

File ACCC/C/M/2017/3

1) Aarhus compliance case ACCC/C/2010/54

Background:

1. The 2014 Decision V/9g of the Meeting of Parties (MoP) endorsed the findings of the Aarhus Convention Compliance Committee (ACCC) that the **EU had failed to comply with Article 7** (and with article 3 (1)) **of the Aarhus Convention (AC)** on public participation concerning plans, programmes and policies relating to the environment because of:
 - i. not having in place a proper regulatory framework and/or clear instructions to implement article 7 of the Convention with respect to the adoption of National Renewable Energy Action Plans (NREAPs) by its Member States on the basis of Directive 2009/28/EC (the RED);
 - ii. not having properly monitored the implementation by Ireland of article 7 of the Convention in the adoption of Ireland's NREAP;
2. Consequently, the Decision endorsed also the **recommendation of the ACCC to:**
 - i. **adopt a proper regulatory framework and /or (ii) clear instructions** with respect to the adoption of National Renewable Energy Action Plans (NREAP).
 - ii. **adapt the manner** in which the Party evaluates NREAPs accordingly;
3. At the 2014 MoP, the Parties invited the EU to submit to the ACCC by 31/12/2014, 31/10/2015 and 31/10/2016 "*detailed information on further progress in implementing the recommendations*". The EU provided timely updates each time.
4. Furthermore, the latest audio conference between the ACCC, Commission representatives and the communicant, took place on 3 March 2017 on the basis of the second progress review by the ACCC delivered on 27 February 2017. The ACCC chair summarised the main question emerging from the progress review, in particular those in para 74. The Commission replied consistently with its 3rd progress report and with the replies given at the open session in December 2016, and further developed its submissions orally.
5. By email of 16 May 2017, the Commission services further updated the ACCC and the communicant on: (i) the way in which France, Germany, Netherlands and Hungary had involved the public in the context of their NREAPs (the EU had informed about process in other Member States already in its 2016 reporting), and (ii) most importantly on the state of play of the negotiations of the Commission proposal on the Regulation on Governance of the Energy Union (see below point III).
6. At the 6th MoP which took place in Budva, Montenegro, from 11 to 14 September 2017, the EU reaffirmed its earlier commitment to implement the compliance decision from the last MoP in 2014. Following this meeting, the EU was asked to report on the evolution of the measures taken to address the recommendations in V/9g as regards former case ACCC/C/2010/54 in October 2018, 2019 and 2020.

7. An oral hearing on the case took place also in March 2018, where the Commission presented the state of play of the main measure relevant to this case, the adoption by the EU of the Regulation on the Governance of the Energy Union.

State of play:

8. As regards actions taken to address the recommendations of the ACCC:
9. First, we recall our written report of 17 of May 2017 in its entirety.
10. Secondly, as we have explained so far, it is the view of the Union that the adoption by the EU of the Regulation on the Governance of the Energy Union is the key tool to address the breaches alleged by the MoP and the recommendations by the ACCC.
11. In particular, the EU has expressed its view that Article 10¹ of the Commission's proposal for the Regulation on the Governance of the Energy Union, including its explicit reference to the Strategic Environmental Directive 2001/42, and the explicit reference also to the Aarhus Convention in recital 20, would ensure that the public is involved in the adoption by Member States of National Energy and Climate Plans (NECPs). These plans will include strategies as regards renewables and will replace the existing National Renewable Energy Action Plans (NREAPs)
12. Furthermore, Annex I of the referred proposal which details the contents of the NECPs refers specifically, in Section A.1.3², to consultations "with stakeholders, including social partners, and engaging with the civil society" and their outcome. This creates the right framework for public involvement in the planning but also for monitoring by the Commission of such involvement.
13. The EU is pleased to report that, in June 2018, the co-legislators (European Parliament and Council) agreed on the text of the Governance Regulation subject to a number of changes in relation to the Commission proposal. This includes Article 10 of the Regulation and the corresponding recitals both with an even more developed text in terms of public participation as compared to the original proposal. Moreover, a new Article 10a provides for the creation of a multilevel dialogue which may include the NECPs and which should further involve the public in energy related decision making.
14. We include here below the relevant text of the Regulation as agreed by co-legislators. Following a lawyer-linguist fine tuning process, the text is expected to be adopted in Plenary by the European Parliament in November. This should allow for publication and entering into force, at the latest, by January 2019.

