

## **Findings and recommendations with regard to communication ACCC/C/2013/96 concerning compliance by European Union**

**Adopted by the Compliance Committee on 4 August 2020<sup>1</sup>**

### **I. Introduction**

1. On 28 October 2013, the European Platform Against Windfarms (the communicant) submitted a communication to the Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging a failure by the European Union to comply with its obligations under articles 3(2), 4 and 7 of the Convention in relation to the European Commission's adoption on 14 October 2013 of a list of 248 "Projects of Common Interest" (PCIs).
2. At its forty-third meeting (17-20 December 2013), the Committee determined on a preliminary basis that the communication was admissible.
3. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 25 March 2014.
4. On 9 September 2014, the communicant provided further information.
5. The Party concerned provided its response to the communication on 12 December 2014.
6. On 21 December 2014, the communicant provided comments on the Party's response.
7. On 17 February and 4 May 2015, the communicant submitted additional information.
8. The Committee requested further information from the communicant on 18 June 2015, which the communicant provided on 21 June 2015.
9. On 5 October 2015, the Committee requested further information from the Party concerned and the communicant's comments thereon. On 30 November 2015 the Party concerned submitted its reply, and on 4 December 2015 the communicant submitted its comments thereon.
10. The Committee held a hearing to discuss the substance of the communication at its fifty-first meeting (Geneva, 15-18 December 2015), with the participation of representatives of the communicant and the Party concerned. At the same meeting, the Committee confirmed the communication's admissibility.
11. On 3 January 2016, the Committee sent questions to the Party concerned.
12. On 3 January and 17 April 2016, the communicant submitted further information.
13. On 20 May 2016, the Party concerned replied to the Committee's questions. On 6 June 2016, the communicant submitted comments thereon.

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<sup>1</sup> This text will be produced as an official United Nations document in due course. Meanwhile editorial or minor substantive changes (that is changes that have no impact on the findings and conclusions) may take place.

14. The Committee completed its draft findings through its electronic decision-making procedure on 1 April 2020. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were forwarded for comments to the Party concerned and the communicant on 6 April 2020. Both were invited to provide comments by 18 May 2020.

15. The communicant provided comments on 17 May 2020. After seeking an extension, the Party concerned provided comments on 3 July 2020, and the communicant submitted comments thereon on 4 July 2020.

16. At its 67th meeting (6-10 July 2020), the Committee finalized its findings in closed session, taking account of the comments received. The Committee adopted its findings through its electronic decision-making procedure on 4 August 2020 and agreed that they should be published as a formal pre-session document to its 68th meeting (23-27 November 2020).

## **II. Summary of facts, evidence and issues<sup>2</sup>**

### **A. Legal framework**

#### **Projects of Common Interest**

17. Article 1(2)(a) of Regulation 347/2013<sup>3</sup> (TEN-E Regulation) states that the Regulation addresses the identification of PCIs necessary to implement priority corridors and areas of trans-European energy infrastructure categories in electricity, gas, oil, and carbon dioxide.

18. Article 3 establishes twelve Regional Groups and requires the decision-making body of each group to adopt a regional list of proposed PCIs drawn up according to the process set out in Annex III.1.

19. Article 3(4) empowers the Commission to adopt delegated acts establishing the Union's list of PCIs. In exercising its power, the Commission shall ensure the Union list is established every two years on the basis of the regional lists. Article 3(4) requires the first Union list be adopted by 30 September 2013 as an annex to the Regulation.

20. Article 7(1) states that adoption of the Union list shall establish, for the purposes of the permit granting process, the necessity of these projects from an energy policy perspective, without prejudice to the project's exact location, routing or technology.

#### **Public participation on the PCIs**

21. Annex III.1 (5) of the TEN-E regulation requires each group to consult with the "relevant stakeholders", namely: producers, distribution system operators, suppliers, consumers, and organizations for environmental protection. Article 9 of the Aarhus Regulation<sup>4</sup> applies to the establishment of the PCI list, as does the Commission's 2002

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<sup>2</sup> This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

<sup>3</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 amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009.

<sup>4</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

Communication “Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission”.<sup>5,6</sup>

#### **Access to environmental information**

22. Regulation 1049/2001<sup>7</sup> regulates access to European Parliament, Council and Commission documents. Its article 4 establishes certain exceptions from disclosure, including to protect commercial interests; ongoing decision-making processes; and the privacy and integrity of the individual in accordance with Community legislation on personal data.

23. At the time of the information requests examined herein, Regulation 45/2001<sup>8</sup> regulated the processing of personal data held by bodies and institutions of the Party concerned.

24. Article 6 of the Aarhus Regulation prescribes how the exceptions from disclosure in article 4 of Regulation 1049/2001 are to be applied to requests for environmental information.

## **B. Facts**

#### **Adoption of the first PCI list**

25. On 14 October 2013, the Commission adopted Delegated Regulation 1391/2013<sup>9</sup> which added a list of 248 PCIs as Annex VII to the TEN-E Regulation. The list was based on the regional lists referred to in paragraph 18 above. On the same day, the Commission adopted a Communication on “Long term infrastructure vision for Europe and beyond” (COM/2013/0711) to provide some further details regarding the adopted list.

26. PCIs benefit from faster and more efficient permit granting procedures, improved regulatory treatment and may access financial support from the Connecting Europe Facility.<sup>10</sup>

27. Regarding how due account was taken of the public participation on the first PCI list, the explanatory memorandum accompanying Delegated Regulation 1391/2013 stated that:

“Some concerns were raised by environmental stakeholders on certain environmental impacts of specific projects. However, it was explained that the inclusion of these projects in the Union list is subject to their continued compliance with Union law, in particular Union environmental legislation.”<sup>11</sup>

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to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.

<sup>5</sup> COM(2002) 704 final.

<sup>6</sup> Party’s response to communication, p. 10.

<sup>7</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

<sup>8</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (repealed 10 December 2018).

<sup>9</sup> Commission Delegated Regulation (EU) No 1391/2013 of 14 October 2013 amending Regulation (EU) No 347/2013 of the European Parliament and of the Council on guidelines for trans-European energy infrastructure as regards the Union list of projects of common interest (Delegated Regulation 1391/2013).

<sup>10</sup> Party’s response to communication, p. 2.

<sup>11</sup> Ibid., pp. 12-13.

