

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

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

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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 Party concerned, 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 Party concerned that the Committee would invite the Party concerned 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 61st meeting.

6. On 31 July 2018, the secretariat wrote a letter to the Party concerned 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 Party concerned 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 Party concerned, the communicants of communications ACCC/C/2008/32 and ACCC/C/2010/54 and registered observers.

12. On 5 March 2019, the communicant of communication ACCC/C/2008/32 submitted additional information.

13. At its sixty-third meeting (Geneva, 11-15 March 2019), the Committee reviewed the implementation of decision VI/8k in open session, with the participation by audio conference of representatives of the Party concerned and of the communicants of communications ACCC/C/2008/32 and ACCC/C/2010/54.

14. On 30 April 2019, the Party concerned submitted a statement following the open session on request ACCC/M/2017/3 at the Committee's sixty-third meeting, and on 6 May 2019, the communicant of communication ACCC/C/2008/32 submitted comments thereon.

15. On 28 May 2019, the Committee sent advice to the Party concerned.

16. On 24 July 2019, the secretariat sent a letter to the Party concerned reminding the Party concerned of the Committee's invitation at its sixty-third meeting to provide a second progress report by 1 October 2019 on the progress it had by that date made to implement paragraph 3 of decision V/9g and paragraph 123 of the Committee's findings on communication ACCC/C/2008/32 (part II).

17. On 30 September 2019, the Party concerned requested an extension of the deadline to submit its second progress report. On the same day, the Chair of the Committee agreed to the extension.

18. On 28 October 2019, the Party concerned submitted its second progress report.

19. On 30 October 2019, the second progress report of the Party concerned was forwarded to the communicants of communications ACCC/C/2008/32 and ACCC/C/2010/54 and registered observers for their comments by 26 November 2019.

20. On 25 November 2019, the communicant of communication ACCC/C/2008/32 submitted its comments on the second progress report of the Party concerned.

21. On 13 December 2019, the communicant of communication ACCC/C/2010/54 submitted his comments on the second progress report of the Party concerned.

22. On 21 January 2020, the secretariat wrote to the Party concerned to inform it that the Committee stands ready to provide advice and assistance with respect to any draft measures to implement paragraph 123 of the Committee's findings on communication ACCC/C/2008/32 (part II), and to express the Committee's willingness to meet with representatives of the Party concerned in this regard.

23. After taking into account the information received, the Committee prepared its second progress review and adopted it through its electronic decision-making procedure on 26 February 2020. The Committee thereafter requested the secretariat to forward the second progress review to the Party concerned and the communicants of communications ACCC/C/2008/32 and ACCC/C/2010/54 and registered observers.

III. Consideration and evaluation by the Committee

24. In order to fulfil request ACCC/M/2017/3 with respect to paragraph 3 of decision V/9g, the Party concerned would need to provide the Committee with evidence that it had adopted a proper regulatory framework 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 Party concerned 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 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 Party concerned must adapt the manner in which it evaluates NREAPs accordingly.

25. 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 Party concerned 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 Party concerned intends to rely on the Aarhus Regulation¹ 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 Party concerned 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 or clear instructions with respect to adoption of NECPs

Amendments to member States' 2010 NREAPs

26. In its first progress review,² the Committee indicated that, upon the adoption and entry into force of legislation superseding article 4(4) of the Renewable Energy Directive,³ the issue of amendments to member States' 2010 NREAPs would no longer form part of the Committee's review of request ACCC/M/2017/3.

27. On 11 December 2018, the Regulation on the Governance of the Energy Union and Climate Action⁴ (the Governance Regulation) was adopted by the Party concerned; it entered into force on 24 December 2018.⁵ The Governance Regulation integrates in the Energy Union

¹ 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.

² Committee's first progress review, 22 February 2019, para. 20.

³ 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.

⁴ Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council.