¹ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the Governance of the Energy Union, amending Directive 94/22/EC, Directive 98/70/EC, Directive 2009/31/EC, Regulation (EC) No 663/2009, Regulation (EC) No 715/2009, Directive 2009/73/EC, Council Directive 2009/119/EC, Directive 2010/31/EU, Directive 2012/27/EU, Directive 2013/30/EU and Council Directive (EU) 2015/652 and repealing Regulation (EU) No 525/2013 (COM/2016/0759 final/2 - 2016/0375 (COD))

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2016:759:REV1>

² See above.

I. RECITALS

(20) *The implementation of policies and measures in the areas of the energy and climate has an impact on the environment. Member States should therefore ensure that the public is given early and effective opportunities to participate in and to be consulted on the preparation of the integrated national energy and climate plans in accordance, where applicable, with the provisions of Directive 2001/42/EC of the European Parliament and of the Council and the United Nations Economic Commission for Europe ("UNECE") Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters of 25 June 1998 (the "Aarhus convention"). Member States should also ensure involvement of social partners in the preparation of the integrated national energy and climate plans, and aim at limiting administrative complexity when implementing their obligations on public consultation.*

(20 bis) *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.*

(20ter) *Member States should establish a permanent multi-level energy dialogue [] gathering local authorities, civil society organisations, business community, investors and other relevant stakeholders to discuss the different options envisaged for energy and climate policies []. Integrated national energy and climate plans as well as long-term strategies should be discussed within the framework of that dialogue []. Such dialogues may consist of any national structure, such as a website, public consultation platform or other interactive communication tools.*

II. ARTICLES

Article 10

Public consultation

Without prejudice to any other Union law requirements, Member States shall ensure that the public is given early and effective opportunities to participate in the preparation of the draft plans - [] as regards the plans for the 2021-2030 period, in the preparation of the final plans well before their adoption - as well as of the long-term [] strategies referred to in Article 14. Member States shall [] attach to the submission of [] such documents to the Commission a summary of the public's views or provisional views. In so far as the provisions of Directive 2001/42/EC are applicable ³, consultations undertaken on the draft in accordance with that Directive shall be deemed to satisfy also the obligations to consult the public under this Regulation.

³ Explanatory note: Art. 6 (1) of Directive 2001/42/EC (SEA - Strategic Environmental Assessment Directive) on the assessment of the effects of certain plans and programmes on the environment requires consultations to be carried out on the *draft* plans or programmes. The Commission underlined that to the extent that a public consultation under Directive 2001/42/EC has taken place, the request for public consultation in the meaning of Article 10 is fulfilled.

1a. *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.*

1d. *Member States shall limit administrative complexity when implementing this Article.*

Article 10a

Multilevel Climate and Energy Dialogue

Member States shall establish a Multilevel Climate and Energy Dialogue pursuant to national rules 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, including for the long term, and review progress, unless they have already a structure which serves the same purpose. Integrated national energy and climate plans could be discussed within the framework of such a dialogue.

III. ANNEX I

GENERAL FRAMEWORK FOR INTEGRATED NATIONAL ENERGY AND CLIMATE PLANS

Part 1

General framework

SECTION A: NATIONAL PLAN

1. OVERVIEW AND PROCESS FOR ESTABLISHING THE PLAN

Part 1

General framework of the plan

1.1. Executive Summary

- i. Political, economic, environmental, and social context of the plan
- ii. [] Strategy [] relating to the five dimensions of the Energy Union
- iii. Overview table with key objectives, policies and measures of the plan

1.2. Overview of current policy situation

- i. National and EU energy system and policy context of the national plan
- ii. Current energy and climate policies and measures [] relating to the five dimensions of the Energy Union
- iii. Key issues of cross-border relevance
- iv. Administrative structure of implementing national energy and climate policies

