

Compliance Committee to the Convention on  
Access to Information, Public Participation  
in Decision-making and Access to Justice  
in Environmental Matters (Aarhus Convention)

**First progress review of developments relating to  
request ACCC/M/2017/3 on compliance by the European Union  
with its obligations under the Convention**

Contents

	<i>Page</i>
I. Introduction.....	2
II. Summary of follow-up action on ACCC/M/2017/3.....	2
III. Considerations and evaluation by the Committee .....	3
IV. Conclusions and recommendations.....	11

## **I. Introduction**

1. At its sixth session (Budva, Montenegro, 11-13 September 2017), the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) agreed to include the following text in the report of its sixth session:

In the spirit of reaching consensus, considering exceptional circumstances, the Meeting of the Parties decided by consensus to postpone the decision-making on draft decision VI/8f concerning the European Union to the next ordinary session of the Meeting of the Parties to be held in 2021. The European Union recalled its willingness to continue exploring ways and means to comply with the Convention in a way that was compatible with the fundamental principles of the European Union legal order and with its system of judicial review.

2. Through paragraph 63 of its report of the sixth session, the Meeting of the Parties requested the Compliance Committee to review any developments that had taken place regarding the matter and to report to the Meeting of the Parties accordingly. In that context, the European Union stated that it reaffirmed its commitment to implement decision V/9g (see ECE/MP.PP/2017/2).

## **II. Summary of follow-up**

3. On 26 February 2018, the communicant of communication ACCC/C/2010/54 submitted a written statement.

4. At its sixtieth meeting (Geneva, 12-15 March 2018), the Committee reviewed request ACCC/M/2017/3 (European Union) in open session with the participation by audio conference of representatives of the European Union, the communicants of communications ACCC/C/2008/32 and ACCC/C/2010/54 and representatives of Italy, Norway, the Netherlands and Switzerland as observers. The Chair informed the European Union that the Committee would invite the European Union to provide a progress report by 1 October 2018 on the measures taken by then to implement request ACCC/M/2017/3.

5. On 26 June 2018, the communicant of communication ACCC/C/2010/54 submitted a written statement to the Committee's 61<sup>st</sup> meeting.

6. On 31 July 2018, the secretariat wrote a letter to the European Union as a courtesy to remind it of the deadline of 1 October 2018 to report on its progress with respect to request ACCC/M/2017/3.

7. On 1 October 2018, the European Union submitted its first progress report on MOP request ACCC/M/2017/3 on time.

8. On 5 October 2018, the secretariat forwarded the first progress report to the communicants of communications ACCC/C/2008/32, and ACCC/C/2010/54, and observers Coalition for Access to Justice for the Environment, Justice & Environment, Ms. Mariolina Eliantonio, Mr. Chris Backes, Mr. Otto Brouwer and Mr. Joep Wolfhagen, inviting their comments by 1 November 2018.

9. On 22 October 2018, the communicant of communication ACCC/C/2010/54 provided comments on the first progress report.

10. On 5 November 2018, the communicant of communication ACCC/C/2008/32 provided comments on the first progress report.

11. After taking into account the information received, the Committee prepared its first progress review and adopted it through its electronic decision-making procedure on 22 February 2019. The Committee thereafter requested the secretariat to forward the first progress review to the European Union, the communicants of communications ACCC/C/2008/32 and ACCC/C/2010/54 and registered observers.

