

Updating Information note

following the Audio-conference with the Aarhus Convention Compliance Committee on
01/03/2017

in the framework of Aarhus compliance case ACCC/C/2010/54

Background of the case:

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:**

- 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);
- not having properly monitored the implementation by Ireland of article 7 of the Convention in the adoption of Ireland's NREAP;

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;

In Decision V/9g, the MOP 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.**

Furthermore, the latest audio conference between the ACC, 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.

In view of the upcoming MoP in September, the Commission services would like to recapitulate and further update the ACCC on the actions and developments by the EU to comply with the recommendation of the ACCC in this case.

Actions taken by the Party to address the recommendations

Commission reported to the ACCC in 2014-2015-2016 on actions taken to ensure that the above recommendation was implemented. We refer the ACCC to the text of those reports and we note the following actions by the EU so far are as follows (**chronologically**):

I. **In relation to the recommendation to adopt clear instructions in relation to the respect of Article 7 of the AC when Member States adopt NREAPs :**

Given that new (amended) NREAPs were only meant to be notified to the Commission (as per the RED 2009/28/EC Directive) *where the share of energy from renewable sources falls below the indicative trajectory in Annex I B¹*, **the Commission addressed clear instructions to Ireland (and all other Member States) through letter** in 2015². In those letters, the Commission indicated that, where an amended NREAP would be provided according to Article 4(4) of the RED, the rules of Article 3(1) and 7 of the AC should be thoroughly observed so that participation to the public would be ensured in view of the findings of the ACCC given participation of both the EU and Ireland to the Aarhus Convention³.

Given that Member States were obliged to submit to the Commission biannual national progress reports (NPR) on progress in the promotion and use of energy from renewable sources, the Commission also addressed a clear instruction to Member States in the 2015 letter, stating that the NPR due to be submitted by Ireland (and the other Member States) to the European Commission by 31 December 2015, would have to include a description of the measures in force ensuring participation of the public in decision making as required by the Convention⁴.

We should stress that, **regardless of the legal nature** of the letters (an issue raised at the open session in December 2016 by the ACCC), **such letter (s) produced the expected result** for Ireland and for many other Member States as detailed in the Commission's 2016 final progress report to the ACCC. In line with that report, we would highlight that: "***Ireland, which had conducted a public consultation within a very short time frame in 2010, namely two weeks, described in detail in its 2015 Progress Report the public consultation process it followed for the adoption of the White Paper on Energy Policy. Prior to the adoption of the White Paper in 2015, a Green Paper on Energy policy in Ireland was launched on 12 May 2014 commencing***

¹ Art. 4 (4) RED.

² The Commission had already sent clear instructions in a letter in 2013.

³ *An amended NREAP under the RED (2009/28/EC) is to be presented where the share of energy from renewable sources falls below the indicative trajectory of Annex I part B, in the immediately preceding two year period)*

⁴ *Article 22 of the RED requires national progress report on progress in the promotion and use of energy from renewable to be submitted every 2 years until 2021*

*a public consultation process on the future of energy policy in Ireland for the medium to long-term. The written consultation period, during which 1200 submissions were received, **lasted two and a half months** and concluded on 31 July 2014. In September 2014, a further Stakeholder Engagement process was launched which included seven national seminars and four regional seminars to facilitate wider engagement of the public. In Ireland today, a detailed description of and references to measures and procedures in force that ensure public participation are included in an implementation table publicly available on the website of the Department of Housing, Planning, Community and Local Government".⁵*

II. In relation to the recommendation to the Party to adapt the manner in which it evaluates NREAPs accordingly

Given that new (amended) NREAPs were only meant to be notified to the Commission *where the share of energy from renewable sources falls below the indicative trajectory*, the Commission used as a monitoring reference precisely the biannual progress reports by Member States. As explained above, the Commission requested Member States through the above mentioned letter that they included the steps taken to comply with Article 7 of the AC; this has **enabled the Commission to monitor such steps**.

This is evidenced by the fact that the third progress report by the Commission to the ACCC describes actions taken by Member States to respect the rights under Art 7 of the C which were included in their biannual 2015 RES reports. The Commission also indicates in that report that, **at the next Renewables Concerted Action Plenary meeting in the first quarter of 2017**⁶ the Commission would ask specific questions to those Member States which did not report on Article 7 AC compliance in their 2015 progress report to verify whether the participation of the public is/was not guaranteed through an appropriate legal framework and put into practice, or whether it was only a reporting error/omission.

UPDATE since the audio conference on consultations by Member States on their plans and programmes in the energy field:

⁵<http://www.housing.gov.ie/sites/default/files/migrated-files/en/Publications/Environment/Miscellaneous/FileDownload%2C30637%2Cen.pdf>

⁶ Background: The CA-RES (Concerted action for renewable energy sources) was a structured and confidential dialogue supporting the effective implementation of the RES Directive 2009/28/EC. The CA-RES is a platform for exchange of experience and good practice between the participating countries. The work of the CA-RES is structured in nine Working Groups covering the key requirements of the RES Directive.