⁵ Additional information from the communicant of communication ACCC/C/2008/32, 5 March 2019, para. 3.

governance system the previous obligations relating to NREAPs under the Renewable Energy Directive.⁶

28. Accordingly, in its review of the progress of the Party concerned to implement paragraph 3 of decision VI/9g, the Committee will henceforth examine the measures taken by the Party concerned to put in place a proper regulatory framework or clear instructions with respect to the adoption of the National Energy and Climate Plans (NECPs) pursuant to the Governance Regulation, which take the place of NREAPs post-2020.

Adoption of NECPs post-2020

29. Article 9(1) of the Governance Regulation requires each member State to submit its draft NECP for the 2021-2030 period to the Commission by 31 December 2018 and every ten years thereafter.⁷ Article 3(1) of the Governance Regulation requires each member State to submit its final NECP for the 2021-2030 period by 31 December 2019, and subsequently by 1 January 29 and every ten years thereafter.⁸

30. Article 10 of the Governance Regulation provides that:

“...each Member State shall ensure that the public is given early and effective opportunities to participate in the preparation of the draft integrated national energy and climate plan — as regards the plans for the 2021 to 2030 period, in the preparation of the final plan well before its adoption... Each Member State shall attach to the submission of such documents to the Commission a summary of the public's views or provisional views...

Each Member State shall ensure that the public is informed. Each Member State shall set reasonable timeframes allowing sufficient time for the public to be informed, to participate and express its views.”⁹

31. Recital 29 of the Governance Regulation provides that:

“When carrying out public consultations, and in line with the Aarhus Convention, Member States should aim to ensure equal participation, that the public is informed by public notices or other appropriate means such as electronic media, that the public is able to access all relevant documents, and that practical arrangements related to the public's participation are put in place.”¹⁰

32. The Party concerned stresses all the European Union environment *acquis* continues to apply in combination with the Governance Regulation.¹¹

33. Article 9(2) of the Governance Regulation requires that the Commission “shall assess the draft [NECPs] and may issue country-specific recommendations to member States in accordance with article 34 no later than six months before the deadline for submitting those [NECPs]”.¹²

34. Article 9(3) of the Governance Regulation requires that:

“Each Member State shall take due account of any recommendations from the Commission in its integrated national energy and climate plan. If the Member State concerned does not address a recommendation or a substantial part thereof, that Member State shall provide and make public its reasons.”¹³

35. Finally, annex I of the Governance Regulation, which establishes the general framework for national plans, refers in section A.1.3 to “consultations with stakeholders, including social partners, and engagement of civil society and the general public”.¹⁴

⁶ Party's second progress report (decision V/9g), 28 October 2019, para. 17.

⁷ Party's second progress report (decision V/9g), 28 October 2019, annex 1, p. 21.

⁸ Party's second progress report (decision V/9g), 28 October 2019, annex 1, p. 16.

⁹ Party's second progress report (decision V/9g), 28 October 2019, annex 1, p. 22.

¹⁰ Party's second progress report (decision V/9g), 28 October 2019, annex 1, p. 5.

¹¹ Party's second progress report (decision V/9g), 28 October 2019, para. 20.

¹² Party's second progress report (decision V/9g), 28 October 2019, para. 25, and annex 1, p. 21.

¹³ Party's second progress report (decision V/9g), 28 October 2019, para. 34, and annex 1, p. 21.

¹⁴ Party's second progress report (decision V/9g), 28 October 2019, annex 1, p. 47.

36. In paragraph 34(a)-(e) of its advice to the Party concerned of 28 May 2019, the Committee advised the Party concerned that the Commission's recommendations to be issued to the member States by 30 June 2019 pursuant to article 9(2) of the Governance Regulation should:

(a) In accordance with the European Union's stated intention, be issued to each Member State;

(b) Reiterate to each Member State (and not merely to Member States "as appropriate") the obligation of the Member State to meet the requirements of article 7 of the Convention with respect to the preparation of its 2021-2030 NECP;

(c) Include a clear statement to each Member State that it should put in place arrangements with respect to the adoption of its final 2021-2030 NECP that meet each of the requirements of article 7 set out in paragraph 3 of decision V/9g, namely that:

- (i) The arrangements are transparent and fair;
- (ii) Within the arrangements the necessary information is provided to the public;
- (iii) 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 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.