### III. Considerations and evaluation by the Committee

12. In order to fulfil request ACCC/M/2017/3 with respect to paragraph 3 of decision V/9g, the European Union would need to provide the Committee with evidence that it had adopted a proper regulatory framework and/or clear instructions for implementing article 7 of the Convention with respect to the adoption of national renewable energy action plans (NREAPs). This would entail that the European Union ensure that the arrangements for public participation in its member States are transparent and fair and that within those arrangements the necessary information is provided to the public. In addition, such a regulatory framework and/or clear instructions must ensure that the requirements of article 6(3), (4) and (8) of the Convention are met, including reasonable time frames, allowing sufficient time for informing the public and for the public to prepare and participate effectively, allowing for early public participation when all options are open, and ensuring that due account is taken of the outcome of the public participation. Moreover, the European Union must adapt the manner in which it evaluates NREAPs accordingly;

13. In order to fulfil request ACCC/M/2017/3 with respect to the Committee's findings on communication ACCC/C/2008/32 (part II), the European Union would need to provide the Committee with evidence that:

(a) All relevant European Union institutions within their competences take the steps necessary to provide the public concerned with access to justice in environmental matters in accordance with article 9(3) and (4) of the Convention.

(b) If and to the extent that the European Union intends to rely on the Aarhus Regulation<sup>1</sup> or other European Union legislation to implement article 9(3) and (4) of the Convention:

(i) The Aarhus Regulation is amended, or any new European Union legislation is drafted, so that it is clear to the Court of Justice of the European Union (CJEU) that that legislation is intended to implement article 9(3) of the Convention;

(ii) New or amended legislation implementing the Aarhus Convention uses wording that clearly and fully transposes the relevant part of the Convention; in particular it is important to correct failures in implementation caused by the use of words or terms that do not fully correspond to the terms of the Convention.

(c) If and to the extent that the European Union is going to rely on the jurisprudence of the CJEU to ensure that the obligations arising under article 9(3) and (4) of the Convention are implemented, the CJEU:

(i) Assesses the legality of the European Union's implementing measures in the light of those obligations and acts accordingly;

(ii) Interprets European Union law in a way which, to the fullest extent possible, is consistent with the objectives of article 9(3) and (4) of the Convention.

#### **Paragraph 3 of decision V/9g – Proper regulatory framework and/or clear instructions with respect to adoption of NREAPs**

14. In regard to the first three sentences of paragraph 3 of decision V/9g, the Committee examines the measures taken by the European Union to put in place a proper regulatory framework and/or clear instructions with respect to the adoption of:

(a) Any amendments to member States' 2010 NREAPs;

(b) The adoption of new NREAPs, or plans that will take their place, post 2020.

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<sup>1</sup> Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.

15. As a preliminary matter, the Committee recalls its first and second progress reviews for decision V/9g<sup>2</sup> and its report to the sixth session of the Meeting of the Parties for decision V/9g,<sup>3</sup> each of which had pointed out that a clear instruction would amount to a direction or order that has to be followed by the member States.

*Amendments to member States' 2010 NREAPs*

16. Pursuant to article 4(4) of the Renewable Energy Directive,<sup>4</sup> “a member State whose share of energy from renewable sources fell below the indicative trajectory in the immediately preceding two-year period...shall submit an amended national renewable energy action plan to the Commission by 30 June of the following year.” At the time the European Union submitted its first progress report on request ACCC/M/2017/3, article 4(4) of the Renewable Energy Directive remained in force, having not yet been amended, repealed or superseded by new legislation. Accordingly, the possibility that member States might need to amend their NREAPs was not at that time precluded.

17. In its first progress report, the European Union does not report that it has taken any measures since the sixth session of the Meeting of the Parties to put in place a proper regulatory framework and/or clear instructions with respect to any amendments to member States' 2010 NREAPs. Rather, it refers back to the information it had provided on 16 May 2017 during the Committee's review of decision V/9g in the last intersessional period.

18. While not reporting that any member States had amended their NREAPs since the sixth session, the communicant of communication ACCC/C/2010/54 submits that, since both Ireland and the Netherlands' share of energy from renewable sources had been lower than their indicative trajectories, according to article 4(4) of the Directive both member States should in fact have submitted amended NREAPs.<sup>5</sup>

19. With respect to the European Union's reliance on the information it submitted to the Committee on 16 May 2017, the Committee underlines that it had already examined that information in the context of its review of decision V/9g in the last intersessional period and had informed the European Union that it did not meet the requirements of the first and second sentences of paragraph 3 of that decision.<sup>6</sup> The Committee accordingly finds that the European Union has not demonstrated any progress since the sixth session of the Meeting of the Parties to fulfil the first three sentences of paragraph 3 of decision V/9g with respect to any amendments of member States' 2010 NREAPs.