### **Mr. Waugh's first and second information request**

28. On 30 July 2012, Mr. Waugh asked the Commission where detailed project information regarding Irish electricity projects might be obtained. The Commission responded that it had publicly released all information it could and more detailed information could not be released due to the developers' commercial confidentiality and confidentiality of personal data. It suggested Mr. Waugh request information from the developers.<sup>12</sup>

29. On 1 October 2013, Mr. Waugh made a further request for access to environmental information regarding the assessment of projects affecting Ireland. On 18 November 2013, the Commission provided partial access to 57 documents and refused access to six documents. Mr. Waugh submitted a confirmatory application for the six documents on 3 December 2013. In its 30 January 2014 confirmatory decision, the Commission provided access to one document and parts of the remaining five, stating that the non-disclosed parts were covered by exceptions on protection of commercial interests, protection of the decision-making process and personal data.<sup>13</sup>

### **Mr. Caulfield's first and second information requests and first Ombudsman complaint**

30. On 20 August 2012, Mr. Caulfield requested information on the processes for evaluating projects, details of how public consultations would be incorporated into the decision-making, of the membership of the project evaluation team, and environmental information on certain projects.<sup>14</sup>

31. On 19 October 2012, the Commission provided some information but refused to provide details on any individuals who would evaluate the projects, asserting this was personal data under Regulation 45/2001. It stated that the consultation included information on the form and location of all projects and it did not currently hold any more detailed environmental information. It noted the consultation did not prejudice future consultation at the project level.<sup>15</sup>

32. On 24 October 2012, Mr. Caulfield filed a confirmatory application requesting all environmental information the Commission held regarding electricity projects E149, E150, E151, E152, E153, E154, E156 and E291. On 28 February 2013, the Commission replied that it held no environmental information on these projects but only responses to a questionnaire with very limited information regarding expectations on sustainability. It provided Mr. Caulfield with a blank questionnaire and stated that he could apply for the completed questionnaires though this would be considered a new information request and would require consultation with third parties involved.<sup>16</sup> The Commission added that, since it held no further environmental information on these projects, the confirmatory application was devoid of purpose.<sup>17</sup>

33. On 22 January 2013, Mr. Caulfield complained to the European Ombudsman claiming the Commission had failed to provide environmental information for the public consultation on the PCIs.<sup>18</sup> The Ombudsman accepted the access to information aspect of his complaint for consideration. However, the issue of the public consultation was not accepted as the

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<sup>12</sup> Communication, pp. 8-9.

<sup>13</sup> Party's response to communication, annex 12, pp. 1-4.

<sup>14</sup> Communication, p. 11, and annex 2.

<sup>15</sup> Ibid.

<sup>16</sup> Communication, p. 11, and annexes 3 and 4.

<sup>17</sup> Communication, annex 3, p. 2.

<sup>18</sup> Communication, annex 12.

“complaint must be preceded by appropriate administrative approaches” to the institutions concerned.<sup>19</sup> On 4 March 2013, Mr. Caulfield sent the Commission a letter to fulfil this requirement.<sup>20</sup>

34. On 5 March 2013, Mr. Caulfield filed a second information request for the project questionnaires regarding Irish electricity projects. On 22 April 2013, the Commission provided the questionnaires, excluding commercially sensitive information<sup>21</sup> and proposed a meeting to clarify issues regarding his first request.<sup>22</sup> On 28 April 2013, Mr. Caulfield replied, stating that, though partially redacted, the questionnaires evidently contained much environmental information, and therefore the 19 October 2012 reply was inaccurate, and that the Commission’s reply did not refer to a legal basis which allowed withholding the information.<sup>23</sup>

35. On 22 January 2014, the Ombudsman issued its preliminary opinion and on 3 June 2014, the Commission responded, stating that it had reassessed the requested questionnaires and had consequently provided some further information.<sup>24</sup> On 16 February 2015, the Ombudsman closed the complaint, noting that the Commission had accepted the Ombudsman’s proposed solution and had provided the complainant with the widest possible access to the requested documents. The Ombudsman further stated that, given this favourable outcome and the Commission’s cooperative attitude, it did not consider it appropriate to issue a critical remark on the procedural oversight identified.<sup>25</sup>

#### **Mr. Caulfield’s second and third Ombudsman complaints**

36. On 21 July 2013, Mr. Caulfield filed a second Ombudsman complaint, claiming that the Commission had failed to conduct the public consultation on the PCIs in accordance with European legislation and to provide evidence of how the population of the Irish Midlands were informed. He requested the consultation be reopened to ensure the environmental information was available to affected communities and to halt the PCI legislative process until these issues were resolved.<sup>26</sup> On 16 December 2013, the Ombudsman closed this complaint for inaction by Mr Caulfield.<sup>27</sup>

37. On 2 February 2014, Mr. Caulfield submitted a third Ombudsman complaint, claiming that firstly, the Commission had failed to use all possible means of publication and information regarding the PCI list and to ensure that interested parties in Ireland had access to the consultation on projects E149, E156 and E291. Secondly, Mr. Caulfield claimed that, by restricting the language of the consultation website to English, the Commission disenfranchised many citizens in countries where the projects may be built. On 28 April 2015, the Ombudsman closed the inquiry, finding no maladministration by the Commission in publishing and informing the public about the PCI consultation. However, it found the Commission’s failure to provide translation to enable the public’s full participation in the consultation was maladministration. The Ombudsman remarked that the Commission should,

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<sup>19</sup> Communication, p. 16.

<sup>20</sup> Communication, annex 13, p. 2.

<sup>21</sup> Communication, p. 12.

<sup>22</sup> Communication, annex 5.

<sup>23</sup> Communication, annex 11.

<sup>24</sup> Email from communicant, 9 September 2014, annex 3.

<sup>25</sup> European Ombudsman decision on complaint 183/2013/AN, received from the communicant on 17 February 2015.

<sup>26</sup> Communication, annex 13.

<sup>27</sup> Party’s response to communication, annex 6.

in addition to using websites, consider more dynamic internet forms of communicating with citizens.<sup>28</sup>

#### **Mr. Conroy's request for information**

38. On 1 April 2013, Mr. Conroy requested information from the Commission regarding project E156. On 7 May 2013, the Commission provided project E156's questionnaire, redacting the developers' names as personal data under Regulation 45/2001.<sup>29</sup>

#### **The communicant's request for information**

39. The communicant requested from the Commission information concerning the "reasons and considerations" for the selection of the Irish renewable electricity projects. The communicant received two documents, partially redacted.<sup>30</sup>

#### **The communicant's request for internal review**

40. On 5 November 2013, the communicant requested internal review under article 10 of the Aarhus Regulation of the Commission's act establishing the PCI list. On 7 February 2014, the Commission found the request inadmissible on the ground that the communicant was not eligible to seek internal review since no documents were provided to prove that it was a legal person and it had no clearly stated objective to promote environmental protection.<sup>31</sup>

### **C. Domestic remedies and admissibility**

#### **Admissibility of claims concerning compliance with European Union law**

41. The Party concerned submits that some of the communicant's allegations do not relate to compliance with the Convention, but with European Union law.<sup>32</sup> It requests the Committee to find these allegations inadmissible under paragraph 13(b) and (c) of the annex to decision I/7.

#### **Admissibility of claims concerning the grievances of others**

42. The Party concerned claims that the communication includes allegations involving persons or organizations other than the communicant and the latter has not established that these third parties entrusted it to present their grievances on their behalf. Accordingly, the Committee should find the grievances of the other individuals and organizations inadmissible under paragraph 20(a) of the annex to decision I/7.<sup>33</sup>

#### **Exhaustion of domestic remedies**

43. The Party concerned claims the communication covers issues for which redress at the European Union level has not been exhausted. For information requests, the redress is to file a confirmatory application, which was not done in all cases. Following the confirmatory request, an applicant may bring proceedings before the General Court under article 263 of the Treaty on the Functioning of the European Union (TFEU), or file an Ombudsman complaint under article 228 TFEU. It submits that the communicant's Ombudsman complaint does not exhaust domestic remedies since the Ombudsman cannot make a legally binding

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<sup>28</sup> Email from communicant, 4 May 2015, annex 1.