(d) To make clear to each Member State that the European Union considers that the fulfilment of each of the requirements set out in subparagraph (c)(i)-(iii) above are necessary for the Member State to comply with article 7 of the Convention.

(e) For each Member State that did not carry out public participation fully meeting the requirements of article 7 of the Convention prior to the submission of its draft 2021-2030 NECP to the Commission on 31 December 2018, to make clear to the Member State that:

(i) It should ensure that all options which were open at the time of the preparation of its draft 2021-2030 NECP are genuinely open at the time of the public participation procedure to be carried out prior to the finalization of its 2021-2030 NECP by 31 December 2019;

(ii) The Member State's fulfilment of the above will be necessary in order for it to comply with the requirements in article 7, in conjunction with article 6(4) and 6(8), of the Convention to provide for early and effective public participation when all options are open and to take due account of the outcomes of the public participation.¹⁵

37. In paragraph 35 of its advice of 28 May 2019, the Committee requested that the Party concerned, together with its second progress report, submit:

(a) For each member State, the evaluation carried out by the Commission pursuant to article 9(2) of the Governance Regulation regarding the public participation carried out or intended to be carried out by the member State on its draft NECP 2021-2030; and

(b) For each member State, the text of the customized recommendations relevant to meeting the requirements of paragraph 3 of decision V/9g issued to that member state pursuant to article 9(2) of that regulation.¹⁶

38. The Committee regrets that, in its second progress report, the Party concerned fails to provide the information requested in paragraph 35 of the Committee's advice of 28 May 2019.

39. In its second progress report, the Party concerned reports on a Communication of 18 June 2019 in which the Commission recalls the obligation for the member States to "ensure that the public has early and effective opportunities to participate in preparing the final plans, which should then include a summary of the public's views."¹⁷ The Communication contains

¹⁵ Committee's advice to the Party concerned, 28 May 2019, para. 34.

¹⁶ Committee's advice to the Party concerned, 28 May 2019, para. 35.

¹⁷ Party's second progress report (decision V/9g), 28 October 2019, para. 30, and annex 2, p. 22.

no other instructions relevant to the obligations to provide public participation in line with article 7 of the Convention.

40. The Party concerned states that following its assessment of the draft NECPs, the Commission adopted on the same date (18 June 2019) ad hoc recommendations on each draft NECP.¹⁸

41. The Party concerned states that at a meeting on 17 September 2019 of the Commission's Technical Working Group for member States for the development of the NECPs, the Commission gave a briefing on the obligations under the Convention and provided the member States with a guiding non-paper, reminding them of their legal obligations as Parties to the Convention and their applicability to the NECP process, and of the Committee's advice of 28 May 2019.¹⁹

42. Finally, the Party concerned states that the Commission is required to assess the final NECPs and may issue recommendations, including on public consultation processes undertaken by member States in the preparation of the final NECPs. It submits that if the member State concerned does not address the Commission recommendations, it must provide its reasoning in the following progress report.²⁰

43. The communicant of communication ACCC/C/2008/32 claims that the Party concerned did not use its recommendations pursuant to article 9(2) of the Governance Regulation to implement paragraph 34(b)-(e) of the Committee's advice of 28 May 2019. It claims that the 28 documents in which the Commission summarizes the information provided by the member States on the public participation procedures that they conducted prior to the submission of their draft NECP contain neither an evaluation, nor any recommendations for future action. It claims that this was the approach even for those member States that reported that they had not organised any public participation on the draft NECP before submitting it to the Commission.²¹ It presents a summary document with what it claims contains all the references to public participation or consultation in the 28 Commission documents.²²

