the Guidance itself legally binding”. It is possible to strengthen reporting guidelines without making them legally binding per se, through appropriate drafting. Such drafting may take many forms and include more rigorous text. The text of the Emission Reporting Guidelines could also be strengthened through further concision and simplification of

wording and by being more precise about what is expected of Parties. Availability in the three UNECE languages may also enhance understanding and application of the Guidelines. Moreover, the Executive Body decision adopting and launching the Guidelines can be worded in a sufficiently strong way to give it political impetus. Another approach to strengthening could include enhanced oversight and review of the implementation of the guidelines by the Executive Body and publication of findings or even the commissioning of a study to determine the causes for reporting not in conformity with the Guidelines. Appropriate measures could then be taken by the Executive Body to address the root causes for non-conformance with the guidelines. In this regard, capacity-building can also play an important role.

11. Under paragraph 1(d)(i) of its terms of reference, the Group was asked to consider whether “Parties within the geographic scope of EMEP could be required to use the methodologies in the latest version of the EMEP/CORINAIR Atmospheric Emission Inventory Guidebook to estimate emissions and projections for each source category”. Neither the Convention, nor any of the protocols seem to authorize the Executive Body to take a decision (with legally binding effect) requiring Parties to use a certain set of methodologies to estimate emissions and projections for each source category. The verb “should” is therefore the appropriate wording for paragraph 13 of the draft Guidelines (in the 2007 draft revision). Such wording would also be compatible with the remainder of the paragraph 13, under which Parties may use alternative methodologies. The Group also noted that paragraph 13 already has a strong normative character, even with the appropriate verb “should”.

12. The next four questions in the terms of reference relate to the informative inventory report (IIR) and were considered together by the Group. First, under paragraph 1(d)(ii) of its terms of reference, the Group was asked to consider whether “Parties within the geographic scope of EMEP could be required to submit an Informative Inventory Report (IIR) prepared in accordance with the outline provided in annex VI” to the Guidelines. Under paragraph 1(d)(iii) of its terms of reference, the Group was asked to consider whether “Parties within the geographic scope of EMEP could be required to identify in their IIR national key categories for the base year and the latest inventory year”. In addition, under paragraph 1(d)(iv) of its terms of reference, the Group was asked to consider whether “Parties could be required to implement and document in the IIR procedures for quality assurance and quality control”. And, finally, under paragraph 1(d)(v) of its terms of reference, the Group was asked to consider whether “Parties could be required to indicate the justification for any recalculation and to describe in the IIR the methods used to ensure time-series consistency, changes in data and calculation methods, and the inclusion of any new sources not previously accounted for, indicating any changes in source category.” The Group concluded that the Executive Body did not have the authority to adopt decisions with legally binding effect on the IIR-related issues raised.

13. However, the Group did recall the following provisions on inventories. The Protocol on Heavy Metals contains, as one of the basic obligations, article 3.5, under which each Party “shall develop and maintain emission inventories for the heavy metals listed in annex I, for those Parties within the geographical scope of EMEP, using as a minimum the methodologies specified by the Steering Body of EMEP, and, for those Parties outside the geographical scope of EMEP, using as guidance the methodologies developed through the workplan of the Executive Body”. In turn, each Party is obliged, under article 7.1(a), to report information on the measures that it has taken to implement article 3.5. And, pursuant to article 7.2, such reported information shall “be in conformity with a decision regarding format and content to be adopted by the Parties at a session of the Executive Body”. Moreover, the terms of such a decision “shall be reviewed as necessary to identify any additional elements regarding the format or the content of the information that is to be included in the reports”. Hence, within the parameters of the provisions recited here, there is room for the Executive Body to exercise authority on (reporting on) inventories in the form of a decision with legally binding effect. The same analysis applies to the Protocol on POPs, where it concerns article 3.8, in conjunction with articles 9.1(a) and 9.2.

14. Under paragraph 1(d)(vi) of its terms of reference, the Group was asked to consider whether “Parties could be required to use the reporting templates in annex IV of the [Guidelines], or other harmonized reporting options”. As far as reporting templates are concerned, two protocol provisions are relevant. Article 8.4 of the Protocol on VOCs and article 8.2 of the Protocol on Nitrogen Oxides provide that the information under those articles “shall, as far as possible, be submitted in accordance with a uniform reporting framework”. In these instances, although there appears to be an implicit authority for the Executive Body to specify a uniform reporting framework, in the form of a decision which would have legally binding effect, the Group noted that such implicit authority is qualified by the terms “as far as possible” which appear to leave open the possibility for the information to be provided otherwise. It is recalled that in relation to the Protocol on VOCs, the Executive Body has already exercised this authority in its decision 2002/10, in section B, under paragraph 2(d), which also includes an explicit reference to annex IV to the current Emission Reporting Guidelines. In this instance, the Group noted that the terms “as far as possible” were included.