20. The Committee notes that, upon the adoption and entry into force of legislation superseding article 4(4) of the Renewable Energy Directive, this issue will no longer form part of the Committee's review of request ACCC/M/2017/3.

*Adoption of NREAPs, or the plans that take their place, post-2020*

21. In its first progress report, the European Union submits with respect to paragraph 3 of decision V/9g “that the adoption of the EU Regulation on the Governance of the Energy Union is the key tool which will address the breaches identified by the MoP and the recommendations of the Compliance Committee.”<sup>7</sup> The European Union explains that the National Energy and Climate Plans (NECPs) that will be required under the new Regulation will replace the existing NREAPs.<sup>8</sup> The European Union contends that article 10 of the proposal for the Regulation, including its explicit reference to the Directive on Strategic

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<sup>2</sup> Committee's first progress review on decision V/9g, 13 October 2015, para. 12; Committee's second progress review on decision V/9g, 23 February 2017, para. 55.

<sup>3</sup> ECE/MP.PP/2017/39, para. 20.

<sup>4</sup> Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L 140.

<sup>5</sup> Comments on the Party's first progress report from the communicant of communication ACCC/C/2010/54, 22 October 2018, pp. 2-4.

<sup>6</sup> ECE/MP.PP/2017/39, paras. 21-27.

<sup>7</sup> Party's first progress report, 1 October 2018, p. 2.

<sup>8</sup> *Ibid.*

Environmental Assessment (SEA),<sup>9</sup> and the explicit reference to the Convention in recital 20 of the proposed Regulation, will ensure that the public is involved in the adoption by member States of NECPs.<sup>10</sup>

22. The European Union adds that annex I of the proposal for the Regulation, which details the contents of the NECPs, refers specifically in section A.1.3 to “consultations with stakeholders, including social partners, and engagement of civil society’ and their outcome.”<sup>11</sup> According to the European Union, this creates the right framework for public involvement.<sup>12</sup>

23. The European Union reports further that in June 2018, the European Parliament and Council agreed on an amended version of the proposal containing “an even more developed text in terms of public participation.”<sup>13</sup> The agreed proposal provides *inter alia*:

(a) Proposed recital 20 *bis* provides that “when implementing their public consultation obligations, and in line with the Aarhus Convention, Member States should aim at equal participation, ensure that the public is informed by public notices or other appropriate means, such as electronic media, that the public can access all relevant documents, and put in place practical arrangements related to the public’s participation;

(b) Proposed recital 20 *ter* provides that “Member States should establish a permanent multi-level energy dialogue” gathering together various stakeholders.

(c) Similarly, article 10a states that:

“Member States shall establish a Multilevel Climate and Energy Dialogue...where local authorities, civil society organisations, business community, investors and other relevant stakeholders and the general public can actively engage and discuss the different scenarios envisaged for energy and climate policies...Integrated national energy and climate plans could be discussed within the framework of such a dialogue.”;

(d) There is now a specific reference under proposed article 10(1)(a) that “member States shall set reasonable timeframes allowing sufficient time for the public to be informed, to participate and express its views. Member States shall ensure that the public is informed.”<sup>14</sup>

(e) Proposed article 10 now not only requires that member States “ensure that the public is given early and effective opportunities to participate in the preparation of the draft plans,” but also that public participation “as regards the plans for the 2021-2030 period,” is to be provided “in the preparation of the final plans well before their adoption - as well as of the long-term strategies referred to in Article 14.”<sup>15</sup>

(f) Proposed article 10 requires member States to attach to their submission of such plans to the Commission a summary of the public’s views or provisional views.<sup>16</sup>

(g) Proposed article 10 also provides that, in so far as the provisions of the SEA Directive are applicable, consultations undertaken on the draft in accordance with that Directive shall be deemed to satisfy the obligations to consult the public under the proposed Regulation.<sup>17</sup>

24. The European Union reports that the new Regulation was expected to be adopted by the European Parliament in November 2018 which would lead to publication of the Regulation and entry into force at the latest in January 2019.<sup>18</sup> As of the date of the present

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<sup>9</sup> Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.

