Reflections by the Chair of the Compliance Committee on the comments by the European Union and its Member States on the fifth draft of the revised Guide to the Committee[1]

6 March 2019

Introduction

1. These reflections are given in response to the comments by the European Union and its member States on the fifth draft of the revised Guide. The intention is to explain how the comments have been taken into account and to what extent I propose that they be reflected in the new version of the revised Guide.

2. I first address the points made by the European Union and its Member States in its statement delivered at the Committee's sixty-second meeting (see paras. 2-11 below). I then consider the points made by the European Union and its Member States in its statement submitted on 27 November 2018, after the Committee's sixty-second meeting (see paras. 12-28 below).

Proposals made by the European Union and its Member States in their statement to the Committee's sixty-second meeting[2]

Commencing deliberations on the substance of a case without a hearing

3. At its sixty-second meeting, the Committee took note of the position of the EU and its Member States that a decision to proceed without a hearing should only be taken with the consent of the parties.[3] As I explained during that meeting, while the final decision on whether a hearing is to be held rests with the Committee, in deciding whether or not a hearing is needed, the Committee will take a careful approach. This means that if either party or an observer provides a substantive reason why a hearing is needed, the Committee will hold a hearing. This careful approach is explicitly made clear in paragraphs 181-186 of the sixth draft of the revised Guide.[4]

4. Moreover, as I explained during the sixty-second meeting, in accordance with its standard practice, the Committee will review its working methods, including its procedure regarding hearings, when preparing its report to the seventh session of the MOP. In that context, Parties, communicants and observers will also have the possibility to provide their views on how the procedure has worked in practice.

Deadline for distribution of draft decisions on compliance before MOP to be extended to at least 3 months

5. As I explained during the sixty-second meeting (5-9 November 2018, Geneva), the deadline for distribution of draft decisions is a matter for the Bureau, not the Compliance Committee.

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[1] The fifth draft of the revised Guide to the Compliance Committee was submitted to the Committee's sixty-second meeting for consideration and is available at: https://www.unece.org/fileadmin/DAM/env/pp/compliance/CC-62/Guide_to_the_ACCC_fifth_draft_for_CC62.pdf.

[2] Available at http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC-62/EU_and_Member_States_statement_to_CC62_on_Committee_s_modus_operandi_and_draft_revised_Guide.pdf

[3] Ibid., p. 2.

[4] The Chair's proposed sixth draft of the revised Guide to the Compliance Committee is to be discussed at the Committee's sixty-third meeting and is available at http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC-63/Guide_to_the_ACCC_sixth_draft_for_CC63_clean.pdf.

Only cases concluded at least 6 months before a MOP to be included in the Committee's report

6. I consider that, though it will have consequences for the timely resolution of cases before the Committee, the European Union's proposal that only cases concluded at least 6 months before a MOP will be possible to take up. I must make clear, however, that the introduction of such a rule will necessarily result in delay in the finalization of some cases as findings that would have otherwise have been finalized in the present intersessional period will need to wait a further four years until the next session of the MOP for endorsement. That being said, if having a 6-month cut-off is important to Parties, I consider it can be accommodated by the Committee.

At least 6 weeks for informing the Party concerned that a communication concerning its compliance will be considered as to preliminary admissibility at the Committee's next meeting

7. I have included this proposed change in my Chair's proposal for the sixth draft of the Guide to the Committee.

At least 3 months for written comments by the Party to new submissions by the communicant in the framework of a pending compliance case, to additional questions by the Committee or in reaction to draft findings

8. The above proposal combines several different elements. I address each of these elements below:

(i) At least 3 months for written comments by the Party to new submissions by the communicant

9. This suggestion raises a point which I consider is important to clarify in the Guide, namely, that there is no requirement for a party to comment on additional information or submissions provided by the other party unless explicitly invited by the Committee to do so. In paragraph 195 of the sixth draft of the revised Guide I have accordingly inserted the following text:

> "In preparing its draft findings and recommendations, the Committee will rely on information provided by the parties and observers only after having made sure that both parties have had a fair opportunity to comment on and give their views on the information provided."