15. Under paragraph 1(d)(vii) of its terms of reference, the Group was asked to consider whether, “for emissions from transport, Parties could be required to calculate and report estimates based on national fuel consumption”. The ad hoc group concluded that there seems to be no legal provision which dictates that a Party is to report fuel used as opposed to fuel sold, or vice versa.

16. Under paragraph 1(d)(viii) of its terms of reference, the Group was asked to consider whether “Parties to the 1999 Gothenburg Protocol, within the geographic scope of EMEP, could

be required to report projected activity data and projected national total emissions for SO<sub>2</sub>, NO<sub>x</sub> and non-methane VOCs for the years 2010, 2015 and 2020". With reference to article 7 of the Gothenburg Protocol, and recalling Executive Body decision 2005/1, the Group noted that the authority of the Executive Body to adopt a decision with legally binding effect does not extend to "projected activity data and projected national emissions", although the Executive Body has the authority to approve an EMEP determination on the periodicity of reporting that would cover "[d]ata on projected emissions and current reduction plans". The Group understood that from a technical point of view, these are different concepts.

17. Under paragraph 1(d)(ix) of its terms of reference, the Group was asked to consider whether "POPs covered by annex I to the POPs Protocol, unless emitted as by-products from energy combustion or industrial processes, could be omitted from the scope of the Guidelines". The ad hoc group concluded that such a step would not pose any legal problem, but emphasized that such omission from the Guidelines would not remove Parties' obligation to report under the Protocol.

18. Under paragraph 1(d)(x) of its terms of reference, the ad hoc group was asked to consider whether "it is possible to encourage or require reporting of primary particulate matter." The ad hoc group concluded that Parties could indeed be required to report particulate matter, pursuant to article 8(a) of the Convention, but noted that, on the basis of the wording in the chapeau of that article, such a requirement would relate to available information. The Group recalled that the Executive Body had already exercised its authority in this regard, by adopting decision 2002/10 (see section A., para. 1(b) of that decision).

19. Under paragraph 1(e) of its terms of reference, the Group was asked to consider "the relationship between new and existing obligations on the one hand, and new and existing reporting provisions on the other hand, in particular for compliance purposes". First, it was emphasized that any reporting provision should be compatible with, or not contradict, existing obligations. It was also stressed that, where definitions in the Guidelines are different from definitions in the Convention or relevant protocols, the definitions in the Convention and protocols will prevail for compliance purposes. Moreover, to the extent that the term "new obligations" used in the terms of reference was meant to refer to possible future obligations (as opposed to "existing obligations"), it was noted that possible future obligations are not relevant to assess compliance with current obligations. Finally, and referring to possible new reporting provisions, the ad hoc group recalled that in several circumstances an Executive Body decision is needed to update the Guidelines, notably when the Executive Body is exercising its authority under the Convention or protocols to adopt a decision with legally binding effect (see para. 3 of the present report).

Annex I

**Terms of Reference of an ad hoc group of legal experts under the Working Group on Strategies and Review**

1. An ad hoc group of legal experts to be nominated from amongst the delegations to the Working Group on Strategies and Review is hereby tasked with the following functions:
  - (a) To explain whether and how a document could be made legally binding through a decision of the Executive Body.
  - (b) To explain the practical implications of making any document legally binding.
  - (c) To consider the legal ways in which use of the draft Emission Reporting Guidelines could be strengthened without making the Guidance itself legally binding.
  - (d) To consider the way in which the following provisions of the draft Emission Reporting Guidelines could potentially be strengthened, and perhaps made legally binding:
    - (i) Whether Parties within the geographic scope of EMEP could be required to use the methodologies in the latest version of the EMEP/CORINAIR Atmospheric Emission Inventory Guidebook to estimate emissions and projections for each source category (ECE/EB.AIR/WG.5/2007/4, paras. 6 and 7);
    - (ii) Whether Parties within the geographic scope of EMEP could be required to submit an Informative Inventory Report (IIR) prepared in accordance with the outline provided in annex VI to the Guidebook (ECE/EB.AIR/WG.5/2007/4, paras. 8 and 9);
    - (iii) Whether Parties within the geographic scope of EMEP could be required to identify in their IIR national key categories for the base year and the latest inventory year (ECE/EB.AIR/WG.5/2007/4, paras. 10 and 11);
    - (iv) Whether Parties could be required to implement and document in the IIR procedures for quality *assurance* and quality control (ECE/EB.AIR/WG.5/2007/4, paras. 12 and 13);
    - (v) Whether Parties could be required to indicate the justification for any recalculation and to describe in the IIR the methods used to ensure time-series

consistency, changes in data and calculation methods, and the inclusion of any new sources not previously accounted for, indicating any changes in source category (ECE/EB.AIR/WG.5/2007/4 paras. 14 and 15);

(vi) Whether Parties could be required to use the reporting templates in annex IV of the Guidebook, or other harmonized reporting options (of ECE/EB.AIR/WG.5/2007/4, paras. 16 and 17);

(vii) Whether, for emissions from transport, Parties could be required to calculate and report estimates based on national fuel consumption (ECE/EB.AIR/WG.5/2007/4, paras. 24 and 25);