<sup>10</sup> Party’s first progress report, 1 October 2018, p. 2.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*, p. 4.

<sup>15</sup> *Ibid.*, p. 3.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*, p. 2.

progress review, the Committee has received no update from the European Union since its first progress report on 1 October 2018 or confirmation that the Regulation has indeed now been adopted, and if so, the content of the text as adopted.

25. The communicant of communication ACCC/C/2008/32 disagrees that the agreed proposal for the Regulation would fully implement the requirement of paragraph 3 of decision V/9g to adopt a proper regulatory framework and/or clear instructions for implementing article 7 of the Convention.<sup>19</sup> The communicant of communication ACCC/C/2010/54 shares this view, whilst considering the proposed Regulation to be an improvement on the Renewable Energy Directive.<sup>20</sup>

26. Firstly, the communicant of communication ACCC/C/2008/32 claims that the agreed proposal would not ensure that public participation will take place “when all options are open”, as required by article 6(4) of the Convention. It claims that proposed article 10 reflects a political compromise to not require public participation on the draft but on the “final plans well before their adoption”. According to the communicant, this will mean that member States will first submit a draft plan to the Commission and receive comments before they will conduct a public participation phase, raising serious concerns that options will be factually closed off before the start of the participation phase.<sup>21</sup>

27. Secondly, the communicant of communication ACCC/C/2008/32 submits that the proposed Regulation does not refer to the requirement in article 6(8) that the public authorities must take due account of the outcome of public participation.<sup>22</sup>

28. Thirdly, the communicant of communication ACCC/C/2008/32 submits that concerns arise with regard to adequate timing being accorded to the various stages because the proposed Regulation does not set specific timelines.<sup>23</sup>

29. The Committee welcomes the amended proposal for the Regulation and will examine below its provisions on public participation to see whether, if adopted and in force, it would fulfil the first three sentences of paragraph 3 of decision V/9g. The observations of the Committee set out below concern the text of the proposed Regulation as agreed by the European Parliament and Council in June 2018. The Committee’s observations are accordingly provisional; the Committee will examine the relevant provisions of the Regulation in more detail once the adopted text has been submitted to it.

30. The Committee first recalls that in its report on decision V/9g to the sixth session of the Meeting of the Parties it had examined the original proposal for the Regulation and had concluded that it would not fully meet the requirements of paragraph 3 of decision V/9g.<sup>24</sup> The Committee accordingly focuses its present review on the changes that have been introduced in the amended proposal of June 2018.

31. In order to fulfil the first three sentences of paragraph 3 of decision V/9g, the European Union should adopt a proper regulatory framework and/or clear instructions that would ensure that member States put in place arrangements with respect to the adoption of NREAPs, or plans that take their place, that would meet each of the elements of article 7 set out in that paragraph, namely that:

- (a) The arrangements are transparent and fair;
- (b) Within the arrangements the necessary information is provided to the public;
- (c) The requirements of article 6(3), (4) and (8) are met, including reasonable timeframes, allowing sufficient time for informing the public and for the public to prepare

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<sup>19</sup> Comments on the Party’s first progress report from the communicant of communication ACCC/C/2008/32, 5 November 2018, para. 13.

<sup>20</sup> Comments on the Party’s first progress report from the communicant of communication ACCC/C/2010/54, 22 October 2018, p. 4.

<sup>21</sup> Comments on the Party’s first progress report from the communicant of communication ACCC/C/2008/32, 5 November 2018, para. 14.

<sup>22</sup> *Ibid.*, para. 15.

<sup>23</sup> *Ibid.*, para. 16.