<sup>29</sup> Communication, annex 9.

<sup>30</sup> Email from communicant, 9 September 2014, p. 3.

<sup>31</sup> Ibid., p. 5.

<sup>32</sup> Party's response to communication, pp. 7-8.

<sup>33</sup> Ibid., p. 7.

decision. Should the Ombudsman mishandle a request, an action for damages may be brought before the General Court. Finally, redress regarding requests for internal review can be sought from the General Court under article 12 of the Aarhus Regulation.<sup>34</sup>

44. The Party concerned submits such court proceedings are not unreasonably prolonged and provide effective and sufficient redress.<sup>35</sup> It disputes that its courts are prohibitively expensive, observing that access is principally free of charge, legal aid is possible, and the Commission does not always claim costs when it wins. It asserts that the communicant did not provide evidence regarding its capacity to bear costs but only made general allegations. It submits the communication should accordingly be declared inadmissible for failure to exhaust domestic remedies.<sup>36</sup>

45. The communicant states that some confirmatory applications have been filed. It claims it did not appeal to the General Court because it had previously been denied standing by the Court for lacking a legal personality under Irish law (Case T-168/13 of 21 January 2014). The communicant submits it could have chosen to become incorporated in a member State but, given the limited scope of internal review under the Aarhus Regulation, this was not worthwhile.<sup>37</sup>

46. The communicant notes the cost of bringing a case to the General Court, including preparing for and attending the hearing in Luxembourg, legal fees, and potentially paying the other side's costs. It claims that Case T-221/14 clarified it is not possible to reduce legal costs by utilising a lawyer from one's own organization. Legal aid is given exceptionally and over the last five years less than fifteen cases related to the Convention, which demonstrates barriers of access to justice. It claims a one day oral hearing would cost about €10,000, or €20,000-€50,000 if the legal issues are complex.<sup>38</sup>

47. The communicant claims it takes at least two years from when an information request is submitted to an EU institution until the General Court issues a judgment and many cases go to appeal, taking even longer. It claims an Ombudsman complaint takes more than eighteen months.<sup>39</sup>

## **D. Substantive issues**

### **Article 3(2)**

48. The communicant claims the Party concerned, through its 28 February 2013 reply to Mr. Caulfield's confirmatory application, failed to comply with article 3(2) by continuing to refuse access to the requested information.<sup>40</sup>

49. The Party concerned did not respond to this allegation.

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<sup>34</sup> Ibid., p. 5.

<sup>35</sup> Ibid., p. 6.

<sup>36</sup> Party's comments on exhaustion of domestic remedies, 30 November 2015.

<sup>37</sup> Email from communicant, 21 June 2015, annex 1, pp. 2-3 and 10.

<sup>38</sup> Ibid., pp. 6-9.

<sup>39</sup> Ibid., pp. 5 and 7.

<sup>40</sup> Communication, pp. 12-13.

#### Article 4

50. The communicant claims that, despite repeated requests and complaints, the information requested by Mr. Waugh, Mr. Caulfield and the communicant continues to be refused in breach of article 4.<sup>41</sup>

51. The Party concerned denies all allegations concerning article 4. It contends that the communicant received the project questionnaires and the Commission disclosed further information after consulting developers, including previously redacted information. In line with article 4 it has not disclosed personal data and commercially sensitive information exempted from disclosure.<sup>42</sup>

##### *Mr. Waugh's requests*

52. The communicant claims the Party concerned failed to address Mr. Waugh's request for information on Irish projects.<sup>43</sup>

53. The Party concerned claims that it gave access to a number of documents in response to Mr. Waugh's second information request, except parts exempted from disclosure.<sup>44</sup> It submits the handling of Mr. Waugh's confirmatory application met the requirements of Regulation 1049/2001, including timeliness.<sup>45</sup>

##### *Mr. Caulfield's requests*

54. The communicant claims that in processing Mr. Caulfield's requests, the Party concerned did not comply with the timeframes in article 4(2) of the Convention. The request was submitted on 20 August 2012; the response was dated 19 October 2012. A confirmatory application was sent on 24 October 2012; the response was dated 28 February 2013. Mr. Caulfield's second information request was sent on 5 March 2013; the response was dated 22 April 2013. The communicant submits these delays restricted both citizens' right to be informed and to participate in the consultation process.<sup>46</sup>

55. The communicant refers to Mr. Caulfield's allegation in his second confirmatory application of 28 April 2013 that more information than "personal data" had been blanked out of the redacted questionnaire.<sup>47</sup> It also claims the questionnaire for project E151 shows the developer planned three project phases but information on the third phase is blanked out without evidence that phase is not likely to affect the environment. Moreover, from the Commission's reply of 3 June 2014 it is evident there were two questionnaires completed for project E151, but the second was not provided.<sup>48</sup>

56. The communicant states the information requested by Mr. Caulfield does not fall under the requirement in annex III.2(2) of the TEN-E Regulation to preserve the confidentiality of commercially sensitive information because the 2012 consultation predated the Regulation's adoption and this requirement moreover violates the Convention.<sup>49</sup>

57. Regarding the Convention's exemption for commercially sensitive information, the communicant cites the Committee's findings on communication ACCC/C/2007/21

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<sup>41</sup> Ibid., p. 7.

<sup>42</sup> Party's response to communication, pp. 13-14.

<sup>43</sup> Communication, p. 10.

<sup>44</sup> Party's response to communication, p. 3.

<sup>45</sup> Party's reply to the Committee's questions, 20 May 2016, p. 3.

<sup>46</sup> Communication, pp. 11-12.

<sup>47</sup> Ibid., pp. 13-14.

<sup>48</sup> Email from communicant, 9 September 2014, p. 9.

<sup>49</sup> Ibid., pp. 9-11.

(European Community) that the exemption does not mean that public authorities are only required to release environmental information where no harm to the interests concerned is identified. Rather, where there is a significant public interest in disclosure and a relatively small amount of harm to the interests involved, the Convention requires disclosure.<sup>50</sup>

58. The communicant claims that the public was denied access to “the project cost, the cost per unit power and the energy storage cost” of Ireland’s Natural Hydro Energy Scheme, despite the Convention’s definition of environmental information clearly including information on “cost-benefit and other economic analyses and assumptions”.<sup>51</sup>

59. The communicant submits that the Party concerned failed to comply with article 4(4)(f) of the Convention in handling Mr. Caulfield’s request in that the Commission stated it “maintains its view that personal names, e-mail addresses and telephone numbers redacted from the questionnaires constitute personal data in the sense of article 2(a), of Regulation 45/2001”. The communicant refers to *The Aarhus Convention: An Implementation Guide* to claim the exception under article 4(4)(f) does not apply to legal persons, such as companies or organizations, but is meant to protect documents such as employee records, salary history and health records and therefore was not applicable.<sup>52</sup>

60. The communicant claims the information requested by Mr. Caulfield was “facts and analyses of facts which [the Party concerned] considers relevant and important in framing major environmental policy proposals” for the purpose of article 5(7)(a) of the Convention and accordingly could not be withheld.<sup>53</sup>

61. The communicant alleges the Commission failed to justify that no overriding public interest existed and failed to provide information on available review procedures in its response to Mr. Caulfield’s confirmatory application.<sup>54</sup>