44. The communicant claims that the 28 documents contain only general recitals that are the same for each member State. Of these, recital 12 for all 28 documents states that "the public and other stakeholders are to be engaged in the preparation of the final integrated national energy and climate plan."²³ The communicant claims that it has checked all 28 documents and found not one country-specific recommendation relating to public participation.²⁴

45. The communicant of communication ACCC/C/2010/54 claims that, with respect to the draft NECP for Ireland, the Commission fails to include an evaluation of public participation measures, nor is the issue raised in any of the nine recommendations raised. The communicant points to recital 12 of the Commission's recommendation for Ireland, claiming it contains the same generalized statement regarding the engagement of the public and other stakeholders. He claims that the accompanying staff working document fails to include details with respect to an assessment either.²⁵

The first three sentences of decision V/9g

46. The Committee recalls that in order to fulfil the first three sentences of paragraph 3 of decision V/9g, the Party concerned should adopt a proper regulatory framework or clear

¹⁸ Party's second progress report (decision V/9g), 28 October 2019, paras. 32-34.

¹⁹ Party's second progress report (decision V/9g), 28 October 2019, para. 36.

²⁰ Statement of the Party concerned, 30 April 2019, p. 4.

²¹ Comments on the Party's second progress report from the communicant of communication ACCC/C/2008/32, 25 November 2019, paras. 9-12, and annex 2.

²² Comments on the Party's second progress report from the communicant of communication ACCC/C/2008/32, 25 November 2019, annex 2.

²³ Comments on the Party's second progress report from the communicant of communication ACCC/C/2008/32, 25 November 2019, para. 13, and annex 3, p. 4.

²⁴ Comments on the Party's second progress report, from the communicant of communication ACCC/C/2008/32, 25 November 2019, para. 13.

²⁵ Comments on the Party's second progress report, from the communicant of communication ACCC/C/2010/54, 13 December 2019, p. 8.

instructions that would ensure that member States put in place arrangements with respect to the adoption of NECPs, 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 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.

47. As the Committee has repeatedly made clear, “a clear instruction would amount to a direction or order that has to be followed by the member States.”²⁶

Transparent and fair arrangements and necessary information

48. The aspirational language that “member States *should aim*” in what was recital 20 bis of the proposed regulation remains unchanged in recital 29 of the Governance Regulation, as adopted (see para. 31 above). The Party concerned moreover has provided no explanation as to how it will ensure that the requirement in article 7 to provide the necessary information to the public is met, despite the Committee’s invitation for it to do so.²⁷ The Committee accordingly considers that the Party concerned has not yet demonstrated that it has put in place a clear requirement to ensure that the arrangements for public participation in the preparation of the member States’ NECPs are transparent and fair and that, within the arrangements, the necessary information is provided to the public.

Article 6(3)

49. The Committee welcomes the requirement in article 10 of the Governance Regulation that “each Member State shall set reasonable timeframes allowing sufficient time for the public to be informed, to participate and to express its views”. The Committee considers that article 10 meets the requirements of article 6(3) of the Convention.

Article 6(4)

50. The Committee also welcomes the requirement in article 10 of the Governance Regulation that member States “shall ensure that the public is given early and effective opportunities to participate” in the preparation of the draft plans. However, as the Committee already pointed out in its first progress review,²⁸ article 10 of the Governance Regulation fails to include an express requirement for the public to have opportunities to participate “when all options are open” as required by article 6(4) of the Convention. The Committee emphasizes that the phrase “when all options are open” (or another equivalent formulation) is a fundamental component of the legal obligations in article 6(4) and imposes a requirement that goes beyond “early and effective” opportunities to participate. Accordingly, the Committee considers that the Party concerned has not yet demonstrated that it has put in place a clear requirement to ensure that the requirements of article 6(4) are met with respect to the member States’ post-2020 NECPs.