<sup>24</sup> ECE/MP.PP/2017/39, paras. 31-36.

and participate effectively, allowing for early public participation when all options are open, and ensuring that due account is taken of the outcomes of public participation.

32. Bearing the above in mind, the Committee welcomes the requirement in proposed article 10(1)(a) that “each Member State shall set reasonable timeframes allowing sufficient time for the public to be informed, to participate and to express its views”.

33. The Committee also welcomes the requirement in proposed article 10 that member States “shall ensure that the public is given early and effective opportunities to participate” in the preparation of the draft plans.

34. The Committee however notes the apparent absence of an express requirement for the public to have opportunities to participate “when all options are open” as stipulated in article 6(4) of the Convention. In this regard, the Committee invites the European Union, in its second progress report due on 1 October 2019, to explain how it will ensure that the requirement for the public to have the opportunity to participate during the preparation of the draft plans “when all options are open” is met.

35. The Committee also notes that, with respect to the plans for the 2021 to 2030 period, the public’s opportunities to participate appear to be explicitly restricted to providing views on the “final plans well before their adoption”. The Committee invites the European Union, in its second progress report due on 1 October 2019, to comment on the submission by the communicant of communication ACCC/C/2008/32 in paragraph 25 above, that in practice this means that the draft plans for 2021 to 2030 will have already been submitted to the Commission for its comments prior to the public having an opportunity to comment.

36. The Committee also notes the apparent absence of a binding requirement in the proposal’s operative provisions that the public be provided with the necessary information. While proposed recital 20 *bis* states that “Member States should aim at equal participation, ... that the public can access all relevant documents”, this would seem to be expressed in aspirational language only. The Committee invites the European Union, in its second progress report, to explain how it will ensure that the requirement to provide the necessary information to the public is met.

37. Finally, the Committee notes the apparent lack of any requirement to ensure that due account is taken of the outcomes of the public participation. While proposed article 10 requires that “a summary of the public’s views or provisional views” be attached to the submission of such documents, the Committee can see no explicit requirement for due account to be taken of those views. The Committee accordingly invites the European Union, in its second progress report, to explain how it will ensure that the requirement to take due account of the outcomes of public participation is met.

38. In light of the above, the Committee finds that, while welcoming the concrete progress made, the Committee does not have evidence before it to conclude that the European Union has met all the requirements of the first three sentences of paragraph 3 of decision V/9g.

### **Paragraph 3 of decision V/9g – Evaluation of NREAPs**

39. When reviewing the extent to which the European Union has fulfilled the final sentence of paragraph 3 of decision V/9g, the Committee likewise examines the measures taken by the European Union to adapt the manner in which it evaluates:

- (a) Member States’ 2010 NREAPs;
- (b) Member States post-2020 NREAPs, or the plans that take their place.

#### *Member States’ 2010 NREAPs*

40. With respect to its evaluation of member States’ 2010 NREAPs, in its first progress report the European Union merely recalls its statement dated 16 May 2017.<sup>25</sup> However, as made clear in its report on decision V/9g to the sixth session of the Meeting of the Parties, the Committee already examined that statement in the last intersessional period and found

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<sup>25</sup> Party’s first progress report, 1 October 2018, p. 2.

that the information provided did not satisfy the requirements of the last sentence of paragraph 3 of decision V/9g.<sup>26</sup>

41. The Committee considers it useful to reiterate the pertinent paragraphs of its report to the sixth session again below:

“40. In the light of the statement by the Party concerned during the audio-conference at the Committee’s fifty-second meeting that, following its assessment of the information provided by member States, it may open infringement proceedings to enforce the requirements of article 7 of the Convention, the Committee in its second progress review invited the Party concerned to:

(a) Provide more detailed information regarding its assessment of the public participation carried out by each member State based on the information provided in each 2015 NREAP progress report, and

(b) Explain, for each member State whose information on their implementation of article 7 was either insufficient or revealed a possible failure to carry out public participation that fully met the requirements of article 7, the specific measures it proposes to take with respect to that member State.