62. The communicant asserts that the Commission’s 3 June 2014 reply to the Ombudsman falsely stated no confirmatory application had been lodged and suggested that the Convention and the Aarhus Regulation only require disclosure of confidential information where the information relates to emissions. It alleges that the Commission’s reply incorrectly interpreted article 4 of the Convention by stating that greater openness is required in legislative procedures than in administrative ones. It submits the Commission’s reply shows that it failed to adequately weigh the public interest in disclosure.<sup>55</sup>

63. The Party concerned claims that in its 28 February 2013 response to Mr. Caulfield the Commission underlined that, at that stage, it did not hold information on the projects and therefore his confirmatory application was devoid of purpose.<sup>56</sup> In response to the Ombudsman’s investigations, the Commission provided wider access to some questionnaires and justified the remaining redactions. It emphasizes the Commission released the identity of the developers as legal persons, and only the names/surnames and contact information of individuals identified as the developers’s contact points were redacted as personal data under Regulation 45/2001.<sup>57</sup>

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<sup>50</sup> Ibid.

<sup>51</sup> Ibid., p. 8.

<sup>52</sup> Ibid., pp. 7-8.

<sup>53</sup> Ibid., pp. 8 and 12.

<sup>54</sup> Ibid., pp. 6-7.

<sup>55</sup> Ibid., pp. 6 and 11-13.

<sup>56</sup> Party’s response to communication, p. 3.

<sup>57</sup> Party’s reply to Committee’s questions, 20 May 2016, p. 2.

64. Regarding the timeframe for the confirmatory decision, the Party concerned states that the request was received on 24 October 2012. On 22 November 2012, the Commission sent a holding letter requesting 15 further working days in line with article 8(2) of Regulation 1049/2001, and on 12 December 2012 submitted an additional holding letter stating it needed more time. The confirmatory decision was sent on 28 February 2013. The applicant neither challenged the implied negative reply nor the confirmatory decision in court.<sup>58</sup>

65. The Party concerned submits that if information relates to other elements than emissions a case-by-case analysis of the proper weighing of the interests concerned must be carried out in accordance with the second sentence of article 6(1) of the Aarhus Regulation in combination with article 4 of Regulation 1049/2001.<sup>59</sup>

#### *The communicant's request*

66. The communicant claims the Party concerned failed to provide information in response to its request for the “reasons and considerations” regarding the selection of renewable electricity projects in Ireland.<sup>60</sup>

#### **Article 7 – applicability**

67. The communicant claims that article 1 of the TEN-E Regulation demonstrates that the PCIs, their supporting regulation and official documentation are a plan or programme related to the environment under article 7 of the Convention.<sup>61</sup>

68. The Party concerned does not contest this but notes the first PCI list was adopted via a delegated regulation as defined in article 290 TFEU. It submits the delegated regulation is a legally binding regulatory act of general application and that prior to its adoption, public participation meeting the requirements of article 7 was carried out.

#### **Article 7 – identification and notification**

69. The communicant claims the Party concerned made no effort to identify the public which may participate. It refers to the Commissioner's reply that “identification of any specific target groups in Ireland and/or in other EU Member States for the purpose or carrying out the consultation on the PCI Regulation was not considered necessary.”<sup>62</sup>

70. To prove the notification was insufficient the communicant points to the low number of responses (142 from the EU region).<sup>63</sup> It submits it is not the regular practice of the public in Ireland to check EU websites and questions how many ordinary people are able to find and read the Commission's “Your Voice in Europe” webpage or the announcements on the responsible authorities' websites. It claims there is no evidence that a press release was printed in any Irish newspapers or that any other “more traditional alternatives to the internet” were utilised. It refers to paragraphs 65 and 66 of the Maastricht Recommendations on Promoting Effective Public Participation in Environmental Matters which recommend public notice through radio, television, social media and local newspapers.<sup>64</sup>

71. The Party concerned submits the 2012 public consultation was announced on the “Your Voice in Europe” website, which is the single access point for all public consultations

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<sup>58</sup> Ibid., pp. 3-4.

<sup>59</sup> Ibid., p. 4.

<sup>60</sup> Email from communicant, 9 September 2014, p. 3.

<sup>61</sup> Ibid., pp. 14-16.

<sup>62</sup> Email from communicant, 9 September 2014, annex 4, p. 7.

<sup>63</sup> Communication, p. 8.

<sup>64</sup> Email from communicant, 9 September 2014, pp. 24-25.

by the Commission.<sup>65</sup> It submits all events were communicated to stakeholders and members of the public through the webpages of its Directorate-General for Energy and that stakeholders and members of the public interested in energy policy follow these.

72. The Party concerned submits the consultation process was open and not subject to limitations based on stakeholders' location, activities performed or any other characteristics.<sup>66</sup>

73. The Party concerned further submits that, prior to construction, each PCI will be subject to public participation at the national level in line with article 9 of the TEN-E Regulation.<sup>67</sup>

#### **Article 7 – necessary information**

74. The communicant claims the “necessary information” for participation was absent. Given the enormous scale and impact of the 248 projects, the “necessary information” should have addressed at least cost, environmental impacts, environmental mitigation measures, quantification of objectives and alternatives.<sup>68</sup> The communicant claims article 9(4) of the Aarhus Regulation, which only requires disclosing “environmental information where available”, incorrectly transposes article 7 of the Convention.<sup>69</sup>

75. The Party concerned states it actively disclosed environmental information during the public consultation from 20 June to 4 October 2012. The Commission published on its website and on the “Your voice in Europe” website the lists of all PCI candidates in the electricity, gas and oil sectors, including the countries concerned, name, description, planned year of completion, developers and reference number in the “Ten Year Network Development Plan”.<sup>70</sup> It submits that at the stage of establishing the PCI lists the Commission did not hold detailed information, such as precise location, routing and technology of the projects and their environmental impacts; this information would become available at the permitting stage.

76. The communicant claims the EU website for the consultation was restricted to English, and therefore most of the EU member States' 500 million citizens were disenfranchised.<sup>71</sup> It claims that the Commission's reply to the Ombudsman that the information published on the “Your Voice for Europe website” was available in 23 EU languages is untrue. The “Your Voice in Europe” website could be accessed in other languages, but most information on the site was only in English.<sup>72</sup>

77. The Party concerned claims the contact details of the Commission service in charge of PCIs and the PCI developers' names have been on its website since June 2012 and the public could request additional information from either source.<sup>73</sup>

78. The Party concerned reiterates that before each PCI is permitted, communities living in the project's vicinity will receive information and be able to communicate their views in their national languages. It contends using solely English did not breach the Convention and

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<sup>65</sup> Party's response to communication, pp. 10-11.

<sup>66</sup> Ibid., p. 11.

<sup>67</sup> Ibid.

<sup>68</sup> Communication, pp. 6 and 18.

<sup>69</sup> Email from communicant, 9 September 2014, p. 17.

<sup>70</sup> Party's response to communication, p. 13.

<sup>71</sup> Communication, p. 18.

<sup>72</sup> Email from communicant, 9 September 2014, pp. 27-28.

