

**Comments by the European Commission, on behalf of the European Union, on the draft findings and recommendations by the Aarhus Convention Compliance Committee with regard to case ACCC/C/2013/96 concerning compliance by the European Union with the Convention's provisions on access to information and public participation in decision-making**

1. These comments by the European Union (EU) refer to the draft findings and recommendations by the Aarhus Convention Compliance Committee (the Committee) in the above-mentioned case, communicated to the EU on 6 April 2020 (the draft findings). They complement the EU's previous submissions, including the EU's Response to the communication on 12 December 2014, Response on exhaustion of domestic remedies on 30 November 2015, Opening statement for discussion at the Committees' 51<sup>st</sup> meeting on 16 December 2015, and Response to the Committee's questions on 20 May 2016.
2. The European Commission (the Commission) submits these comments on behalf of the EU.

*Preliminary remarks: the limits of EU competence*

3. The Commission wishes first of all to address the limits of the EU competence as regards Article 7 of the Aarhus Convention.
4. As indicated by the ACCC at para 21 of its draft findings, Article 9 of the Aarhus Regulation<sup>1</sup> would be applicable in the present case, given that the '*plans and programmes*' to be adopted by an EU institution or body, as indicated in Article 2(1)(e) of that Regulation, would consist here of the list of projects, to be adopted by the Commission under Article 3(4) of the TEN-E Regulation<sup>2</sup>.

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<sup>1</sup> 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, in OJ L 264, 25.9.2006, p. 13–19.

<sup>2</sup> 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

5. Under Article 3(1-3) of the TEN-E Regulation, the lists of projects (that could be considered as plans or programmes) are adopted at the level of regional groups of Member States.
6. Decision-making powers as regards the list of projects of common interest are reserved to the Member States and the Commission in their role as the decision-making bodies of regional groups, as indicated in Article 3(1) of the TEN-E Regulation: *‘Decision-making powers in the Groups shall be restricted to Member States and the Commission, who shall, for those purposes, be referred to as the decision-making body of the Groups’*.
7. Following the decision of the decision-making bodies of the regional groups, the Commission is empowered to adopt delegated acts every two years that establish the Union list of projects of common interest from an energy policy perspective in line with criteria laid down in Article 4.
8. The framework laid down in Annex III.1.5 of the TEN-E Regulation puts on the national authorities and not on the Commission the obligation to consult the public on aspects related to the implementation of projects, given that it is mainly on the territory of the Member States (to which the project *‘relates’*: see Article 3(1)(a)) that citizens and main stakeholders can reasonably have views as regards aspects arising from their construction, notably transparency in their planning and building and potential environmental impacts.
9. It follows that, the main responsibility to ensure an appropriate public consultation on such projects remains with the Member States as their inclusion on the Union list of projects is made from an energy policy perspective and does not pre-empt the application of national provisions with regards consultations within the remit of permitting or environmental assessments.

*The focus of the present comments: the Committees recommendation concerning the language of documents used in the public consultation*

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amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009. OJ L 115, 25.4.2013, p. 39–75.

10. These comments focus on the Committee's recommendation concerning the language of the documents used in the public consultation. In this regard, while the EU is of the view that there is no wide or systemic non-compliance in this regard, it is ready to consider further improvements in the practical arrangements for its linguistic regime to ensure effective consultations.

*Additional comments on the traceability of the way account is taken of the outcomes of public participation*

11. In addition, these comments also discuss the draft recommendation that requires that '*due account of the outcomes of the public participation is taken, in a transparent and traceable way, in the decision-making*'. While here also, the EU is of the view that there is no wide or systemic non-compliance in this regard, it is ready to consider further improvements in the way the EU reports on how the input received during the public consultations is taken into account.

*The remainder of the findings*

12. As to the rest of the findings, the EU welcomes the fact that:
  - a. with regard to a number of the allegations, the Committee has found that the claims are inadmissible because they do not relate to an alleged infringement of the Convention (see para 90);
  - b. in other cases, the Committee found that the claims are inadmissible as the communicant has not exhausted domestic remedies (see para 92);
  - c. on several points the Committee concluded that the EU had not failed to comply with the Convention (see paras 101, 102, 112, 118, 121-123, 128); and
  - d. that finally, even where the Committee found potential non-compliance, it had not found any wide or systemic compliance problem that would have required it to adopt a recommendation (see paras 106, 111, 138(a) and (b) and 140).