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42. The Committee expresses its concern that the Party concerned has entirely failed to respond to the Committee’s questions as set out in paragraph 40 above. In its further information provided on 16 May 2017, the Party concerned provided examples of four member States that had provided for public participation in the preparation of certain measures in the field of renewable energy, apparently as examples of good practice by its member States. However, the Party concerned did not reply at all to the Committee’s actual questions (see para. 40 above). As noted in paragraph 39 above, the Party concerned itself has stated that ten member States had entirely failed to report on public participation in the preparation of their NREAPs and a further six member States had provided insufficient information. In its second progress review, the Committee thus asked the Party concerned to explain the specific measures it proposes to take with respect to each of these sixteen member States. To date, the Party concerned has provided no information on this point. The Committee therefore finds that the Party concerned has not fulfilled the final sentence of paragraph 3 of decision V/9g either.”

42. The Committee expresses its serious concern that not only has the European Union still failed to reply to the questions put to it in the Committee’s second progress review, it has referred back to the information it provided on 16 May 2017, which the Committee had already made clear in its report on decision V/9g to the sixth session was insufficient.

43. The Committee thus requests the European Union, together with its second progress report due by 1 October 2019, to provide clear and detailed replies to the questions first put to it in February 2017 in the Committee’s second progress review on decision V/9g<sup>27</sup> and set out in paragraph 41 above.

44. In the light of the above, the Committee finds that the European Union has not yet fulfilled the final sentence of paragraph 3 of decision V/9g with respect to the evaluation of member States’ 2010 NREAPs.

*Member States post-2020 NREAPs, or the plans that take their place*

45. The only mention of evaluation or monitoring in the European Union’s first progress report is its very brief assertion that the reference to consultations “with stakeholders, including social partners, and engaging with the civil society” in Section A.1.3 of Annex I of the proposed Regulation “creates the right framework for public involvement in the planning but also for monitoring by the Commission of such involvement”.<sup>28</sup>

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<sup>26</sup> ECE/MP.PP/2017/39, paras. 39-42

<sup>27</sup> Committee’s second progress review on decision V/9g, 23 February 2017, para. 70.

<sup>28</sup> Party’s first progress report, 1 October 2018, p. 2.

46. From the above statement, it is not clear to the Committee how, if at all, the European Union has adapted the manner in which it will evaluate member States' post-2020 plans. The Committee thus finds that the European Union has not yet fulfilled the final sentence of paragraph 3 of decision VI/8g with respect to member States' post-2020 plans either.

**Paragraph 123 of the Committee's findings on communication ACCC/C/2008/32 (Part II)**

47. In respect of paragraph 123 (a) of ACCC/C/2008/32 (Part II), in its first progress review the European Union reports that on 8 May 2018 the European Commission published a Roadmap on "EU implementation of the Aarhus Convention in the area of access to justice in environmental matters"<sup>29</sup>. In accordance with the Roadmap, an external study was launched in August 2018 to "evaluate the redress possibilities in environmental matters covered by EU law which are currently available both in EU courts and via the courts of its Member States. As outlined in the Roadmap, the study will examine the functioning of the existing system, will identify possible shortcomings and, if relevant, will also examine the options for addressing them and their respective impacts."<sup>30</sup>

48. According to the European Union, the study is currently focused on gathering evidence and initiating a wider public consultation to allow input from NGOs and other interested stakeholders. It submits that any option to address the issues identified will have to be based on the guidelines that are established for Better Regulation. The European Union submits that all options will be looked at, especially in relation to their administrative and legal implications. Finally, the scope of the study should cover the European Union, that is, both the European Union level and member State level.<sup>31</sup>

49. The European Union reports that it expects the results of the study to be available by the end of September 2019.<sup>32</sup>