51. Moreover, with respect to the 2021-2030 NECPs, not only is article 10 of the Regulation silent as to any explicit requirement that public participation take place when all options are open, it requires public participation only on “the final plan well before its adoption”. This means that article 10 only requires public participation on the 2021-2030 NECPs at a time when all options will most likely no longer be open, not least because the draft plans will have already been provided to the Commission for comment. In the light of the above, the Committee considers that the Party concerned has failed to demonstrate that it

²⁶ 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, ECE/MP.PP/2017/39, para. 20, Committee’s first progress review, 22 February 2019, para. 15, and Committee’s advice, 28 May 2019, para. 29.

²⁷ Committee’s first progress review, 22 February 2019, para. 36.

²⁸ Committee’s first progress review, 22 February 2019, para. 34.

has put in place a clear requirement to ensure that the requirements of article 6(4) are met with respect to the member States' 2021-2030 NECPs in particular.

Article 6(8)

52. Article 10 of the Governance Regulation as adopted lacks any requirement that the member State ensure that due account is taken of the outcomes of the public participation.²⁹ As with the draft provisions examined in the Committee's first progress review,³⁰ neither the requirement in article 10 to provide with the NECPs "a summary of the public's views or provisional views," nor annex I of the Governance Regulation Section A.1.3 establish any obligation on the member States to actually take due account of the outcomes of public participation. Nor has the Party concerned pointed the Committee to any other provision of the Regulation imposing such an obligation.

53. Accordingly, the Committee considers the Party concerned has not yet demonstrated that it has put in place a clear requirement to ensure that the requirements of article 6(8) are met with respect to the member States' NECPs.

54. Based on the considerations in paragraphs 48-53, the Committee considers that the Party concerned has not yet demonstrated that it has put in place a proper regulatory framework to ensure that the requirements of article 7 are met with respect to the adoption of the member States' NECPs.

Clear instructions – recommendations under article 9(2) or article 34 of the Regulation

55. In the light of its conclusion in paragraph 54 above that the Party concerned has not yet demonstrated that it has put in place a proper regulatory framework to ensure that member States implement article 7 of the Convention with respect to the post-2020 NECPs, the Committee examines below whether the Party concerned could instead rely on its recommendatory powers under articles 9(2) and 34 of the Regulation to issue "clear instructions" to member States to require them to do so.

56. In its advice of 28 May 2019, the Committee did not examine whether recommendations issued by the Commission to member States under articles 9(2) or 34 of the Governance Regulation could amount to "clear instructions" as required by paragraph 3 of decision V/9g.³¹ The Committee considers the present review is the appropriate occasion to undertake such an examination, particularly in light of the fact that pursuant to article 3 of the Regulation all member States should have submitted their final 2021-2030 NECPs by 31 December 2019.

57. To recall "a clear instruction would amount to a direction or order that has to be followed by the member States". Articles 9(2) and 34(1) of the Governance Regulation give the Commission the power to issue recommendations.³² However, articles 9(3) and 34(2)(b) of the Governance Regulation do not establish that a member State concerned must follow the Commission's recommendations. To the contrary, they only establish three obligations on the member States: (a) To give the Commission's recommendations due consideration and; (b) where the member State concerned does not address a recommendation or a substantial part thereof, that member State shall provide its reasons and; (c) that the member State make public its reasons in (b). Thus, if a member State concerned fails to provide for public participation in line with all the requirements of article 7 with respect to an obligation not laid out in the Governance Regulation, and the Commission issues a recommendation aimed at remedying that failure, the member State is not obliged to undertake any actual measures to address that failure. Thus, by failing to be a "clear instruction", such recommendations in themselves cannot *ensure* compliance.

58. Given the above, in particular the express wording of articles 9(3) and 34(2)(b) of the Regulation, the Committee considers that recommendations issued under article 9(2) or article 34(1) of the Regulation do not amount to "clear instructions" for the purposes of paragraph 3 of decision V/9g.

²⁹ Party's second progress report (decision V/9g), 28 October 2019, annex 1, p. 22.

³⁰ Committee's first progress review, 22 February 2019, para. 37.

³¹ Committee's advice to the Party concerned, 28 May 2019, para. 34.

