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## Economic Commission for Europe

### Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

#### Sixth session

Budva, Montenegro, 11–13 September 2017

### Excerpt from the report of the sixth session of the Meeting of the Parties (ECE/MP.PP/2017/2)\*

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49. The Meeting of the Parties considered draft decision VI/8 on general issues of compliance (ECE/MP.PP/2017/19) and draft decisions VI/8a-k (ECE/MP.PP/2017/20-30) concerning compliance by individual Parties (namely Armenia, Austria, Belarus, Bulgaria, Czechia, the European Union, Kazakhstan, Romania, Slovakia, Spain and the United Kingdom).

50. Issues of non-compliance relating to individual Parties reported by the Committee to the Meeting of the Parties included the following:

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(f) European Union (failure to implement decision V/9g and findings of non-compliance on communication ACCC/C/2008/32 (part II) (ECE/MP.PP/C.1/2017/7) concerning access to justice regarding acts and omissions by European Union institutions);

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#### *Draft decision VI/8f on compliance by the European Union*

55. Considering draft decision VI/8f on compliance by the European Union (ECE/MP.PP/2017/25), a delegate of the European Union suggested that with regard to communication ACCC/C/2008/32 (part II) on access to justice by members of the public the findings of the Compliance Committee should not be “endorsed” but “taken note of” and requested several amendments to the draft decision. More precisely, the European Union representative requested that:

(a) Paragraph 6 of the draft decision be amended to read as follows: “Takes note of the finding of the Compliance Committee with regard to communication ACCC/C/2008/32 (part II) that the Party concerned fails to comply with article 9, paragraphs 3 and 4, of the Convention”;

(b) The heading of paragraph 7 be amended to read as follows: “Recommends that the Party concerned considers that:”;

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\* The full text of the report of the sixth session of the Meeting of the Parties (ECE/MP.PP/2017/2) is available in English, French and Russian from [http://www.unece.org/env/pp/aarhus/mop6\\_docs.html#/.](http://www.unece.org/env/pp/aarhus/mop6_docs.html#/)

(c) In subparagraph 7 (b) (i) the words “to the Court of Justice of the European Union” be deleted;

(d) Subparagraph 7 (c) be deleted.

56. The European Union representative provided explanations regarding the European Union proposal, referring in particular to the specificity of the European Union legal system. The proposal was followed by interventions from delegations of Parties, i.e., Georgia, Norway, Switzerland and Ukraine, and a representative of the European ECO Forum. None of the speakers supported the proposal of the European Union.

57. A representative of Georgia noted the importance of the compliance mechanism in assisting Parties to identify existing gaps and support better implementation of the provisions of the Aarhus Convention. The European Union position rejected particular recommendations of the Compliance Committee, but had not explained how such a rejection could allow the Party to avoid the fact of non-compliance. She noted, in that regard, that draft decision VI/8f clearly laid out that the Party should further explore different ways that it could come into compliance with the Convention. The representative of Norway also expressed concern regarding the proposal by the European Union. By proposing those amendments the European Union seemed to be seeking for itself a kind of special status as a Party to the Aarhus Convention with regard to the extent of its obligations and the need to implement measures necessary to comply with them. The recommendations in the decision on compliance should be considered as a list of possible measures to be taken by the Party concerned to come into compliance with the Convention.

58. A representative of Switzerland stressed the positive example set by the Aarhus Convention for other conventions at the global level and expressed concern that the proposal by the European Union put into peril the long-standing practice of the Meeting of the Parties to endorse findings of the Compliance Committee on a consensus basis and to take action according to its recommendations. A delegate of Ukraine underscored the importance of the Compliance Committee as a key mechanism to support the implementation of the Convention’s provisions. She highlighted that the Meeting of the Parties had made a great effort over the years to achieve decision-making on compliance matters on a consensus basis and also that there was a specificity to the situation for each Party when implementing recommendations on how to come into compliance.

59. A representative of the NGO ClientEarth, speaking on behalf of the European ECO Forum, expressed a fear of introducing a double standard that would exempt the European Union from complying with the Convention. The Compliance Committee’s recommendations could be met by amending either legislation or the jurisprudence of the courts; there was no need to change the Treaty on the Functioning of the European Union. Citing article 27 of the Vienna Convention on the Law of Treaties, she also requested the delegation of the European Union to explain how it interpreted the provision that a party might not invoke the provisions of its internal law as justification for its failure to perform a treaty.

