

Aarhus compliance case - Communication ACCC/C/2010/54

Request ACCC/C/M/2017/3 - 2019 Progress report

Background:

1. The 2014 Decision V/9g of the Meeting of Parties (MoP) endorsed the findings of the Aarhus Convention Compliance Committee (ACCC) on communication ACCC/C/2010/54 that the **European Union (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;
 - 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 5th MoP, which took place in Maastricht, Netherlands, from 30 June – 4 July 2014, 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. At the 6th MoP, which took place in Budva, Montenegro, from 11 to 14 September 2017, the Commission reaffirmed its earlier commitment to implement compliance decision V/9g.
5. Following the 6th MoP, the EU was to report on the evolution of the measures taken to address the recommendations in V/9g as regards communication ACCC/C/2010/54 in October 2018, 2019 and 2020. The EU has submitted its report in October 2018, and the present report constitutes the deliverable for 2019.
6. At its fifty-ninth meeting, on 11-15 December 2017, the ACCC agreed to apply the reference ACCC/M/2017/3 (European Union) to the request.
7. At the audio conference on 12 March 2018 between the ACCC, Commission representatives and the communicant regarding request ACCC/C/M/2017/3, the

Commission presented the state of play of the main measure relevant to this case, the Regulation on the Governance of the Energy Union¹.

8. On 26 February 2019, the ACCC sent its first progress review on request ACCC/M/2017/3 to the EU, communicants and observers. ACCC noted in particular regarding paragraph 3 of decision V/9g²;

(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.

9. Furthermore, and in light of the above, the ACCC requested the EU, 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

¹ 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 (Text with EEA relevance.) – “*The Governance Regulation*” in future reference. The full text of the Regulation available at Eur-Lex here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.328.01.0001.01.ENG&toc=OJ:L:2018:328:FULL

² Paragraph 3 of decision V/9g provides the following: “*Also welcomes the willingness of the Party concerned to accept the Committee’s recommendation, namely, that it adopt a proper regulatory framework and/or clear instructions for implementing article 7 of the Convention with respect to the adoption of 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 and/or clear instructions must ensure that the requirements of article 6, paragraphs 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*”.

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.

10. On 5 March 2019, the ACCC was informed of the final text of the Governance Regulation, as adopted on 11 December 2018, which entered into force on 24 December 2018.
11. At its sixty-third meeting on 11-15 March 2019, the ACCC requested the second progress report from the EU regarding request ACCC/M/2017/3, to be provided by 1 October 2019.
12. On 30 April 2019, the EU submitted its statement regarding request ACCC/M/2017/3 in response to the progress review of 26 February 2019 by ACCC.
13. On 28 May 2019, the ACCC provided Advice to the EU concerning the implementation of request ACCC/M/2017/3, specifically in relation to the development on National Energy and Climate Plans (NECPs) according to the Governance Regulation.

State of play:

14. As regards actions taken to address the request ACCC/M/2017/3 of the ACCC:
15. First, we recall our written contributions, in particular the progress report of October 2018 and the statement of 30 April 2019 in their entirety.
16. Secondly, as we have explained so far, it is the view of the Commission that the adoption by the EU of the Governance Regulation is the key tool to address the breaches alleged by the MoP and the recommendations by the ACCC.