³² Party's second progress report (decision V/9g), 28 October 2019, annex 1, pp. 21 and 36-37.

Concluding remarks regarding the first three sentences of decision V/9g

59. In the light of paragraphs 0-5859 above, while welcoming the progress by the Party concerned to put in place clear requirements to ensure reasonable timeframes and early and effective opportunities to participate, the Committee considers that the Party concerned has not yet demonstrated that it has met all the requirements of the first three sentences of paragraph 3 of decision V/9g. The Committee invites the Party concerned, together with its final progress report due on 1 October 2020, to provide evidence that it has adopted a proper regulatory framework or clear instructions for implementing article 7 with respect to the adoption of post-2020 NECPs, 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.

Paragraph 3 of decision V/9g – Evaluation of NREAPs and NECPs

60. When reviewing the extent to which the Party concerned has fulfilled the final sentence of paragraph 3 of decision V/9g, which requires the Party concerned to adapt the manner in which it evaluates NREAPs, the Committee in its first progress review examined the measures taken by the Party concerned to adapt the manner in which it evaluates:

- (a) Member States' 2010 NREAPs;
- (b) Member States' post-2020 NECPs.

Member States' 2010 NREAPs

61. Regarding the evaluation by the Party concerned of member States' 2010 NREAPs, the Committee already made clear in its report on decision V/9g to the sixth session of the Meeting of the Parties that the information provided by the Party concerned in that intersessional period did not satisfy the requirements of the last sentence of paragraph 3 of decision V/9g.³³ The Committee stressed the need for the Party concerned to address these points. The Party concerned has to date failed to do so.

62. The Committee reiterates its serious concern that, despite having been explicitly invited to do so in the Committee's first progress review,³⁴ the Party concerned in its second progress report has still not yet replied to the questions put to it in the Committee's second progress review on decision V/9g in the last intersessional period.³⁵ The Committee regrets the lack of engagement by the Party concerned on this issue.

63. However, since a proper regulatory framework or clear instructions for implementing article 7 with respect to the NREAPs was never, and upon the NECPs' supersession of the NECPs, now never will be, put in place by the Party concerned, there will remain no proper framework or clear instructions for any public participation on the NREAPs to be evaluated against. The Committee thus considers it would be futile for the Committee to spend further time on reviewing the manner in the Party concerned evaluates NREAPs and more expedient to instead focus its review on the evaluation of the Party concerned of the member States' post-2020 NECPs. The Committee underlines that it expects considerably better engagement from the Party concerned moving forward than that it has provided with respect to the evaluation of member States' 2010 NREAPs.

Member States post-2020 NECPs

64. In its second progress report, the Party concerned states that the Commission assessed the draft NECPs as to whether and how member States have complied or intend to comply with their obligation to involve the public early and effectively in the preparation of the final NECPs.³⁶ The Party concerned claims that it will assess the final NECPs and may issue recommendations, including on public consultation processes undertaken by member States in the preparation of the final NECPs. It states that member States are obliged to take due

³³ ECE/MP.PP/2017/39, paras. 39-42.

³⁴ Committee's first progress review, 22 February 2019, paras. 42-43.

³⁵ Committee's second progress review on decision V/9g, 23 February 2017, para. 70.

³⁶ Party's second progress report (decision V/9g), 28 October 2019, para. 32.

account of these recommendations on the final NECP. It notes that if the member State does not address the Commission recommendations, it must provide its reasoning in the following progress report. It states that this iterative process not only enables member States to comply with their obligations, but also enables the Commission to monitor that such obligations are complied with.³⁷

65. The communicant of communication ACCC/C/2008/32 submits that the measures taken to date cannot fulfil paragraph 3 of decision V/9g.³⁸ It claims that the overview of how public participation has been conducted provided together with the final NECPs will likely demonstrate that inadequate public participation has been provided in a number of member States. It states that it will then be important that the Commission follow up with the member State concerned, introducing infringement proceedings where necessary.³⁹