1.3. Consultations and involvement of national and EU entities and their outcome

- i. Involvement of the Parliament
- ii. Involvement of local and regional authorities

- iii. Consultations with stakeholders, including social partners, and engagement of civil society *and the general public*
- iv. Consultations with other Member States
- v. Iterative process with the European Commission
- 1.4. Regional cooperation in preparing the plan
 - i. Elements subject to joint or coordinated planning with other Member States
 - ii. Explanation of how regional cooperation is considered in the plan
- [...]

2) Aarhus compliance case ACCC/C/2008/32

Background:

1. At the 6th MoP in Budva from 11 to 14 September 2017, the Parties agreed with regard to draft decision VI/8f on compliance by the EU and in relation to case ACCC/C/2008/32 the following:

"In the spirit of reaching the 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 is compatible with the fundamental principles of the Union legal order and with its system of judicial review."

The Meeting of the Parties also requested the Committee to review any developments that have taken place regarding the matter, and to report to the Meeting of the Parties accordingly.

2. On 12 March 2018, an "**open session**" took place with the ACCC regarding file ACCC/C/M/2017/3, where the EU was asked to detail any progress so far. The Committee also asked for a written summary of its observations during the open session, notably on follow-up measures to the earlier Case ACCC/C/2008/32.
3. On a preliminary basis regarding that request, the Commission recalled that the MoP had not yet endorsed the findings of the Committee in Case ACCC/C/2008/32 and that all information was thus only provided on the basis of the EU's unilateral commitment, undertaken at the MoP in September 2017 in Budva, as quoted above. These remarks remain valid.
4. The Commission reiterated in the open session that it is well aware of the importance of the issue and the need to organise the follow-up.

5. On 8 May 2018, the Commission published its **Roadmap** on "*EU implementation of the Aarhus Convention in the area of access to justice in environmental matters*".⁴ The Roadmap was brought to the attention of the ACCC on 13 June 2018, together with the written summary of the EU's observations during the open session.
6. The Roadmap provides for a **detailed external, independent study** meant 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 assess their respective impacts. The Commission has launched the tendering procedure for this study on 8 June 2018. The tenderer, Milieu Ltd, signed the contract on 14 August 2018. The Commission expects the results of the study to be available by end September 2019.
7. The Council has on 19 June 2018 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*".⁵
8. The Commission replied by **note of 24 September 2018**⁶, in which it agreed that it is important to explore ways and means to comply with the Aarhus Convention in a way that is compatible with the fundamental principles of the Union legal order and with its system of judicial review. The Commission further recalled the Roadmap and informed the Council on progress with the independent study.
9. The study is currently focused on gathering evidence and initiating a wider **public consultation** to allow input from NGOs and other interested stakeholders. As mentioned also in the open session, any option to address the issues identified will have to be based on the guidelines that are established for Better Regulation.⁷ Thus, having a solid evidence base is crucial. As part of this process, all options will be looked at especially in relation to their administrative and legal implications. The scope of the reflections should cover the EU, i.e. at the EU level and Member State level.
10. In these efforts, the Commission **works closely together with the Member States**. It has called for a meeting of the Expert Group on Aarhus Implementation on 16 April 2018, and a second meeting will take place on 15 October 2018. The upcoming meeting will mainly look at the process for collecting evidence and planning of the further work. This specialist expert group works in coordination with the "**Environmental Compliance and Governance Forum**", which was established by the Commission at the beginning of 2018.⁸

⁴ The Commission Roadmap on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters (2018)2432060 was published on 8.5.2018 (https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-2432060_en)

⁵ Official Journal L 155 of 19 June 2018, page 6, <https://eur-lex.europa.eu/eli/dec/2018/881/oj>

⁶ See enclosed.

⁷ Staff Working Document (2017)350 of 4.7.2017.

⁸ Commission Decision of 18.1. 2018 setting up a group of experts on environmental compliance and governance, C(2018)10 final.