(viii) Whether Parties to the 1999 Gothenburg Protocol, within the geographic scope of EMEP, could be required to report projected activity data and projected national total emissions for sulphur dioxide, nitrogen oxides and non-methane volatile organic compounds for the years 2010, 2015 and 2020 (ECE/EB.AIR/WG.5/2007/4 paras. 18 and 19);

(ix) Whether persistent organic pollutants (POPs) covered by annex I to the POPs Protocol, unless emitted as by-products from energy combustion or industrial processes, could be omitted from the scope of the Guidelines (ECE/EB.AIR/WG.5/2007/4, paras. 28); and

(x) Whether it is possible to encourage or require reporting of primary particulate matter (ECE/EB.AIR/WG.5/2007/4, para. 29).

(e) To consider the relationship between new and existing obligations on the one hand, and new and existing reporting provisions on the other hand, in particular for compliance purposes;

(f) Report back to the Working Group on Strategies and Review at its fortieth session, having presented an oral report to the EMEP Steering Body at its thirty-first session. To this end, the ad hoc group of legal experts must ensure that any documents for presentation to the Working Group are submitted to the secretariat for translation by 1 July 2007 at the latest.

2. The ad hoc legal group is strongly encouraged to seek technical input in the conduct of its work.

Annex II**Existing obligations under the Convention and its protocols**

Agreement	Relevant reporting obligation	Format of reporting	Relevant authority of the Executive Body	Executive Body decision
Convention	Emissions of agreed pollutants; major changes in policy; technologies; costs; scientific transmission and effects data; sulphur control policies (article 8)	None specified	- Set periodicity of reporting, air pollutants to report on, size of grid units; or flux distances and times (article 8)	2002/10 set periodicity, air pollutants, and size of grid units
1985 Sulphur Protocol	Annual sulphur emissions and calculation basis (article 4); progress towards reducing emissions or fluxes (article 6)	None specified	None	None
1988 NO <sub>x</sub> Protocol	National policies and progress achieved thereunder; annual emissions and calculation basis; national emissions standards; control measures; progress on unleaded fuel; technology exchange; progress on critical loads (article 8)	“[A]s far as possible . . . submitted in accordance with a uniform reporting framework.” (article 8)	- Specify a uniform reporting framework (implicit in article 8)	None
1991 VOC Protocol	National policies and progress achieved thereunder; first-year baseline data under Executive Body-specified guidelines; national emissions standards and control techniques; technology exchange (article 8)	“[A]s far as possible . . . submitted in accordance with a uniform reporting framework.” (article 8)	- Specify a uniform reporting framework (implicit in article 8) - Set guidelines for first-year baseline data reporting (article 8) - Set intervals and spatial resolution for EMEP emissions reporting (article 8)	2002/10 set baseline guidelines, intervals and special resolution for EMEP reporting, and uniform reporting framework (reserving Executive Body authority on revisions)
1994 Sulphur Protocol	National policies; annual sulphur emissions in accordance with Executive Body guidelines; other obligations in conformity with an Executive Body decision on format and content; EMEP reporting (article 5)	As specified in article 5.	- Set periodicity of reporting (article 5) - Specify guidelines for national annual sulphur emission reporting (article 5) - Agree on decision regarding format and content of reporting on implementation of other obligations (article 5) - Approve EMEP reporting (article 5)	2002/10 set periodicity, guidelines for emissions reporting (reserving Executive Body authority on decisions), and approved EMEP reporting
Protocol on Heavy Metals	Subject to confidentiality laws, on: measures in conformity with an Executive Body decision on format and content; EMEP reporting on annex I emissions at a minimum according to EMEP methodologies (non-EMEP reporting if requested); report on other heavy metal emissions “as appropriate” taking into account EMEP methodologies (article 7)	As specified in article 7	- Set periodicity of reporting (article 7) - Approve EMEP reporting (article 7) - Agree on decision regarding format and content of reporting on implementation measures (article 7)	2005/1 set periodicity of reporting
Protocol on POPs	Subject to confidentiality laws, on: measures in conformity with an Executive Body decision on format and content; EMEP reporting on POPs emissions at a minimum according to EMEP methodologies (non-EMEP reporting if requested); report on annex III emissions (article 9)	As specified in article 9	- Set periodicity of reporting (article 9) - Approve EMEP reporting (article 9) - Agree on decision regarding format and content of reporting on implementation measures (article 9)	2005/1 set periodicity of reporting
1999 Gothenburg Protocol	Subject to domestic laws and regulations and in accordance with Protocol obligations, on: measures in conformity with an Executive Body decision on format and content; EMEP reporting on emissions at a minimum according to EMEP methodologies, projections, plans, justification for variances (non-EMEP reporting if requested) (article 7)	As specified in article 7	- Set periodicity of reporting (article 7) - Approve periodicity of EMEP reporting (article 7) - Agree on decision regarding format and content of reporting on implementation measures (article 7)	2005/1 set periodicity of reporting