66. With respect to the statement by the Party concerned that:

“the Commission shall also assess the final NECPs and may issue recommendations, including on public consultation processes undertaken by Member States in the preparation of the final NECPs...If the Member State concerned does not address the Commission recommendation(s), it must provide its reasoning in the following progress report”⁴⁰

the Committee points out that, by the time of the member State’s “following” progress report, the 2021-2030 NECP will already be long adopted. Consequently, the Commission requiring a member State to provide its reasoning in a future progress report as to why it did not carry out proper public participation on its 2021-2030 NECP prior to the plan’s adoption is effectively an empty gesture. In this regard, the Committee recalls that it has already indicated on several occasions that an assessment by the Party concerned of the information provided by member States on the public participation procedure carried out on their plans, coupled with a real possibility of infringement proceedings against any member State whose information is insufficient or reveals a failure to carry out public participation that fully met the requirements of article 7, may fulfil the final sentence of paragraph 3 of decision VI/8g.⁴¹

Concluding remarks regarding evaluation of NECPs

67. In light of the above, the Committee considers that the Party concerned has not yet demonstrated that it has met the requirements of the final sentence of paragraph 3 of decision V/9g. The Committee invites the Party concerned to provide, together with its final progress report:

- (a) For each member State, the relevant sections of its final 2021-2030 NECP which address the public participation carried out thereon;
- (b) For each member State, the evaluation carried out by the Commission regarding the public participation carried out with respect to the final 2021-2030 NECP;
- (c) An explanation of the specific measures it has by that date taken with respect to each member State whose information on the implementation of article 7 in its final 2021-2030 NECP was either (i) insufficient or (ii) reveals a possible failure to carry out public participation that fully met the requirements of article 7 of the Convention.

Paragraph 123 of the Committee’s findings on communication ACCC/C/2008/32 (part II)

68. In respect of paragraph 123(a) of ACCC/C/2008/32 (part II), in its second progress report the Party concerned reports that an independent study commissioned to evaluate the redress possibilities in environmental matters covered by EU law which are currently

³⁷ Statement of the Party concerned, 30 April 2019, p. 4.

³⁸ Comments on the Party’s second progress report from the communicant of communication ACCC/C/2008/32, 25 November 2019, para. 18.

³⁹ Comments on the Party’s second progress report from the communicant of communication ACCC/C/2008/32, 25 November 2019, para. 19.

⁴⁰ Statement of the Party concerned, 30 April 2019, p. 4.

⁴¹ ECE/MP.PP/2017/39, para. 38.

available both in EU courts and via the courts of its member States has been concluded.⁴² The Party concerned submits that the study will provide guidance on how to respect both EU primary law and the requirements of the Convention as interpreted in the Committee's findings on communication ACCC/C/2008/32 (part II).⁴³

69. The Party concerned reports that this study was published on the internet, together with a Staff Working Document entitled "Report on European Union implementation of the Aarhus Convention in the area of access to justice in environmental matters (SWD(2019) 378 final of 10 October 2019)" and was sent to other EU institutions and bodies, including the Council and, through this means, to the member States.⁴⁴ The study and accompanying Staff Working Document examine different actions proposed to remedy the deficiencies identified in the Committee's findings on communication ACCC/C/2008/32 (part II).

70. The communicant of communication ACCC/C/2008/32 states that the study and the Staff Working Document are positive in that they recognize for the first time the insufficient access to justice provided on the EU level.⁴⁵ The communicant states that it would have been more positive if the Commission would have begun immediately with the preparation of a legislative proposal, as this appears to be clearly appropriate in the light of the outcomes of the study.⁴⁶ It states that there is need of urgent action from the Party concerned.⁴⁷

71. Given the prospective nature of the scenarios included in the study and the absence of indication of the actions the Party concerned intends to take, the Committee considers it premature in its second progress review to evaluate the different measures discussed in the study. The Committee however highlights that, as stated in its letter of 21 January 2020 to the Party concerned, the Committee stands ready in accordance with paragraphs 36(a) and 37(a) of the annex to decision I/7 to provide advice and assistance with respect to any draft measures through which the Party concerned proposes to implement paragraph 123 of the Committee's findings on communication ACCC/C/2008/32 (part II).

