

Comments on the progress report on the implementation of request of the Meeting of the Parties ACCC/M/2017/3 (European Union)

1. On 1 October 2018, the European Union has provided its first progress report on its implementation of the MOP request ACCC/M/2017/3.
2. As the communicant of communication ACCC/C/2008/32 (European Union), ClientEarth would like to make the following comments on the report.

Findings on communication ACCC/C/2008/32 (Parts I and II)

3. The findings of the Aarhus Committee and recommendations are very clear. One of the recommendations is that: "The Aarhus Regulation be amended, or any new European Union legislation be drafted, so that it is clear to the CJEU that that legislation is intended to implement article 9, paragraph 3, of the Convention".
4. We welcome the fact that the Commission finally acts and acknowledges the Committee's decision. However, carrying out a study falls short of what is needed to bring about compliance with the Convention. The Committee found that the definition of the acts that can be challenged under the Aarhus Regulation is far too narrow and prevents NGOs from challenging most of the decisions adopted by EU institutions in environmental matters. While the industry has legal standing to challenge decisions to defend their economic and financial interests, the public interests, environmental protection and public health, are left unrepresented before the EU Courts.
5. The only measure the Commission may adopt to address this lack of compliance is a legislative proposal to amend the Aarhus Regulation.
6. The scope of the study also seems to be disproportionately broad. We fail to understand the need 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". More worrying is that the objective of the study is not to assess how to best revise the Aarhus Regulation, which would have been the right approach to take, but only to do a scoping exercise of what redress possibilities exist throughout the EU.
7. Conscious of that lack of political willingness, the Council adopted its Article 241TFEU decision. We welcome this move from the Council. However, we regret that the initial intent of the Council and the first draft of its decision had to be amended to make it less ambitious.
8. Five member States, France, Italy, Spain, Luxembourg supported by Latvia, have adopted an official statement to regret the "lack of ambition of the decision". According to them "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 (September 2020) is too remote given that the next Meeting of the Parties will take place in 2021. We can only support these concerns and disappointment.

9. The Council is not the only institution to call for the revision of the Aarhus regulation. Two resolutions were adopted by the European Parliament last November, one on an Action Plan for nature, people and the economy, and the other on the EU Environmental Implementation Review (EIR). They both call, inter alia, on the Commission to submit a new legislative proposal reviewing Regulation (EC) No 1367/2006, in order to take account of the Committee recommendation.
10. We are therefore concerned that the actions carried out by the Party concerned will not necessarily aim at addressing and fulfilling the recommendations of the Committee.

Findings on communication ACCC/C/2010/54

11. With regard to the findings on communication ACCC/C/2010/54, the Party concerned states 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" (para. 10). ClientEarth agrees with this statement, which acknowledges the applicability of the Committee's finding to the Governance Regulation and the National Energy and Climate Plans (NECPs) as plans replacing National Renewable Energy Action Plans in the EU system.
12. ClientEarth also concurs that the provisions referred to by the Party concerned are certainly relevant to the implementation of decision V/9g.
13. However, ClientEarth does not agree that the finally agreed text of the Governance Regulation fully implements the Committee's recommendation that the Party concerned "adopt a proper regulatory framework and/or clear instructions for implementing article 7 of the Convention" with respect to the adoption of the NECPs. In particular, ClientEarth does not consider that the provisions of the Regulation 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" and 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" as required by paragraph 3 of decision V/9g.
14. Firstly, the finally agreed text does not ensure that public participation will take place "when all options are open" as required by article 7 in conjunction with article 6(4) of the Convention. Article 10 of the agreed text reflects a political compromise to not require public participation on the draft but on the "final plans well before their adoption." If Member States follow the letter of this provision, they will first submit a draft plan to the European Commission and receive comments before they will conduct a public participation phase. Such a procedure would raise serious concerns that options are factually closed off before the start of the participation phase.
15. Secondly, the Governance 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. This is a serious omission as article 6(8) is the central element of the public participation phase to

ensure that the procedure does not become a box-ticking exercise without adequate consideration of the public's comments.

16. Further concerns arise with regard to adequate timing being accorded to the various stages of the public participation because the Governance Regulation does not set specific timelines.
17. In light of these omissions, ClientEarth submits that the Party concerned has not yet fulfilled the requirements of paragraph 3 of decision V/9g and accordingly the requirements of request ACCC/M/2017/3.
18. ClientEarth therefore calls upon the Committee to continue to monitor the Party's compliance based on the practical implementation of the public participation obligations in the preparation of the first National Energy and Climate Plans by the Member States. In particular, the Party concerned should be recommended to provide clear instructions to the Member States on how to implement the public participation requirements of the Governance Regulation in practice, so as to ensure that all the requirements mentioned in paragraph 3 of decision V/9g are complied with.



ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

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