

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

1. On 28 October 2019, the European Union has provided its second 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. As mentioned by the Party concerned in its progress report, the study prepared by an external consultant was published on 10 October 2019. The Commission published the study together with a Commission Report (Staff Working Document), in which it presents its views on the study. Both documents were submitted together to the Council for its consideration.
4. Together with the European Environmental Bureau, Justice & Environment and Pesticide Action Network Europe, ClientEarth has sent a joint letter to the Council summarizing the main findings of the study and giving some recommendations on the way forward (see Annex 1).
5. As mentioned in the letter, the study and Commission Report are positive in that they recognize for the first time the insufficient access to justice provided on EU level. It would have been more positive if the Commission would have resumed immediately with the preparation of a legislative proposal, as this appears to be clearly "appropriate" in the light of the outcomes of the study, thus requiring the Commission to submit a legislative proposal in the sense of Art 2(1) of Council Decision (EU) 2018/881 by 30 September 2020. Nonetheless, the Commission Report now provides the Council with another piece of evidence confirming the need to request the Commission to indeed prepare a legislative amendment.
6. There are accordingly no justifications left to further delay action. Given the need to approve the amendment to Regulation 1367/2006 before the 2021 Meeting of the Parties, it is pivotal that the Council now requests the Commission to act without delay.
7. As also pointed out at the outset of the letter,<sup>1</sup> the Commission Report also includes some statements that may suggest that the Commission does not yet recognize some of the deficiencies in the way access to justice is currently provided. It will therefore be important to monitor closely that the Commission indeed proposes adequate measures that will address the Committee's findings and recommendations.

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<sup>1</sup> 4th paragraph of the 1st page of Annex 1.

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## Findings on communication ACCC/C/2010/54

8. ClientEarth would first like to use this opportunity to express its appreciation of the quickly issued, targeted advice that the Committee sent to the Party concerned on 28 May 2019 on how to implement the Committee's recommendation following from its findings on communication ACCC/C/2010/54. The advice was timely and brought the relevant issues with the ongoing participation procedures in clear focus.
9. Unfortunately, the Party concerned did nonetheless not use its recommendations pursuant to Art 9(2) Governance Regulation to implement para. 34(b)-(e) of the Committee's advice.
10. On 18 June 2019, the Party concerned published: (a) a Communication assessing the draft NECPs submitted by the Member States cumulatively, (b) 28 reports (Staff Working Documents) summarizing the information provided by the Member States in their draft NECPs and (c) 28 recommendations also specific to each of the Member States.<sup>2</sup>
11. The overarching Communication (a) mentions public participation only once stating that: "*Member States need 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.*"<sup>3</sup> The Communication further states: "*In the second half of 2019 and beyond, the European Commission will continue to promote an inclusive debate on the NECPs.*" These appear to be the two sentences that para. 30 of the second progress report relates to. The first of the two sentences goes some way to address paragraph 34(b) of the Committee's advice but it fails to mention Art 7 of the Convention. More importantly however, neither of these sentences addresses any of the points mentioned in para. 34(c)-(e) of the Committee's advice nor para. 3 of decision V/9g.
12. The country-specific reports (b) summarize the information provided by the Member States on the public participation procedures that they already conducted prior to the submission of their draft NECP. Contrary to what para. 32 of the Progress Report may suggest, the Commission summarizes this information without evaluation, let alone with any recommendations for future action. This applies even for those Member States that themselves reported that they had not organised any public participation on the draft NECP before submitting it to the Commission (this applies to: Austria, Belgium, Bulgaria, Croatia, Denmark, Germany, Hungary, Italy, Malta, Slovakia, Slovenia and the UK). ClientEarth has prepared a summary document with all the references to public participation or consultation in these Reports (see Annex 2).
13. The country-specific recommendations (c) each commence with 12 generic recitals that are the same for each Member State. Recital 12 thereof reads: "*The public and other stakeholders*

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<sup>2</sup> All relevant documents can be accessed here: <https://ec.europa.eu/energy/en/topics/energy-strategy-and-energy-union/governance-energy-union/national-energy-climate-plans> .

<sup>3</sup> Annex 2 to second progress report on the implementation of decision V/9g from the Party concerned, p. 21 (section 3.1).

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*are to be engaged in the preparation of the final integrated national energy and climate plan.*"<sup>4</sup> This appears to be the phrase referred to in para. 33 and 34 of the Progress Report. Beyond this generic statement, ClientEarth has checked all 28 recommendations and not found one country-specific recommendation relating to public participation. This clearly falls short of clear instructions to the Member States on organizing Art 7 compliant public participation.

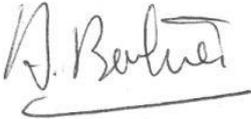
14. As opposed to the claim of the Party concerned in para. 33 of the progress report, these documents therefore do not address any of the points in para. 34(c)-(e) of the Committee's advice nor para. 3 of decision V/9g.
15. Since the Committee's advice had not been followed in the recommendations, ClientEarth had called on the Commission to issue further written instructions to the Member States on the concrete requirements of public participation under Art. 10 of the Governance Regulation and Art 7 of the Aarhus Convention. ClientEarth argued that these instructions should be publicly available in order to assist civil society in the Member States to hold their national authorities to account.
16. In its progress report, the Party concerned states in para. 36 that "*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*" at a meeting of the Commission's Technical Working Group for Member States on 17 September 2019.
17. Contrary to ClientEarth's suggestion, this non-paper has not been published. It is ClientEarth's understanding that it has also not been made available as part of this MOP review. ClientEarth therefore has at this stage no insights on the content of the paper and is therefore in no position to comment on it. For the same reason, it would appear that it cannot form part of the Committee's consideration as to whether the Party concerned has now fulfilled para. 3 of decision V/9g.
18. ClientEarth does not suggest that the European Commission has not undertaken any actions to implement decision V/9g, there was certainly a willingness to highlight the importance of public participation within the remits of the Governance Regulation. Nonetheless, one month before the deadline for submission of the final NECPs, neither the Governance Regulation nor any other document produced by the Party concerned give clear instructions to the Member States on the public participation requirements arising from article 7 of the Convention. Nor is there any document that would clarify the consequences if no adequate public participation is organized. It is therefore clear that the Party concerned has not yet fulfilled the requirements of para. 3 of decision V/9g.
19. As also mentioned by the Party concerned, the Member States will be required to submit with their final NECPs an overview over how public participation has been conducted. This will likely demonstrate that inadequate public participation has been provided in a number of

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<sup>4</sup> See by way of example, Recommendations for Austria, Annex 3, recital 12. The other country-specific recommendations can be accessed here: <https://ec.europa.eu/energy/en/topics/energy-strategy-and-energy-union/governance-energy-union/national-energy-climate-plans> .

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Member States. It will then be important that the Commission follows up with the Member State concerned, introducing infringement proceedings where necessary.



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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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