Concluding remarks

72. In the light of the above, the Committee considers that the Party concerned has not yet fulfilled the requirements of paragraph 123 of the Committee's findings on communication ACCC/C/2008/32 (part II).

73. Moreover, based on the timeframe reported by the Party concerned in its first progress report and in particular the date of 30 September 2020 for the Commission to present to the Council its proposal to amend the Aarhus Regulation, the Committee expresses its serious concern that any measures to be put in place as a result of that proposal will be too late to be taken into account in the Committee's report to the seventh session of the Meeting of the Parties.

74. The Committee reminds the Party concerned 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 Party concerned to put in place and report on any measures to fulfil paragraph 123 of the Committee's findings on communication ACCC/C/2008/32 (part II) is 1 October 2020.

75. The Committee accordingly invites the Party concerned to provide, as an urgent matter, the text of any legislative or other measures it proposes to take to fulfil paragraph 123 of the findings, together with the timeline for their adoption.

IV. Conclusions

76. The Committee welcomes the second progress report of the Party concerned, which is detailed and clearly structured, and provides useful substantiating documents.

⁴² Party's second progress report (ACCC/C/2008/32), 28 October 2019, paras. 1-3.

⁴³ Ibid., para. 2.

⁴⁴ Ibid., paras. 3-4.

⁴⁵ Comments on the Party's second progress report from the communicant of communication ACCC/C/2008/32, para. 5.

⁴⁶ Ibid.

⁴⁷ Ibid., para. 6.

77. Concerning paragraph 3 of decision V/9g:

(a) While welcoming the progress by the Party concerned to put in place clear requirements to ensure reasonable timeframes and early and effective opportunities to participate, the Committee considers that the Party concerned has not yet demonstrated that it has met all the requirements of the first three sentences of paragraph 3 of decision V/9g;

(b) The Committee considers that the Party concerned has not yet demonstrated that it has met the requirements of the final sentence of paragraph 3 of decision V/9g.

78. Concerning paragraph 123 of the Committee's findings on communication ACCC/C/2008/32 (part II), the Committee considers that the Party concerned has not yet fulfilled the requirements of that paragraph.

79. The Committee invites the Party concerned, together with its final progress report due on 1 October 2020:

(a) With respect to the first three sentences of paragraph 3 of decision V/9g, to provide evidence that it has adopted a proper regulatory framework or clear instructions for implementing article 7 with respect to the adoption of post-2020 NECPs, 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;

(b) With respect to the final sentence of paragraph 3 of decision V/9g, the Committee invites the Party concerned to provide, together with its final progress report:

(i) For each member State, the relevant sections of its final 2021-2030 NECP which address the public participation carried out thereon;

(ii) For each member State, the evaluation carried out by the Commission regarding the public participation carried out with respect to the final 2021-2030 NECP;

(iii) An explanation of the specific measures it has by that date taken with respect to each member State whose information on the implementation of article 7 in its final 2021-2030 NECP was either (i) insufficient or (ii) reveals a possible failure to carry out public participation that fully met the requirements of article 7 of the Convention.

80. With respect to paragraph 123 of the Committee's findings on communication ACCC/C/2008/32 (part II), the Committee invites the Party concerned to provide, as an urgent matter and at the latest together with its final progress report, the text of any legislative or other measures it proposes to take to fulfil paragraph 123 of the findings, together with the timeline for the measures' adoption.

81. The Committee reminds the Party concerned that all measures necessary to implement request ACCC/M/2017/3 must be completed by, and reported upon, by no later than 1 October 2020, as that will be the final opportunity for the Party concerned to demonstrate to the Committee that it has fully met the requirements of the request.