<sup>73</sup> Party's response to communication, pp. 9-10.

that the Committee already found in communication ACCC/C/2010/46 (United Kingdom) that article 3(9) of the Convention is silent on language discrimination.<sup>74</sup>

**Article 7 in conjunction with article 6(4)**

79. The communicant claims the Party concerned breached article 7 by not providing public participation on the first PCI list. The text of COM/2013/0711, which enumerates the representatives who contributed to preparing the list, does not mention the public. Accordingly, the 2012 consultation on the first PCI list failed to comply with the Convention.<sup>75</sup>

80. The communicant claims the Party concerned avoids public participation at the plan/programme level and relies on participation at the permitting level. Despite the Committee's findings on communication ACCC/C/2010/54 (EU), the Party concerned still refuses to comply with the Convention's requirements for public participation on plans and programmes.<sup>76</sup>

81. The communicant claims the Party concerned breaches article 6(4) of the Convention because it prevents public participation "when all options are open". It submits the public will not be able to raise concerns about the overall renewable energy programme at the permitting stage.<sup>77</sup>

82. The Party concerned claims a project's inclusion on the PCI list is the result of an extensive upstream consultation process. Point 5 of Annex III of the TEN-E Regulation requires that each Regional Group consult the organizations representing stakeholders, and, if deemed appropriate, stakeholders directly, including producers, distribution system operators, suppliers, consumers and environmental protection organizations.<sup>78</sup>

83. The Party concerned reiterates each project will undergo a permitting process including the consultation of stakeholders likely to be directly affected, including landowners, citizens living in the vicinity of the project, and the general public.<sup>79</sup>

84. The Party concerned submits its 2012–2013 consultation was comprehensive, highlighting seven events:

- Open public consultation from 23 May–7 June 2012 to identify infrastructure projects as potential PCIs;
- Open public consultation from 20 June–4 October 2012 to obtain views of the public, through a detailed online questionnaire, on all infrastructure projects proposed as potential PCIs;
- "Information Day on the process of identifying PCIs in energy infrastructure" on 17 July 2012 to provide the public with detailed information on the PCIs identification process and the ongoing public consultation;
- European Gas Regulatory Forum (Madrid Forum) meeting on 18 April 2013 to obtain views on proposed PCIs from the gas sector;

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<sup>74</sup> Ibid, p. 12.

<sup>75</sup> Communication, pp. 5-7.

<sup>76</sup> Email from communicant, 9 September 2014, p. 21.

<sup>77</sup> Ibid.

<sup>78</sup> Party's response to communication, pp. 8-9.

<sup>79</sup> Ibid., p. 9.

- Electricity Regulatory Forum (Florence Forum) meeting on 16 May 2013 to obtain views on proposed PCIs from the electricity sector;
- Submission of the draft regional PCI lists to relevant environmental stakeholders and discussion with these stakeholders at a meeting on 5 June 2013, with participation of eleven environmental organizations. Additional information requested by stakeholders was provided and a further period for written comments granted;
- Final written public consultation from 3–17 July 2013, mainly with environmental stakeholders.<sup>80</sup>

#### **Article 7 in conjunction with article 6(8)**

85. The communicant claims the Party concerned failed to take the outcome of the public participation into account in the final decision on the PCIs. It claims the 142 submissions the Party concerned received were never published and there is no record how they were evaluated. It presents an example it alleges was ignored.<sup>81</sup>

86. The Party concerned states the public's views were duly taken into account; the Regional Groups considered all 142 responses when assessing the PCI proposals and the Commission considered stakeholders' comments in an internal inter-service consultation process; it highlights two modifications made to the PCI list as a result. Finally, it states that a summary of the process was included in the explanatory memorandum accompanying Delegated Regulation 1391/2013.<sup>82</sup>

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

87. The European Union approved the Convention through Council Decision 2005/370/EC of 17 February 2005. The European Union has been a Party to the Convention since 17 May 2005.

#### **Admissibility**

##### *Claims related to European Union law*

88. The Committee is competent to assess only compliance with the Convention, and not with domestic law, and proceeds on this basis.

##### *Admissibility of claims concerning the grievances of others*

89. The Committee's role is to review the compliance of Parties with the Convention and, where non-compliance is found, to assist them to come into compliance. Communicants' allegations need not relate to their own experience. Rather, communicants need only be "members of the public" under paragraph 18 of the annex to decision I/7. Many members of the public have submitted communications concerning the experiences of third parties and indeed, such evidence is often indispensable to substantiate systemic non-compliance. The communicant's claims concerning compliance of the Party concerned regarding other persons are therefore not inadmissible on this ground.

##### *Exhaustion of domestic remedies – articles 3(2) and 4*

90. No other domestic remedies were used to challenge the handling by the Party concerned of the information requests filed by Mr. Waugh, Mr. Conroy and the communicant besides a confirmatory application. The Committee accordingly finds the communicant's

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<sup>80</sup> Ibid., pp. 9-10.

<sup>81</sup> Communication, p. 8.

<sup>82</sup> Party's response to communication, p. 12-13 and footnote 25.

allegations concerning these requests inadmissible under paragraphs 20(d) and 21 of the annex to decision I/7 for failure to exhaust domestic remedies.

91. Mr. Caulfield's requests were followed by several complaints to the Ombudsman but none to the General Court. The Committee considers that an appeal to the Ombudsman may in some access to information cases suffice for the purposes of paragraph 21 of the annex to decision I/7 on the use of domestic remedies. For example, where the Ombudsman proceedings have resulted in significant delay or the cost of court proceedings make it unreasonable to require the communicant to use the courts. Regarding delay, this is in line with paragraph 21 of the annex to decision I/7, which requires the Committee at all relevant stages to take into account any available domestic remedy unless the application of the remedy is unreasonably prolonged. Such a consideration would be particularly relevant where the public authorities of the Party concerned caused the delay.<sup>83</sup>

92. Mr. Caulfield received a partial refusal to his first request after 60 days. He waited another 90 days for a reply to his confirmatory application before turning to the Ombudsman. It took the Ombudsman 1 year to issue a preliminary opinion; a further 4 months, 12 days for the Commission to issue a new decision; and 8 months, 13 days for the Ombudsman to issue its final opinion, meaning that the review procedures took nearly two years and four months. It would be unreasonable to expect an applicant to then bring a case to court in circumstances in which the case had already taken such a prolonged period of time.<sup>84</sup> Moreover, the two-month time limit provided to bring claims to court under article 263 TFEU would have long lapsed by then, meaning that Mr. Caulfield's claims under that provision would be time-barred. The communicant's allegations under article 3(2) and article 4 regarding Mr. Caulfield's information requests are therefore not inadmissible on this ground.

#### *Exhaustion of domestic remedies – article 7*

93. The communicant requested internal review of Delegated Regulation 1391/2013 but was denied standing because it was not an eligible applicant for such review. The Committee thus considers that the communicant exhausted the domestic remedies available regarding its article 7 claim, and it is thus not inadmissible on this ground.

94. Based on paragraphs 91-93 above, the Committee finds those aspects of the communication admissible.

#### **Scope of consideration**

95. While the Party concerned adopted second and third PCI lists in November 2015 and November 2017, respectively, the communicant's allegations concern the first PCI list adopted in October 2013 and accordingly the Committee limits its examination to the first list.