50. It reports that in parallel, the Commission called for a meeting of the European Union Expert Group on Aarhus Implementation on 16 April 2018 and that a second meeting would take place on 15 October 2018, at which the participants will mainly look at the process for collecting evidence and planning of the further work. The European Union reports that this specialist expert group works in coordination with the "Environmental Compliance and Governance Forum", which was established at the beginning of 2018.<sup>33</sup>

51. Finally, the European Union reports that the Council adopted Decision (EU) 2018/881 "requesting the Commission to submit a study on the Union's options for addressing the findings of the Aarhus Convention Compliance Committee in case ACCC/C/2008/32 and, if appropriate in view of the outcomes of the study, a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1367/2006".<sup>34</sup>

52. The communicant of communication ACCC/C/2008/32 welcomes the fact that the Commission has taken action, yet submits that carrying out a study falls short of what is needed.<sup>35</sup> The communicant of communication ACCC/C/2010/54 shares this view.<sup>36</sup> The communicant of communication ACCC/C/2008/32 submits that a legislative proposal to amend the Aarhus Regulation is the only measure the Commission may adopt to address the Committee's findings on communication ACCC/C/2008/32.<sup>37</sup> Furthermore, the communicant claims that the scope of the study is disproportionality broad. It submits that it is worrying that the objective of the study is not to assess how best to revise the Aarhus

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<sup>29</sup> Ibid, p. 6.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid. See Commission Decision of 18 January 2018 setting up a group of experts on environmental compliance and governance, C(2018)10 final.

<sup>34</sup> Ibid., p. 6.

<sup>35</sup> Comments on the Party's first progress report from the communicant of communication ACCC/C/2008/32, 5 November 2018, para. 4.

<sup>36</sup> Comments on the Party's first progress report from the communicant of communication ACCC/C/2010/54, 22 October 2018, p. 8.

<sup>37</sup> Ibid., paras. 4-5.

Regulation, but rather to only do a scoping of what redress possibilities exist throughout the European Union.<sup>38</sup>

53. The communicant of communication ACCC/C/2008/32 welcomes the Council's decision under article 241 of the Treaty on the Functioning of the European Union yet regrets that the final draft of this decision was less ambitious than the first draft.<sup>39</sup> It notes further that five member States adopted an official statement regretting the "lack of ambition of the decision" as, in their view, "the revision of the Aarhus Regulation no longer appears clearly as the objective of the decision but as one possible option among others" and the deadline set for the Commission to submit its revision proposal in September 2020 is too remote given that the next Meeting of the Parties will take place in 2021. The communicant shares those member States' concerns.<sup>40</sup> Finally, the communicant notes that the Council is not the only institution calling for the revision of the Aarhus Regulation. It states that in November 2017, the European Parliament adopted two resolutions, both of which call inter alia on the Commission to submit a legislative proposal reviewing the Aarhus Regulation to take into account the Committee's recommendations.<sup>41</sup>

54. The Committee welcomes the information provided in the first progress report of the European Union concerning the implementation of paragraph 123 of the Committee's findings on communication ACCC/C/2008/32 (Part II).

55. However, the Committee regrets that the European Union has not provided a clearer picture of the scope of the study commenced in August 2018, its precise timeline and the expected follow-up actions. Moreover, no indications have been given to the Committee regarding the range of policy options considered by the European Union to date, in particular whether it proposes to implement paragraph 123 of the Committee's findings by taking appropriate legislative measures or through the jurisprudence of the CJEU (see para. 13 (b) and (c) above).

56. With respect to the Expert Group and the Environmental Compliance and Governance Forum, the European Union has provided no information on their workplans or agendas or the findings, agreed outcomes or recommendations of those processes. Most importantly, the European Union has not explained how these groups will concretely contribute to the European Union meeting the requirements of paragraph 123 of the Committee's findings. The Committee accordingly invites the European Union, in its second progress report to do so.

57. The Committee considers that, due to the lack of precise information provided by the European Union regarding the above matters, it is not possible to assess whether progress towards fulfilling paragraph 123 of the Committee's findings has in fact yet been made. The Committee therefore requests the European Union in its second progress report due on 1 October 2019 to provide a detailed plan of action setting out the measures it proposes to take to fulfil paragraph 123 of the findings on communication ACCC/C/2008/32 (Part II), together with the proposed timetable for its implementation.