### **1. Recommendation concerning the language of the consultation documents**

13. The co-existence of 24 official languages is one of the most distinctive features of the European project. On practical grounds, EU institutions and services do not

carry out their daily work in all 24 languages. In their contacts and communications with the public, they also tend to use most widely spoken languages, such as English. On the other hand, when presenting their general activities and initiatives, they typically do it in all official languages.

14. Translating every single document of the Commission's services into 24 official languages would lead to a disproportionate burden on taxpayers and delay procedures to an intolerable level for all concerned, apart from being hardly possible to do in practice. As it stands, the overall cost for delivering translation and interpretation services in the EU institutions is around €1 billion per year, which represents 1 % of the EU budget or just over €2 per citizen.<sup>3</sup>
15. The communicant's arguments, unfortunately, stem from a limited understanding of the nature of the EU's linguistic practice, and how it applies to consultations regarding the PCI list. To assist the Committee in its assessment, in the following, the EU provides an overview of these factual aspects.

### **1.1. Languages in consultations in the TEN-E context**

16. The TEN-E Regulation lays down the framework for the timely development and interoperability of cross-border energy infrastructure (TEN-E) networks in order to achieve the EU's energy policy objectives. Its key objective is the timely implementation of the projects of common interest (known as PCIs), which interconnect the energy markets across Europe.
17. The Commission is currently reviewing the TEN-E Regulation, which is the framework for selecting PCIs. For the TEN-E consultation process, the Directorate-General for Energy (DG ENER), the Commission department responsible for energy policy, follows a carefully considered and comprehensive strategy on public consultations. The consultation strategy includes a range of consultation methods and tools. A distinction is made between so-called '*targeted consultations*', aimed at

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<sup>3</sup> Multilingualism: The language of the European Union, Briefing by the European Parliamentary Research Service, September 2019, available at [https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/642207/EPRS\\_BRI\(2019\)642207\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/642207/EPRS_BRI(2019)642207_EN.pdf)

specific stakeholder groups and more generic ones, designed for a broader, non-specialist audience<sup>4</sup>.

18. The targeted consultations are aimed at specialised target groups such as national regulatory authorities, distribution system operators (DSOs), transmission system operators (TSOs) and others. EU consumers (both individuals and organized civil society) are also among key stakeholders. A variety of tools are used to ensure maximum effectiveness, including targeted online surveys, in-depth interviews and online stakeholder webinars. The strategy also takes into account and addresses the Ombudsman's recommendations referred to by the Committee in para 39 of its draft findings.

*A. Illustrative example for multilingual consultation in all EU official languages on the EU's 'Have Your Say' website: the TEN-E consultation*

19. As mentioned above, the Commission is currently reviewing the TEN-E Regulation, which is the framework for selecting PCIs. For the TEN-E consultation process, as also noted above, the consultation is available on Have your say, the EU's portal for public consultations: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12382-Revision-of-the-guidelines-for-trans-European-Energy-infrastructure>. The replies as well as a synopsis report are/will be also made available on the same page.
20. This is an example of how the Commission organises online public consultations aimed at the public at large: there is an open public consultation in all EU languages. The public consultation survey has simple, easy to read wording and addresses issues of general interest, soliciting more general, strategic views on the future of energy infrastructure. The questionnaire is available in all official EU languages, and participants are free to reply to the consultation in the EU official language of their choice.

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<sup>4</sup> To illustrate, a link to the news item regarding the public consultation is provided here: [https://ec.europa.eu/info/news/reviewing-eu-rules-trans-european-energy-infrastructure-2020-may-18\\_en](https://ec.europa.eu/info/news/reviewing-eu-rules-trans-european-energy-infrastructure-2020-may-18_en) and link to the actual consultation page on Have Your Say page here: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12382-Revision-of-the-guidelines-for-trans-European-Energy-infrastructure>.

21. The online public consultation is always accessible on the Commission's 'Have your say' website, including links to background documents and to relevant webpages, such as, in this case, the ones dedicated to the TEN-E policy and the European Green Deal.