#### **Requests for environmental information – article 4 in conjunction with article 2(3)**

96. Mr. Caulfield received some additional information as a result of his confirmatory application and complaint to the Ombudsman but parts of the eight questionnaires on Irish electricity projects remained redacted. This included the developers' personal data, the level of access to funding and estimated capital costs, the cost per unit power and the energy storage cost, information about possible subsequent project phases, follow-up actions and the type of resources to be invested, and a summary of the ownership of shares in one of the projects. The parties do not dispute that the requested information was environmental information within the meaning of article 2(3) of the Convention. Thus, the requested

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<sup>83</sup> See ECE/MP.PP/C.1/2017/16, para. 65.

<sup>84</sup> Ibid.

information had to be disclosed, unless it could be validly withheld under one of article 4's stated exceptions, as examined below.

#### **Exceptions from disclosure – article 4(4)**

##### *Commercial confidentiality – article 4(4)(d)*

97. The Commission withheld three types of “commercially confidential” information: (a) the level of access to funding and estimated capital costs, the cost per unit power and the energy storage cost, including a related brief explanation, (b) information about possible subsequent project phases, follow-up actions and the type of resources to be invested, and (c) a summary of the ownership of shares in one of the projects.

98. The Party concerned justifies its categorization of the above information as commercially confidential chiefly by economic impact. The Committee concurs that such information may be characterized as commercial information under article 4(4)(d) of the Convention. However, withholding commercial information under this provision also requires that the confidentiality of the information is protected by law; and moreover that this ground for refusal is “interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment”.

99. The first condition is met, since article 4(2), first indent, of Regulation 1049/2001 provides an exemption for commercial information. The Committee considers that context is an important factor in evaluating the second condition and that, as stated in the Committee's findings on communication ACCC/C/2007/21 (European Community), “in situations where there is a significant public interest in disclosure of certain environmental information and a relatively small amount of harm to the interests involved, the Convention would require disclosure.”<sup>85</sup> The Commission acknowledged to the Ombudsman it had not provided information on how the public interest had been taken into account in its replies to the request and confirmatory application.<sup>86</sup> However, while deciding that certain information should nonetheless be withheld, its reply to the Ombudsman demonstrates that it considered the public interest in disclosure as part of the friendly settlement in the Ombudsman proceedings.<sup>87</sup> The Committee accordingly finds that the Party concerned indeed took into account the public interest in disclosure in its final decision on the disclosure of the requested information and it is thus not in non-compliance with article 4(4)(d) of the Convention.

##### *Personal data – article 4(4)(f)*

100. The questionnaires included the names and the contact details of natural persons acting on behalf of developers and there is no indication that those persons consented to disclosure, a prerequisite for a disclosure of personal data under article 4(4)(f) of the Convention. While there is no evidence that the Commission indeed weighed the interest served by disclosure, the Committee does not consider that – bearing in mind the fact that the names of the companies themselves were disclosed – there was a significant public interest in disclosure of the personal data of the persons acting on their behalf. Thus, the Committee

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<sup>85</sup> See ECE/MP.PP/C.1/2009/2/Add.1, para. 30.

<sup>86</sup> EU Ombudsman decision on complaint 181/2013/AN, provided by the communicant on 17 February 2015, p. 7.

<sup>87</sup> Comments of the Commission on a proposal for a friendly solution, provided by the Party concerned on 20 May 2016, pp. 1 and 5-6.

finds that this information could be validly withheld under article 4(4)(f) of the Convention and the Party accordingly is not in non-compliance with this provision.

*Proceedings of public authorities – article 4(4)(a)*

101. Having found in paragraph 99 and 100 above that the exempted information could be withheld, the Committee does not consider it necessary to examine whether the information might also have been validly withheld under article 4(4)(a) of the Convention.

**Timeframes for information requests and the review thereof - article 4(2) and (7) and article 9(1)**

*Timeframes for replying to information requests - article 4(2) and (7)*

102. The communicant submits the Party concerned failed to comply with the time limits in article 4(2) of the Convention due to its delays in replying to Mr. Caulfield's information requests and in the handling of his confirmatory applications and Ombudsman complaints. The Committee clarifies that, while the timing of the replies to Mr. Caulfield's requests indeed should be considered under article 4(2), the timeframes for his confirmatory applications and Ombudsman complaints should be examined under article 9(1) of the Convention.

103. Regarding the replies to Mr. Caulfield's requests, his first request was submitted on 20 August 2012 and the response is dated 19 October 2012, while the second request was submitted on 5 March 2013 and the response is dated 22 April 2013. In both cases the response failed to meet the one month time limit in article 4(2) of the Convention. The Committee has not been provided with evidence that the Commission informed Mr. Caulfield, as required by article 4(2), that the volume and complexity of the information requested would justify an extension of the one month time limit. Thus, despite the fact that in both cases the extended time limit of two months was observed, the Committee finds that, by not informing the applicant that longer timeframes would be needed to reply to the information requests and of the reasons therefor, the Party concerned failed to comply with article 4(2) of the Convention.

104. The Committee emphasizes the importance that the Party concerned ensures that, when the volume and the complexity of an environmental information request may justify an extension of the one-month time limit in article 4(2) of the Convention, the applicant is informed of the extension and of the reasons therefor. However, taking into consideration that no evidence has been presented to substantiate that the non-compliance found in paragraph 103 above was of a wide or systemic nature, the Committee refrains from making a recommendation on this point.

*Expeditious review of information requests – article 9(1)*

105. The Party concerned provides the possibility for member of the public who consider that their information requests have not been adequately dealt with to seek court review under article 263 TFEU. Pursuant to the second paragraph of article 9(1) of the Convention, in circumstances where a Party provides for such review by a court of law, it must ensure that members of the public also have access to an expeditious and inexpensive procedure for reconsideration by a public authority or review by another independent and impartial body.

106. In previous findings, the Committee has made clear that when considering whether a procedure is “expeditious” under article 9(1) of the Convention, the time limits set out in article 4(2) and (7) are indicative.<sup>88</sup>

107. In the present case, the Party concerned took more than four months to reply to Mr. Caulfield’s first confirmatory application. Thereafter the Ombudsman took one year to prepare its first opinion and a further 8 months to issue its final opinion.

108. The Committee considers that neither the four months that the Commission took to respond to Mr. Caulfield’s first confirmatory application nor the more than two years the Ombudsman took to issue its final decision were “expeditious”. The fact that, after taking more than four months to reply to his confirmatory application, the Commission informed Mr. Caulfield that he should file a new request regarding a sub-set of the information originally requested, leading to further delay, is also of concern. The Committee accordingly finds that, by failing to ensure at least one review procedure that was expeditious, the Party concerned failed to comply with the requirement in article 9(1), second sentence, of the Convention to ensure an “expeditious” procedure for the reconsideration of information requests.

109. The Committee stresses the importance that the Party concerned ensures at least one expeditious procedure under article 9(1), second sentence, of the Convention for the review of environmental information requests. However, taking into consideration that no evidence has been presented to substantiate that the non-compliance found in paragraph 108 above was of a wide or systemic nature, the Committee refrains from making a recommendation on this point.