10. In my view, the above insertion, coupled with the possibility for a party to request an extension of time to provide its comments if it considers it will need one in the particular case, should address the underlying concern of the EU and its Member States, while still enabling the Committee to ensure the efficient management of its caseload.

(ii) At least 3 months for the Party concerned to reply to questions by the Committee

11. The Committee's practice to date has been that parties have a timeframe of approximately four weeks to reply to substantive questions if there are a small number of questions, or six to eight weeks (ie two months) if the questions are very lengthy or complex. I consider that it could potentially be workable to set a timeframe of six weeks for substantive questions as a general rule, whilst allowing for shorter timeframes when there are only a small number of questions or the questions are very simple. However, a general timeframe of longer than six weeks to reply to questions from the Committee would be highly problematic for the efficient management of the Committee's caseload. This is because such an extension and formalization of the Committee's procedure would significantly complicate the effective management of the Committee's work and its case-load. It would also result in significant delays of the Committee's work. This would be even more so if longer and fixed timeframes to reply to the Committee's questions were coupled with a similar length of time to comment on the other party's reply to the Committee's questions. Accordingly, I do not consider that the proposal of 3 months for replying to the Committee's questions should be

taken up. Once again, I note that, if in the particular case, a party considers it will need more time to prepare its replies to the Committee's questions, then it can request an extension of time, in accordance with the above.

(iii) ***At least 3 months to comment on draft findings***

12. In the light of the above suggestion, I consider it is important and timely also to clarify the purpose for which the Committee sends its draft findings to the parties for comment. Draft findings are sent to the parties for the purpose of checking that the relevant facts and law are correctly reflected therein. It is not the time for detailed legal submissions on the substance of the case. All such submissions should have already been made at an earlier stage in the procedure. Bearing this in mind, there is no need for the parties to have three months to simply check that the facts and law are correctly set out in the draft findings. However, having said this, in order to accommodate the views of the EU and its Member States, in paragraph 198 of the sixth draft of the revised Guide I have proposed a timeframe of six weeks for parties to comment on the draft findings. This is an increase from the timeframe of approximately four weeks which had applied to comments on draft findings in the past. Again, if in a particular case either party considers that in the circumstances of the case, it will need a longer timeframe to comment on the draft findings, it can seek an extension of time. To date, all such requests have been granted at least in part.

Proposals made by the European Union and its Member States in their statement dated 27 November 2018[5]

Access to information about cases before the Committee

13. With regards to the proposal by the EU and its Member States to delete the phrase "to the extent feasible" from the second paragraph under the heading "access to information about cases before the Committee," I must clarify that the words "to the extent feasible" should be retained for practical reasons. Incoming documentation to the Committee may be received in any of language used in the 47 Parties to the Convention. For annexes submitted in languages other than Convention's three official languages it is simply not possible for either the Committee or secretariat to confidently identify whether that documentation contains personal data. Moreover, while the secretariat does to the extent feasible screen incoming documentation for personal data before posting it on the website, given the sheer volume and size of many annexes and bearing in mind the secretariat's many other tasks, it is simply not possible for it to dedicate a large amount of time doing so. At the same time, to take account of the comments of the European Union, I have inserted the following text in paragraph 24 of my proposed sixth draft of the revised Guide with a view to addressing the concerns of the EU and its Member States:

> "Parties, communicants and observers are accordingly requested to redact such details from their documentation prior to submitting them to the Committee."

Exhaustion of domestic remedies

14. Concerning the issue of domestic remedies, I consider it is important to point out at the outset that the Compliance Committee is not a redress mechanism, but instead a mechanism for reviewing the implementation of the Convention. In keeping with this, decision I/7 contains no requirement that the communicant has itself been affected or is likely to be affected by the alleged non-compliance. Rather, a communicant need only be "one or more members of the public" within the meaning of paragraph 18 of the annex to decision I/7. Similarly, there is nothing in paragraph 21 of the annex

[5] Available at http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC-62/Comments_by_the_EU_and_MS_on_the_fifth_draft_of_the_revised_Guide_to_the_ACCC_27.11.2018.pdf

to decision I/7 that requires that the communicant itself has exhausted domestic remedies, but merely that:

> "The Committee should at all relevant stages take into account any available domestic remedy unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress."