17. To address the ACCC decision V/9g, in particular paragraph 3 point a (i), the Commission would like to clarify that the Governance Regulation integrates in the Energy Union governance system the previous obligations relating to NREAPs under the Renewables Directive 2009/28/EU. Planning, reporting and monitoring obligations in the energy and climate fields are streamlined therein. The EU therefore reiterates that the main instrument to address the requirements of Article 7 of the Aarhus Convention is the Governance Regulation.
18. In particular, the Commission has expressed its view that the Governance Regulation, which includes explicit reference to the Strategic Environmental Directive 2001/42/EC and to the Aarhus Convention in the recitals, ensures that the public is involved in the adoption of the NECPs, in particular with a view to the following;
19. Article 10 of the Governance Regulation, which uses explicit and binding language, establishes an obligation that 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 plans (or preparation of the final plans *"well before adoption"* for the plans covering the period 2021-2030).
20. Article 10 of the Governance Regulation also includes a clear caveat in its very beginning, which states that the application of this Article is without prejudice to any other Union law requirements. It follows that all the EU environmental *acquis* continues to apply in combination with the Governance Regulation.
21. Moreover, Article 10 incorporates language used in the Aarhus Convention, such as the requirement that each Member State *"shall set reasonable timeframes allowing sufficient time for the public to be informed, to participate and express its views"*. This further confirms that the Governance Regulation has taken due account of the requirements of the Aarhus Convention.
22. In this regard, the Governance Regulation goes even further than the Convention in requiring that Member States reduce administrative complexity when they fulfil their obligations regarding public participation.
23. Additionally, each Member State is required to attach to the submission of both the draft and final national energy and climate plans (NECPs) and the long-term strategies to the Commission a summary of the public's views or provisional views.
24. The Commission notes that, despite the tight deadline between the entry into force of the Governance Regulation, on 24 December 2018, and the obligation of Member States to submit their first draft NECPs by 31 December the same year, several Member States had already consulted the public on documents underpinning the draft NECP during the previous year, and this even before the Governance Regulation entered into force. This is the result of a constant dialogue between the Commission and Member States regarding the obligation to effectively involve the public in preparation of the final NECPs.
25. Further to the above-mentioned obligations on Member States, Article 9, paragraph 2, of the Governance Regulation, establishes that the Commission *"shall assess"* the draft

NECPs and may issue recommendations, including on public consultation processes undertaken by Member States in the preparation of the final NECPs.

26. Moreover, Article 11 of the Governance Regulation obliges each Member State to establish a multilevel climate and energy dialogue, which must be open to active participation by the public in discussion of policy scenarios, and may include discussion of the NECPs.
27. Furthermore, Annex I of the Governance Regulation details the content of the NECPs, and refers in Section A.1.3 explicitly 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.
28. Finally, the above describes the iterative process set out in the Governance Regulation to contribute to the Union achieving its 2030 energy and climate objectives and targets. The Governance iterative process is based on a spirit of dialogue to enable Member States to comply with their obligations to this effect, and to enable the Commission to monitor the compliance with such obligations. However, and in any event, the requirements for Member States to consult the public, to include a summary of their consultations and to take due account of Commission recommendations, are legally binding under the Governance Regulation.
29. Included as an annex to this report, are the relevant provisions of the Governance Regulation.
30. In its Communication "*United in delivering the Energy Union and Climate Action – Setting the foundations for a successful clean energy transition*" of 18 June 2019³, the Commission recalled the obligation for the Member States to enable early and effective public participation in preparing the final NECPs, including by summarising the public's views, in accordance with the obligations of the Governance Regulation. Furthermore, the Commission confirmed its commitment to securing participation of all levels of society in a systemic way and to promote an inclusive debate on the NECPs.
31. Following up on this commitment, the Commission has ensured public access to all draft NECPs directly on its website dedicated to the Governance of the Energy Union⁴, provided English translations of the draft NECPs, provided links to the national websites for the draft NECPs, and developed factsheets summarising the Commission's assessment the draft NECPs individually.
32. As stated in the EU's statement of 30 April 2019, specifically point 2 (d) and (e), and according to the Governance Regulation Article 9, paragraph 2, the Commission analysed in the assessment of the draft NECPs, 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.

³ COM(2019)285 <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1565713062913&uri=CELEX:52019DC0285>

⁴ <https://ec.europa.eu/energy/en/topics/energy-strategy-and-energy-union/governance-energy-union/national-energy-climate-plans>

33. Following its assessment of the draft NECPs, the Commission adopted on 18 June 2019 ad hoc recommendations on each draft NECP, duly recalling in this regard that public consultation and engagement on the final NECPs is an obligation. These recommendations are similarly available, also to the public, on the Commission's dedicated website. This addresses the issues raised in the Advice provided by the ACCC of 28 May 2019, points 32, 33 and 35 in particular.
34. Importantly, the Commission reminds in this context that Member States are obliged to address these recommendations in the final NECP, in accordance with the Governance Regulation (Article 9, paragraph 3). If the Member State concerned does not address the Commission recommendation(s), it must provide and make public its reasons.
35. Addressing additional elements of the Advice provided by the ACCC on 28 May 2019, in particular point 30, the Commission services have further provided both bilateral and multilateral support to the Member States in ensuring awareness and enhancing compliance with their obligations, as parties to the Aarhus Convention, in order to ease early and effective opportunity for public consultation and involvement, in particular in drafting and finalising the NECPs.
36. Thus, at the meeting of 17 September 2019 of the Commission's Technical Working Group for Member States for the development of the NECPs, the Commission services gave a briefing on the obligations according to the Aarhus Convention and provided Member States with a guiding non-paper, reminding of the legal obligations as parties to the Convention and their applicability to the NECP process, as well as with the advice issued by the Aarhus Compliance Committee in May 2019.
37. The Commission confirms its continued commitment to providing support to ensure that the Member States, as parties to the Aarhus Convention, fulfil their obligations according to the Convention, including as regards the development of their final NECPs as well as in a broader context of the transposition, implementation and application of the EU energy *acquis*.