### **Article 3(2)**

110. The communicant states that by its “continuing refusal to provide access to what was requested back on the 20th August [2012]”, the Commission’s 28 February 2013 reply to Mr. Caulfield’s confirmatory application must be considered a breach of article 3(2) of the Convention.<sup>89</sup> The Committee considers it would render article 3(2) meaningless if every breach of article 4 were simultaneously a breach of article 3(2). Since the communicant has not further elaborated on how it considers that the Party concerned has failed to comply with article 3(2), the Committee finds the allegation regarding article 3(2) unsubstantiated.

### **Article 7**

111. The decision-making procedures regarding the PCIs can be divided into two levels: EU and member States’ level. The present communication is focused only on the decision-making procedures at the EU level, namely those regarding the establishment of the PCI list. In this respect the following points do not appear to be disputed by the parties:

- Article 7 of the Convention applies to the decision-making to establish the first PCI list;
- Before the adoption of the first list, public consultations were conducted;
- The communicant’s claims relate to the stage establishing the PCI list and not to subsequent steps in the procedure.

112. The essence of the communicant’s article 7 claim is that the consultations regarding the first PCI list was not “early public participation, when all options are open” and were not conducted “having provided the necessary information to the public,” because the public

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<sup>88</sup> See ECE/MP.PP/C.1/2017/16, para. 90.

<sup>89</sup> Communication, p. 12.

that would be most affected was not identified, not properly notified, not provided with necessary information and did not have a chance to participate at an early stage. Moreover, the language of the public participation was restricted to English, which is only understood by a minority of those affected by the decision-making. Finally, the communicant claims that the public's views were not taken into account.

113. Based on the above, the Committee will examine the following issues under article 7 of the Convention:

- (a) Identification and notification of the public which may participate (article 7 in conjunction with article 6(2));
- (b) Early public participation, when all options are open (article 7 in conjunction with article 6(4));
- (c) Obligation to provide the necessary information to the public (article 7);
- (d) Obligation to take due account of the outcome of public participation (article 7 in conjunction with article 6(8)).

114. The Committee will examine under article 3(9) of the Convention the communicant's allegation regarding the language of the information provided.

#### **Identification and notification of the public - article 7 in conjunction with article 6(2)**

##### *Identification*

115. Article 7 of the Convention requires the relevant public authority to identify the public which may participate. It uses the broader term "the public" rather than "the public concerned" and expressly requires public authorities to take into account the Convention's objectives when identifying the public which may participate. The Committee makes clear that the obligation to identify the public which may participate must not be used by public authorities in a way that would restrict public participation, but rather as a way of making public participation more effective.<sup>90</sup> However, simply designing the procedure so that anyone who may wish to participate can do so may not be enough.<sup>91</sup> Even if the procedure is open to all, it is recommended that, bearing in mind *inter alia* the nature of the decision-making and its geographical scope, a wide range of interest groups is identified and encouraged to take part in the process.<sup>92</sup> The bottom line is that the public participation procedure must be open to allow anyone affected by or with an interest in the decision to participate.<sup>93</sup>

116. Bearing in mind the multi-stage nature of the PCI decision-making whereby there will be subsequent possibilities to participate at the stage where specific details of the projects and their environmental impacts are known, the Committee is not convinced that the decision-making at the EU level to establish the PCI list requires all members of the public concerned by each and every project proposed for inclusion in the list to be proactively identified. The Committee rather considers it sufficient at the EU stage to identify those members of the public who have already shown themselves to be concerned by the pan-European dimension of the PCI list.

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<sup>90</sup> See ECE/MP.PP/C.1/2014/9, para. 59.

<sup>91</sup> Maastricht Recommendations, para. 164.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*, para 163.

### *Notification*

117. The public must be notified of its opportunities to participate. The conclusion that the requirements of article 6(2) of the Convention are applicable to article 7 follows from the fact that this provision is incorporated into article 6(3), which in turn is incorporated into article 7.

118. The evidence in the present case indicates that notification was only made through websites. As a general rule, the Committee considers it unreasonable to expect the public to proactively check websites in case there are any decision-making procedures of interest to them and therefore other means of notifying the public are also needed.<sup>94</sup> In cases where the “relevant stakeholders” are clearly indicated (as in Annex III.1 (5) regarding consultations held by the Regional Groups) it may be useful to notify the representatives of such stakeholders individually. This however must not preclude other members of the public from participating. For all other members of the public interested in decision-making at the EU level the Committee considers it reasonable to have one single point through which they are notified.

119. In the light of the above, the Committee does not consider that, in the particular circumstances of the decision-making on the PCI list at the EU level, the measures taken to identify or notify the public were inadequate.

120. The Committee accordingly does not find the Party concerned to have failed to comply with article 7 in conjunction with article 6(2) of the Convention regarding the identification and notification of the public in this case.

### **Early and effective public participation - article 7 in conjunction with article 6(4)**

121. The incorporation of article 6(4) of the Convention into the text of article 7 means that Parties must provide for early public participation on plans and programmes relating to the environment when all options are open, including the so-called “zero option”. Regarding the first PCI list, this meant that the public must have had the opportunity to participate at a time when the decision, or any type of commitment,<sup>95</sup> to include any particular PCI in the list had not yet been made. As set out in paragraph 84 above, members of the public did have an opportunity to comment already at that stage. Moreover, there is no evidence that the PCIs included in the first list were pre-determined prior to the public consultation. Furthermore, the inclusion of a project on the PCI list does not preclude, as a matter of law, the possibility of the project being refused authorisation at the stage of national permitting. The Committee accordingly finds that, based on the information provided, the the Party concerned did not fail to comply with article 7 in conjunction with article 6(4) of the Convention regarding the preparation of the first PCI list.

### **Necessary information - article 7**

122. As the Committee held in its findings on communication ACCC/C/2014/100 (United Kingdom):

“the obligation in article 7 to provide ‘the necessary information to the public’ includes requirements both:

- (a) To actively disseminate the information indicated in article 6 (2), including information about the opportunities to participate and availability of the relevant information; and

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<sup>94</sup> ECE/MP.PP/C.1/2017/3, para. 76.

<sup>95</sup> Maastricht Recommendations, para. 80.

(b) To make available to the public all information that is in the possession of the competent authorities and is relevant to the decision-making and is to be used for that purpose. The relevant information under category (b) would normally include the following information:

- (i) The main reports and advice issued to the competent authority;
- (ii) Any information regarding possible environmental consequences and cost-benefit and other economic analyses and assumptions to be used in the decisionmaking;
- (iii) An outline of the main alternatives studied by the competent authority.<sup>96</sup>

123. The communicant submits that, given the enormous scale and impact of the 248 projects, the “necessary information” for public participation on the first PCI list should have addressed at least their cost, environmental impacts, environmental mitigation measures, quantification of objectives and alternatives. The communicant also claims article 9(4) of the Aarhus Regulation, which only requires disclosing “environmental information where available” incorrectly transposes article 7 of the Convention.

124. Regarding the communicant’s latter claim, the Committee in its findings on communication ACCC/C/2014/100 (United Kingdom) made clear that the obligation to provide the necessary information requires Parties to make available to the public all information that is relevant to the decision-making “that is in the possession of the competent authorities”. Accordingly, the Committee does not consider that article 9(4) of the Aarhus Regulation fails to comply with article 7 of the Convention in this respect.