*B- Illustrative example for targeted consultations in the context of the review of the TEN-E Regulation*

22. A targeted consultation for the review of the TEN-E Regulation is open in parallel, allowing those more familiar with the implementation of the TEN-E Regulation to provide in-depth contributions and share their practical experience. The targeted questionnaire will collect detailed information available to expert stakeholders, such as project promoters, representatives of local, regional and national government, regulatory bodies, non-governmental organisations and energy industry representatives, although it is not restricted to these categories of respondents.
23. The targeted questionnaire will be available in English and will be embedded in the open public consultation page, as well as promoted on a dedicated webpage hosted by DG ENER. In this and similar cases, it is more practical for all parties concerned to use a single common language, such as English. In the experience of DG ENER, this linguistic arrangement has been found to be appropriate and has not been questioned by the stakeholders concerned by these targeted consultations.

## **1.2. Languages and PCI lists**

24. In the context of the PCI lists, firstly, the EU highlights that the PCI selection process is a result of an assessment based on criteria measuring the contribution of the project to energy policy objectives, pursuant to Article 4 of the TEN-E Regulation. Projects on the list are subject to national legislation with regards to their implementation. Their selection on the Union list of PCIs does not pre-empt further due diligence and assessment in line with transparency, participation and environmental legislation at national level. As such, the public consultation process is not aimed to address aspects of local implementation of the projects. For local implementation, separate permitting and strategic as well as environmental impact assessment procedures apply, subject to all the requirements under the Aarhus

Convention for public consultation, as applied under the national laws of the EU Member States concerned as parties in their own right to the Convention.

25. For each PCI, a project promoter will have to carry out a project-specific permit granting process. This process will be carried out in the local language(s), so that all information disclosed to stakeholders and members of the public will also be available in the local language(s). Consequently, before any binding decision is taken by national authorities with regard to any PCI, local communities and individuals living in close vicinity of the project will receive information about that project and will be able to communicate their views on that project in their own languages.
26. The public consultation on the PCI lists is thus not a replacement for local consultation processes in local languages. The consultation needs and the applicable linguistic regime for drawing up the PCI list are therefore distinctly different from subsequent local preparation and implementation of the projects themselves.
27. Accordingly, the linguistic regime of the PCI consultations at EU level is designed to ensure that the stakeholders concerned by the consultations are able to effectively and efficiently access the necessary information and reply to the consultation regarding the above-mentioned criteria, in line with Article 4 of the TEN-E Regulation.
28. Secondly, the relevant stakeholders can, in any event, often more effectively communicate in a single language throughout the process. This is especially true considering that communication is not only bi-directional, from stakeholders to the Commission. Rather, the PCI selection process relies heavily on the outcome of various stakeholder groups working closely together, in the framework of regional working groups.
29. Thirdly, the related technical and background information of individual candidate PCI projects subject to assessment and consultation is available only in English. For electricity and gas candidate projects, in order to be eligible for inclusion in the Union lists, projects should be part of the latest available 10-year network development plan developed by the European Network of Transmission System

Operators of Electricity and Gas, which uses English as a common language due to its pan-European mission.

30. Based on the foregoing, it would be unnecessary, disproportionate and almost impossible to provide all documents and all technical and other project details in all 24 EU official languages.

*Practical examples for use of local languages, in combinations with English, as a common language, during PCI consultation*

31. To illustrate with some practical examples, targeted consultations for PCIs are published on the DG ENER webpage and are available only in English: [https://ec.europa.eu/info/consultations/consultation-on-the-list-of-candidate-projects-of-common-Interest-in-electricity-infrastructure\\_en](https://ec.europa.eu/info/consultations/consultation-on-the-list-of-candidate-projects-of-common-Interest-in-electricity-infrastructure_en). The EU Survey link for this particular consultation is no longer active as the consultation has closed, but other information is still available, including the list of candidate PCIs. Via that link, the Commission provided technical details on all projects and asked the opinion of stakeholders and their contribution.
32. The EU survey link itself consists of a large Excel sheet. This Excel sheet, in turn, contains links to the project websites. Typically, these websites are in the relevant local languages as well as in English. To illustrate, on the project websites (ran by the promoters) the information relating to a cross-border project involving the UK and France was published in French and English (<http://www.eleclink.co.uk/>). Similarly, in case of a project involving Denmark and Germany, the language of the website was in Danish, German and English (<https://klixbuell-endrup.eu/>), and in a case involving Italy and Switzerland, the website was set up in Italian and English only (<http://www.greenconnector.it/it/index.html>).
33. The Commission do not have the possibility to translate all related documents on these websites into all official EU languages. Nor would have the translation provided any tangible benefits or would have resulted in better communication with stakeholders.
34. In general, while publicly available and open to all, the targeted consultations cater for a specialised audience, where the use of a single commonly spoken language,

such as English, in combination with detailed technical information in local languages where necessary, has proven to be most effective.