15. In this regard, the outcomes of a third party's litigation can be key evidence that remedies are in fact unavailable, or that they are unreasonably prolonged or obviously do not provide an effective and sufficient means of redress.

16. Moreover, a number of communications considered by the Committee to date have concerned allegations of systemic non-compliance. In such cases, communicants may necessarily need to rely on the exhaustion of domestic remedies by other persons who had standing to challenge the various cases referred to in the communication to substantiate the alleged systemic non-compliance.

17. Furthermore, I must clarify that, contrary to the European Union's assertion, the Committee's approach is by no means unique in international law. Thus, for example, in interpreting the requirement to exhaust domestic remedies in article 35(1) of the European Convention on Human Rights, the European Court of Human Rights has allowed applicants to rely on the domestic remedies used by others to show that the remedy is ineffective and would be so in their case as well.[6]

18. Finally, with respect to civil law jurisdictions, the Committee is well aware that a number of Parties to the Convention are civil law jurisdictions which do not have the system of precedent as such. However, the European Union's submission that it cannot be inferred from the outcome of a previous case how national courts would apply the law as far as the communicant is concerned would, if taken to its logical conclusion, in practice mean that domestic remedies could never be exhausted in civil law jurisdictions. For the purposes of the compliance mechanism as a tool to review compliance with the Convention, such a view cannot be accepted.

19. In the light of the above, I consider that the sentence in the draft Guide explaining that if other members of the public have already exhausted the domestic remedies available to challenge the alleged non-compliance this may fulfill the requirements of paragraph 21 of the annex to decision I/7 indeed accords with the Committee's existing practice and should be retained in the Guide (see para. 118 of the sixth draft).

A hearing with the parties concerned

20. The European Union's proposal that, instead of stating that parties are "expected" to participate in a hearing should a hearing take place, the Guide should state that such participation "is recommended" cannot be taken up. As the Committee has repeatedly made clear, hearings, where held, perform a vital role in the Committee's procedure to examine compliance. A failure by a party to attend the hearing, while ultimately its own choice, means that party has forfeited an important opportunity to make its positions clear to the Committee. Moreover, without the participation of both parties, the usefulness of the hearing is seriously compromised, thereby presenting a major obstacle to the Committee's work. Accordingly, if the Committee decides a hearing is needed in a particular case, the attendance of the parties is indeed expected and I consider that it is important to make this clear in the Guide from the outset.

21. While taking note of the European Union's suggestion that audio conferences be used for hearings, I have not proposed that it be taken up in the sixth draft of the revised Guide. As the Committee had

[6] See e.g. *Case of Vasilkoski and Others v. The Former Yugoslav Republic of Macedonia*, Application no. 28169/07, 27 October 2010, paras. 42-46, and *Case of Laska and Lika v. Albania*, Applications nos. 12315/04 and 17605/04, 20 April 2010, paras. 45-48.

repeatedly made clear, including in its report to the sixth session of the Meeting of the Parties,[7] if a hearing is held, in-person attendance is critical for the hearing to be effective. In this context, it should be also noted that the secretariat does not guarantee the required technical support to ensure that hearings could be conducted effectively via audio or video conference. It is therefore simply not feasible to take up this proposal even from a practical point of view.

22. Finally, I do not consider that the reference in the Guide indicating that each party should ensure that its representative(s) taking part in the hearing has the necessary competence to answer the Committee's questions within the scope of the case places an inappropriate burden on the parties or interferes with a party's right to decide how best to defend its own interests. Rather, it should go without saying that each party's representative(s) at the hearing is sufficiently well-briefed to reply to the Committee's questions on the case and is in fact authorized to do so. The Committee's experience has been that the vast majority of Parties meet these requirements. Only in a small number of hearings to date has this not happened, with the effectiveness of the hearing being significantly reduced as a result. I accordingly consider that it is important for the Guide to make this clear. Moreover, this paragraph in the Guide is intended to assist Parties, including relevant officials from other competent ministries, who may not have attended a Committee hearing before to better understand how best to prepare for the hearing.

23. At the same time, taking into account the comments from the EU and its Member States on this issue, in paragraph 188 of my proposed sixth draft to the Guide I have re-phrased the sentence "this may require" the participation of other relevant ministries to "this may include" the participation of representatives of such ministries.