125. Moreover, there is no evidence before the Committee that would indicate that the Party concerned possessed further environmental information regarding the first PCI list at the time when the public consultation was held but failed to disclose it. Rather, the Party concerned states that such information was to be made available at the time of permitting the specific projects. It is not for the Committee to determine whether it was reasonable to take a decision on the first PCI list without having information on their cumulative environmental effects.

126. Based on the above, the Committee finds that, in the circumstances of this case, the Party concerned did not fail to comply with the requirement in article 7 of the Convention to provide the “necessary information” to the public during the preparation of the first PCI list.

**Due account - article 7 in conjunction with article 6(8)**

127. The incorporation of article 6(8) of the Convention into article 7 means that Parties must ensure that due account is taken of the outcome of the public participation during the preparation of plans and programmes relating to the environment. As the Committee observed in its findings on communication ACCC/C/2012/70 (Czech Republic), “a requirement to make accessible the reasons and considerations on which the decision is based is not expressly provided for in article 7 of the Convention. Nevertheless, the Party concerned has the obligation to demonstrate that it has fulfilled its obligations under article 6, paragraph 8.”<sup>97</sup>

128. In those findings, the Committee pointed out that in the process of preparing a plan this obligation could be fulfilled by following the procedure set out in article 6(9), or any

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<sup>96</sup> ECE/MP.PP/C.1/2019/6, para. 94.

<sup>97</sup> ECE/MP.PP/C.1/2014/9, para. 62.

other way the Party concerned chooses to demonstrate that it has taken “due account” of the outcome of the public participation.<sup>98</sup> Whatever procedure is used, the Committee emphasises that it is for the Party concerned to demonstrate that it has taken due account of the outcome of the public participation. The obligation to take due account has just as much force for plans, programmes and policies under article 7 as it has for projects under article 6.

129. The Party concerned has pointed the Committee to two examples of how it claims stakeholders’ comments were taken into account in the preparation of the first PCI list.<sup>99</sup> The Committee notes that these examples concern just two of the 248 PCIs on the PCI list. Moreover, one of the examples actually refers to comments submitted by the Directorate-General Environment of the Party concerned, rather than comments from the public. The Committee considers that these examples are not sufficient to demonstrate that the Party concerned took due account of the outcomes of the public participation in the first PCI list.

130. The Party concerned also states that a summary of the public participation was included in the explanatory memorandum of 14 October 2013 which accompanied the PCI Regulation. However, the explanatory memorandum merely reports in two brief sentences that “some concerns were raised [...] on certain environmental impacts of specific projects” and that “it was explained that the inclusion of these projects in the Union list is subject to their continued compliance with Union law, in particular Union environmental legislation” (see para. 27 above). The Committee considers that the explanatory memorandum does not demonstrate, in a transparent and traceable way, how the 142 comments from members of the public were given due account.

131. Accordingly, the Committee finds that, by failing to demonstrate, in a transparent and traceable way, how due account was taken of the public participation on the first PCI list, the Party concerned failed to comply with article 7 in conjunction with article 6(8) of the Convention.

### **Article 3(9)**

132. The communicant alleges that, since the information for the public participation was only provided in English, a majority of the citizens of the Party concerned were disenfranchised. In its findings on communication ACCC/C/2012/71 (Czech Republic), the Committee held that the general test for discrimination under article 3(9) is whether one section of the public concerned has been given less favourable treatment than another.<sup>100</sup> The Party concerned submits that, in its determination of inadmissibility on communication ACCC/C/2010/46 (United Kingdom), the Committee held that article 3(9) “is silent on matters of discrimination on the basis of language”<sup>101</sup> and 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”.<sup>102</sup> The Committee points out, however, that in its determination on communication ACCC/C/2010/46, it made clear that “the lack of availability of documentation in a particular language might under certain circumstances present an impediment to correct implementation of the Convention”. Moreover, in its findings on ACCC/C/2010/51 the Committee held that “if, on the other hand, national law provides for translations to different official languages ... article 3, paragraph 9, of the Convention implies

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<sup>98</sup> Ibid.

<sup>99</sup> Party’s response to communication, pp. 12-13, footnote 25.

<sup>100</sup> ECE/MP.PP/C.1/2017/3, para. 107.

<sup>101</sup> Party’s comments on draft findings, para. 35.

<sup>102</sup> ECE/MP.PP/C.1/2014/12, para. 105.

that these criteria must be applied in a non-discriminatory way”.<sup>103</sup> This is the situation in the present case.

133. The communicant’s allegation relates to the availability of the necessary information in the twenty-three official languages of the Party concerned. It must thus be distinguished from communication ACCC/C/2010/51, which dealt with a request for translation into foreign languages. In the present case, the information made available to the public during the consultation on the first PCI list was indeed only provided in English. According to the Party concerned, this information included the lists of all PCI candidates in the electricity, gas and oil sectors, including the countries concerned, name, description, planned year of completion, developers and reference number in the “Ten Year Network Development Plan” (see para. 77 above). It also included the notification to the public of their opportunities to participate. The Committee considers that the provision of these main consultation documents only in English meant that non-English speaking members of the public in the Party concerned received less favourable treatment.

134. The Committee accordingly finds that, by not making the main consultation documents, including the notification to the public, available to the public in its official languages other than English, the Party concerned discriminated against non-English speaking members of the public in the European Union and thus failed to comply with article 3(9) of the Convention.

## **IV. Conclusions and recommendations**

135. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

### **A. Main findings with regard to non-compliance**

136. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

137. The Committee finds that:

(a) By not informing the applicant that longer timeframes would be needed to reply to the information requests and of the reasons therefor, the Party concerned failed to comply with article 4(2) of the Convention;

(b) By failing to ensure at least one review procedure that was expeditious, the Party concerned failed to comply with the requirement in article 9(1), second sentence, of the Convention to ensure an “expeditious” procedure for the reconsideration of information requests;

(c) By failing to demonstrate, in a transparent and traceable way, how due account was taken of the public participation on the first PCI list, the Party concerned failed to comply with article 7 in conjunction with article 6(8) of the Convention;

(d) By not making the main consultation documents, including the notification to the public, available to the public in its official languages other than English, the Party concerned discriminated against non-English speaking members of the public in the European Union and thus failed to comply with article 3(9) of the Convention.

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<sup>103</sup> Ibid.

## **B. Recommendations**

138. The Committee, pursuant to paragraph 36 (b) of the annex to decision I/7 of the Meeting of the Parties, and noting the agreement of the Party concerned that the Committee take the measures requested in paragraph 37 (b) of the annex to decision I/7, recommends that the Party concerned take the necessary legislative, regulatory or other measures and practical arrangements to ensure that in public participation procedures within the scope of article 7 of the Convention carried out under the TEN-E Regulation, or any superseding legislation:

(a) The main consultation documents, including the notification to the public, are provided to the public in all the official languages of the Party concerned;

(b) Due account of the outcomes of the public participation is taken, in a transparent and traceable way, in the decision-making.

139. Taking into consideration that no evidence has been presented to substantiate that the non-compliance found in paragraph 137(a) and (b) above was of a wide or systemic nature, the Committee refrains from making recommendations on these points.

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