60. At the request of the Meeting of the Parties, the Chair of Compliance Committee provided clarifications regarding a number of legal issues raised by the discussion. He also noted that the Compliance Committee used the recommendations of the Meeting of the Parties as a measure against which to assess in the future whether the Party had implemented the Committee’s findings, but the Party concerned was free to choose various ways to address the non-compliance found.

61. Delegations were not convinced by the arguments put forward by the European Union that the draft decision challenged the fundamental principles of the European Union legal order or its system of judicial review. On the contrary, delegations considered that the European Union proposal and the accompanying explanations had not been legally

substantiated; that it challenged the principle of equal treatment of all Parties; that it undermined the authority of the Meeting of the Parties; and that it threatened Parties' strongly voiced commitment to take decisions by consensus in accordance with the Meeting of the Parties' own rules of procedure (ECE/MP.PP/2/Add.2).

62. The Meeting of the Parties thus failed to reach consensus with regard to the adoption of draft decision VI/8f on compliance by the European Union. None of the arguments put forward by the European Union in support of its position received backing from the other delegations. Delegations made a strong stand against the efforts of the European Union to prevent the Meeting of the Parties from adopting the draft decision. Faced with a situation that could seriously jeopardize the authority of the Meeting of the Parties and the integrity of the Convention's compliance mechanism, the strong resistance by several Parties together with environmental NGOs and other stakeholders ultimately saw the United Nations spirit of consensus prevail. It was agreed that the discussion on the decision on compliance by the European Union would be postponed until the next ordinary session of the Meeting of the Parties. Nevertheless, several Parties expressed their great concern and reluctance to deviate, as an exceptional measure for that particular case only, from the long-standing and consistent practice of adopting decisions at each ordinary session of the Meeting of the Parties endorsing all of the findings issued by the Compliance Committee during the intersessional period regarding non-compliance by individual Parties. A number of statements highlighted that the agreement to postpone consideration of the draft decision was exceptional and therefore would not create a precedent for any future decision-making concerning a Party's compliance. Concluding its discussion, the Meeting of the Parties 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.

63. The Meeting of the Parties also 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 Party concerned stated that it reaffirmed its commitment to implement decision V/9g.

64. The Meeting of the Parties took note of the following statements made by Norway and Switzerland and of their requests to reflect their positions in the meeting report.

(a) *Norway:*

Norway supports draft decision VI/8f concerning compliance by the European Union with its obligations under the Convention as submitted to the Meeting of the Parties by the Bureau. The decision is drafted in accordance with the long-standing and consistent practice of the Meeting of the Parties to endorse the findings of the Compliance Committee and to recommend that the Party concerned take actions in accordance with the recommendations of the Committee.

We therefore regret that due to exceptional and unfortunate circumstances surrounding this matter it was not possible to reach consensus on this draft decision. Consensus is the main rule, it gives each Party an equal chance to influence decisions. In order to reach consensus all Parties have to engage in good faith and with the willingness to negotiate and compromise, while respecting their obligations of the Aarhus Convention.

We do however welcome the fact that the finding of the Compliance Committee concerning the compliance of European Union with the Convention in case ACCC/C/2008/32 (part II) is not opposed or rejected, and that Parties are willing to continue the deliberations on the draft decision with a view to reaching consensus in accordance with the Convention and the long-standing and consistent practice at the next session of the Meeting of the Parties.

There are several years to the next session of the Meeting of the Parties and the matter is important. The European Union has expressed 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. We urge the European Union to make sincere efforts to comply and engage constructively with the Compliance Committee for this purpose.

We support that the Compliance Committee is requested to review any developments that have taken place regarding the matter, and to report to the Meeting of the Parties accordingly. This is important in order for the Parties to have updated information on the status and possible improvements made and could make it easier to reach consensus on the decision on this matter at the next Meeting of the Parties;

(b) *Switzerland:*

Given the exceptional situation in which we find ourselves today, this decision (to postpone the adoption of this decision to the next session of the Meeting of the Parties) seems to be the most reasonable one for us; and we support this decision. We would like to reiterate the importance Switzerland attaches to the practice of adopting decisions by the Meeting of the Parties, and in particular, to the standing practice that every effort should be made to reach a decision by consensus. By the time of the next session of the Meeting of the Parties we hope to have the time to deploy these efforts with the goodwill of all the Parties. Thus, decisions of the Meeting of the Parties will continue to be effectively implemented by Parties in the constructive and positive spirit of the Convention in order to strengthen environmental governance in the pan-European region and beyond.

65. The Meeting of the Parties further took note of the request by a representative of Belarus to explicitly indicate in the meeting report the “exceptional circumstances” (see paras. 57–64 above) surrounding the agreement to postpone the decision-making in the present case.

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