Committee's review of the implementation of MOP decisions

24. The proposal by the EU and its Member States that a reference to "video conferencing" be reinserted to the text of the Guide on the review of the implementation of MOP decisions has been incorporated in paragraph 212 of my proposed sixth draft of the Guide.

25. With respect to the suggestion by the European Union and its Member States that Guide should make clear that the "parties" to the Committee's follow-up on a MOP decision on compliance should stay the same as those in the previous procedure before the Compliance Committee, including the registered observers, I must clarify that the Guide accurately reflects the Committee's longstanding practice. Thus, the text of the Guide remains unchanged on this point.

26. To explain, it has always been the Committee's practice at any stage of its procedures to permit observers to submit written comments and to participate in the Committee's discussions in open session. This has been a useful means for the Committee to get relevant information for the review of MOP decisions on compliance. Moreover, I must clarify that the follow-up on a MOP decision on compliance is not a procedure between "parties" as such. Rather, the purpose of the Committee's review is to assist the Party concerned to fully implement the recommendations in the MOP decision concerning its compliance. Both communicants and observers can play an important role in assisting the Committee in its review. There is accordingly no basis for restricting the participation in the follow-up only to those who were communicants or observers in the earlier case giving rise to the MOP decision at issue.

27. Regarding the concern expressed by the EU and its Member States that the fifth draft of the revised Guide referred to "recommendations" made to the Party concerned by the Committee in its progress reviews, in paragraph 210 of my proposed sixth draft of the revised Guide I have clarified that the progress review may include "advice" to the Party concerned.

[7] ECE/MP.PP/2017/31, para. 29.

Report to MOP on implementation of MOP decision

28. With respect to the concern expressed by the EU and its Member States that the Committee might finalize its report to MOP on the implementation of a MOP decision without consulting the Party concerned, in paragraph 214 of my proposed sixth draft of the Guide I have made clear that:

> "The Party concerned, as well as communicants and observers, are given the opportunity to comment on the Committee's draft report to the Meeting of the Parties before it is finalized."

Any developments subsequent to the finalization of the Committee's report to MOP

29. The EU and its Member States further asks for flexibility to be introduced into the Guide in order to take into account relevant developments subsequent to the Committee's finalization of its reports to MOP. This request is not feasible, in particular in the light of the new earlier deadlines requested by the European Union and its Member States for the Committee to finalize its documentation prior to each session of the Meeting of the Parties (see paras. 5 and 6 above). The deadline for each Party concerned to fulfil the requirements of the MOP decision concerning its compliance was set by the Meeting of the Parties at its sixth session. That deadline is 20 October 2020. In order for the Committee to (a) ensure the equal treatment of all Parties; (b) ensure a careful and thorough review of the information provided; and (c) meet the deadline for finalizing its reports to the seventh session, it is not possible for the Committee to have different deadlines for different Parties. Rather, as indicated in paragraphs 217-219 of the proposed sixth draft Guide to the Committee, there are two possibilities:

    (a) If a further MOP decision concerning that Party's compliance is to be adopted at the upcoming session of the Meeting of the Parties, and the new information relates to the remaining points of non-compliance within the scope of that decision, the Committee will examine the new information provided in the course of its follow-up on the new MOP decision during the next intersessional period.

    (b) If there is no MOP decision concerning that Party's compliance to be adopted at the upcoming session of the Meeting of the Parties or the new information relates to matters outside the scope of the new MOP decision, the new information may be submitted in the form of a communication (by a member of the public) or submission (by a Party).

30. In this context, I recall my note to the sixth session of the Meeting of the Parties,[8] through which the above issue was clarified. This note was well-received and widely accepted by Parties. The above approach guarantees that any decision on compliance matter taken by Parties is based on a thorough legal review rather than on ad hoc information that it has not been possible for either the Committee or the Meeting of the Parties to properly assess.

31. In addition, the Meeting of the Parties may request the Committee to act pursuant to paragraphs 13 (b) and (c) of the annex to decision I/7.

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[88] See: https://www.unece.org/fileadmin/DAM/env/pp/mop6/Documents_aec/Information_note_for_agenda_item_on_compliance_mechanism_Inf.5.pdf