58. In this regard, based on the timeframe reported by the European Union in its first report, and in particular the date of September 2020 for the European Commission to present its revision proposal, the Committee expresses its serious concern that any measures to be put in place as a result of that proposal will be taken too late to be taken into account in the Committee's report to the seventh session of the Meeting of the Parties. The Committee makes clear that, in order to be taken into account in the Committee's report to the seventh session of the Meeting of the Parties, the final deadline for the European Union to put in place any measures to fulfil paragraph 123 of the Committee's findings on communication ACCC/C/2008/32 (Part II) will be 1 October 2020.

59. In the light of the above, the Committee finds that the European Union has not yet fulfilled the requirements of paragraph 123 of the Committee's findings on communication ACCC/C/2008/32 (Part II).

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<sup>38</sup> Ibid., para. 6.

<sup>39</sup> Ibid., para. 7.

<sup>40</sup> Ibid., para. 8.

<sup>41</sup> Ibid., para. 9.

## IV. Conclusions

60. The Committee welcomes the first progress report of the European Union, which was submitted on time.

61. Concerning paragraph 3 of decision V/9g, the Committee finds:

(a) The European Union has not demonstrated any progress since the sixth session of the Meeting of the Parties to fulfil the first three sentences of paragraph 3 of decision V/9g with respect to any amendments of member States' 2010 NREAPs;

(b) While welcoming the concrete progress made, should the proposed Regulation on the Governance of the Energy Union be adopted in the form reported by the European Union in its first progress report, the European Union would still not yet have met all the requirements of the first three sentences of paragraph 3 of decision V/9g with respect to the plans to take the place of member States' NREAPs post-2020;

(c) The European Union has not yet fulfilled the final sentence of paragraph 3 of decision V/9g with respect to the evaluation of member States' 2010 NREAPs;

(d) The European Union has not yet fulfilled the final sentence of paragraph 3 of decision V/9g with respect to the evaluation of the plans to take the place of member States' NREAPs post-2020.

62. Concerning paragraph 123 of the Committee's findings on communication ACCC/C/2008/32 (Part II), the Committee finds that the European Union has not yet fulfilled the requirements of that paragraph nor has taken any significant steps in that direction.

63. The Committee accordingly requests the European Union, together with its second progress report due on 1 October 2019 to:

(a) With respect to the first three sentences of paragraph 3 of decision V/9g:

(i) To provide evidence that it has adopted a proper regulatory framework for implementing article 7 with respect to the adoption of plans to take the place of member States' NREAPs post-2020, pursuant to which member States are clearly instructed to put in place arrangements to meet each of the elements of article 7 set out in paragraph 3 of decision V/9g. The text of any new Regulation, as adopted, should be attached;

(ii) To comment on the extent to which any new Regulation, as adopted, addresses the Committee's concerns set out in paragraphs 34-37 above;

(b) With respect to the final sentence of paragraph 3 of decision V/9g:

(i) Concerning the evaluation of member States 2010 NREAPs, to provide clear and detailed replies to the Committee's questions of 23 February 2017, namely:

a. To provide more detailed information regarding its assessment of the public participation carried out by each member State based on the information provided in each 2015 NREAP progress report, and

b. To explain, for each Member State whose information on their implementation of article 7 was either insufficient or revealed a possible failure to carry out public participation that fully met the requirements of article 7, the specific measures it proposes to take with respect to that member State.

(ii) Concerning the plans to take the place of member States' NREAPs post-2020, to explain how it has adapted the manner in which it evaluates those plans accordingly.

(c) With respect to the requirements of paragraph 123 of the Committee's findings on communication ACCC/C/2008/32 (Part II), to provide a detailed plan of action setting out the measures it proposes to take to fulfil those recommendations, together with the proposed timetable for its implementation.