### **1.3. ACCC/C/2010/46 confirms that the Convention does not set specific language requirements for public participation to be effective**

35. The EU reiterates the findings that the ACCC has already held in an earlier case (ACCC/C/2010/46, United Kingdom), where language requirements relevant for effective public participation were at stake. Accordingly, while the principle of non-discrimination on the basis of citizenship, nationality or domicile is explicit in Article 3, paragraph 9, of the Convention, the provision is silent on matters of discrimination on the basis of language. The Convention does not therefore set any language requirements for public participation to be effective.
36. As a consequence, the EU does not consider that the sole use of English (or its use in combination only with the relevant local languages) has created a discrimination or any impediment to the correct implementation or application of the public participation provisions of the Aarhus Convention, neither in the present case nor as a general principle.
37. While the EU does not exclude, as it was noted in case ACCC/C/2010/46, United Kingdom, that the lack of availability of documentation in a particular language might under certain specific circumstances present an impediment to correct implementation of the Convention, nothing in the present communication suggests that such circumstances occurred.
38. The communicant in the present case has not even claimed that he himself would have suffered any prejudice because of this alleged linguistic obstacle. Indeed, it appears that he could not have suffered such prejudice, having had access to all information in English, which he speaks as a native speaker. Apart from this communication, the Commission has received no complaints regarding the linguistic regime it applies for the PCI process and its understanding is that stakeholders are generally satisfied with the way languages are used during the consultation process.
39. Should there be a genuine concern regarding fair and equal opportunities to those concerned about any particular project on the PCI list, the Commission would do its utmost to address those concerns on a case by case basis.

#### **1.4. ACCC/C/2010/51 confirms that the Convention does not – in the absence of requirements under the laws of the Party concerned - set specific language requirements**

40. The EU also reiterates that in its findings on communication ACCC/C/2010/51 (Romania), the Committee stated that article 3(9) *'cannot be interpreted as generally requiring the authorities to provide a translation of the information into any requested language'*.
41. The Committee, in para 134 of its draft findings suggests that ACCC/C/2010/51 (Romania) is not directly relevant for the case at hand because it concerns translations, rather than original documents. The EU contests this as it concerns precisely translation of originals to 23 other EU languages, which would indeed create an unreasonable and disproportionate administrative burden for EU institutions and unjustifiable costs to taxpayers, without any corresponding benefits in ensuring effective public consultation.
42. In addition, the EU also insists that the Committee itself erroneously relies on the passage in the same finding in ACCC/C/2010/51 (Romania) where the Committee went on to state that *'if, on the other hand, national law provides for translations to different official languages ... article 3, paragraph 9, of the Convention implies that these criteria must be applied in a non-discriminatory way'*.
43. The EU considers that this passage is entirely irrelevant to the case at hand, considering that EU law does NOT, in any way, require *'translations to different official languages'* in the case at hand.

#### **2. Recommendation regarding traceability of the way how consultation results are processed**

44. The Committee recommends, in its draft findings, that *'due account of the outcomes of the public participation is taken, in a transparent and traceable way, in the decision-making'*.
45. The EU is of the view that there is no wide or systemic non-compliance problem in this regard.

46. Importantly, as a rule, the results of the public consultations published via the ‘Have your Say’ website, by default, are summarised in a summary report.
47. In addition, where applicable, the Explanatory Memorandum of the relevant legislative proposal provides details on how the input received during public consultation are taken into account.
48. Nevertheless, the EU is ready to consider further improvements to the way it reports on the way the results of public consultations are taken into account.
49. In the European Green Deal<sup>5</sup>, the Commission has committed to review and update the EU regulatory framework for energy infrastructure, including the TEN-E Regulation, to ensure consistency with the 2050 climate neutrality objective.
50. In connection with this work, further measures may be taken, as necessary, to further advance the way how the contributions received during public participation are taken into account, and in particular, to enhance transparency and traceability of the way they are taken into account.

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<sup>5</sup> [https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en)