ANNEX⁵I. RELEVANT RECITALS OF REGULATION 2018/1999/EU

"(28) The implementation of policies and measures in the areas of 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 to limit administrative complexity** when fulfilling their obligations with regard to public consultation."

"(29) 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."

"(30) Each Member State should establish a **permanent multi-level energy dialogue**, bringing together local authorities, civil society organisations, the business community, investors and other relevant stakeholders to discuss the different options envisaged for energy and climate policies. It should be possible for the Member State's integrated national energy and climate plan as well as its long-term strategy to be discussed within the framework of that dialogue. The dialogue may take place by means of any national structure, such as a website, public consultation platform or another interactive communication tool."

"(40) Member States' integrated national energy and climate progress reports should mirror the elements set out in the template for the integrated national energy and climate plans. A template for the integrated national energy and climate progress reports should be detailed in subsequent implementing acts given their technical nature and the fact that the first progress reports are due in 2023. The progress reports should be carried out in order to ensure transparency towards the Union, other Member States, regional and local authorities, market actors including consumers, any other relevant stakeholders and the general public. They should be comprehensive across the five dimensions of the Energy Union and, for the first period, at the same time put emphasis on areas covered by the targets of the 2030 Climate and Energy Framework."

⁵ The emphasis in the quotations are added.

II. RELEVANT ARTICLES OF REGULATION 2018/1999/EU

Article 9

"Draft integrated national energy and climate plans

1. *By 31 December 2018, and subsequently by 1 January 2028 and every ten years thereafter, each Member State shall prepare and submit to the Commission a draft of the integrated national energy and climate plan in accordance with Article 3(1) and Annex I.*

2. *The Commission shall assess the draft integrated national energy and climate plans 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 integrated national energy and climate plans. Those recommendations may, in particular, address:*

(a) the level of ambition of objectives, targets and contributions with a view to collectively achieving the Energy Union objectives and, in particular, the Union's 2030 targets for renewable energy and energy efficiency as well as the level of electricity interconnectivity that the Member State aims for in 2030 as referred to in point (d) of Article 4, taking due account of relevant circumstances affecting the deployment of renewable energy and energy consumption, as indicated by the Member State concerned in the draft integrated national energy and climate plan and the indicators of the urgency of action for interconnectivity established in point 2.4.1 of Section A of Part 1 of Annex I;

(b) policies and measures relating to Member State- and Union-level objectives and other policies and measures of potential cross-border relevance;

(c) any additional policies and measures that might be required in the integrated national energy and climate plans;

(d) interactions between and consistency of existing and planned policies and measures included in the integrated national energy and climate plan within one dimension and among different dimensions of the Energy Union

3. *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.***

4. *In the context of the public consultation as referred to in Article 10, each Member State shall make available to the public its draft integrated national energy and climate plan."*

Article 10

"Public consultation

Without prejudice to any other Union law requirements, 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 — as well as of the long-term strategies referred to in Article 15. Each Member State 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 Directive 2001/42/EC is applicable, consultations undertaken on the draft in accordance with that Directive shall be deemed to satisfy the obligations to consult the public under this Regulation.

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**.

Each Member State shall **limit administrative complexity** when implementing this Article."

Article 11

"Multilevel climate and energy dialogue

Each Member State shall establish a multilevel climate and energy dialogue pursuant to national rules, in which local authorities, civil society organisations, business community, investors and other relevant stakeholders and the general public **are able actively to engage and discuss the different scenarios envisaged for energy and climate policies**, including for the long term, and review progress, unless it already has a structure which serves the same purpose. Integrated national energy and climate plans may be discussed within the framework of such a dialogue."

III. ANNEX I OF REGULATION 2018/1999/EU

"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 national 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 of other Member States
- v. Iterative process with the 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

[...]"