Intelligent Energy Europe (IEE) Concerted Actions assist Member States to implement EU legislation cost-effectively. They help implementing bodies in each country to share experiences with the EU Directives on Energy Performance of Buildings, Energy Efficiency (formerly Energy Services) and Renewable Energy. National authorities meet informally to discuss and evaluate the most effective options for implementing these directives. The discussions also offer opportunities for the European Commission to work informally with Member States.

Following the last Renewables Concerted Action, the Commission services can further report to the ACCC on the **implementation of Article 7** of the Aarhus Convention in the field of renewables and, more generally in the energy field, **as regards France, Germany, Netherlands and Hungary**:

In France, following the 'adoption in 2015 of the Law n° 2015-992 of 17 August 2015 on energy transition for green growth, the tools for energy programming defining sectorial trajectories as regards renewable energies have been merged within a new single programming tool called « *Programmation pluriannuelle de l'énergie* » (PPE), having a wider and more integrated scope. The first PPE covering the period between 2016 and 2018 is the result of a collective work organised in 22 workshops involving more than 800 participants. Pursuant to Directive 2001/42/CE (the SEA Directive) the draft PPE was further subject to impact assessment, and to public consultation between 15 September and 15 October 2016 receiving more than 5338 comments which were examined, summarised, considered and published by the authorities at <http://www.consultations-publiques.developpement-durable.gouv.fr/projet-de-programmation-pluriannuelle-de-l-energie-a1526.html>. This should fully satisfy the requirements under the Aarhus Convention.

In the Netherlands any draft legislation and regulations prepared by the Government or the Parliament is submitted to public consultation through a system of internet consultation on www.internetconsultatie.nl. This includes legislation and regulations with respect to renewable energy (i.e. regulations on subsidies).

As regards plans, programmes and policies, environmental laws themselves refer to the preparatory procedure of the General Administrative Law Act (GALA) for the preparation of plans and programmes. If reference is made to Division 3.4 GALA, a draft plan will be made available for examination allowing everyone to submit views. The draft plan is made available for examination together with the relevant documents which are necessary to assess the draft, as required by Article 7 of the Convention.

In Germany the Federal Government consulted associations and NGOs from the fields of renewable energy and environment on the draft of the National Action Plan in July 2010. In a consultation meeting on 9 July 2010, the associations presented their remarks and comments in the Federal Environment Ministry. The Federal Government included some of these suggestions and comments in the present National Action Plan. In addition, local and regional stakeholders were involved in the consultation process.

As regards **Hungary**, it is worth signalling that the authorities consulted about 90 organisations (listed in the Hungarian 2015 renewable energy progress report) in the preparation of their most significant domestic strategy in terms of renewable energies, Hungary's Renewable Energy Utilisation Action Plan.

In any event, we draw the attention of the ACCC to point III below, since the new Commission proposal for a new Regulation on the Governance of the Energy Union will be, once adopted, a the key legislative framework applicable across the EU for Energy planning.

III. In relation to the recommendation to adopt a proper regulatory framework to ensure public participation in line with the AC in relation to the adoption of National Renewable Energy Action Plans (NREAP) (i above).

When the Commission submitted the third report (27 October 2016) on compliance with the V/9g decision to the ACCC, **the Commission proposal for a Regulation on Governance of the Energy Union** was not yet on the table. However, it was already mentioned at the last open session on Decision V/9g of 6 December 2016, where the Commission informed the ACCC of **the new regulatory measures proposed by the European Commission on the 30th November 2016**. In order to vertebrate the various planning and programming obligations which exist for Member States under the EU energy acquis, that proposal brings together those obligations under an Integrated National Energy and Climate Plan (NECP), on which reporting will also be streamlined in 1 biennial report for the whole of the NECP⁷.

The Commission proposal for a Regulation on the Governance of the Energy Union was adopted on 30 November 2016.

Article 10 of the proposed regulation⁸:

- requires that a draft version of these plans should be subject to public consultation;
- requires that the MS should give the public "**early and effective** opportunities to participate", both the key elements of Article 6(3) and (4) of the Aarhus Convention;
- further completes the obligations of Member States under the SEA (Strategic Environmental Assessment) Directive.

Furthermore:

- Annex I of the Commission proposal which details the contents of the NECPs refers specifically in Section A.1.3. to consultations and involvement of national and EU entities **and their outcome** ("consultations with stakeholders, including social partners, and engaging with the civil society").

⁷ *Timing: the draft plans should be sent to the Commission by 1 January 2018 and they will include a "description of the consultation and involvement of stakeholders". Commission may issue recommendations. Final plans should be adopted by 1 January 2019 covering a 10 year period.*

⁸ *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 draft plans referred to in Article 9 of this Regulation and attach to the submission of their draft integrated national energy and climate plan to the Commission a summary of the public's views. In so far as the provisions of Directive 2001/42/EC are applicable, consultations undertaken in accordance with that Directive shall be deemed to satisfy also the obligations to consult the public under this Regulation"*

- This creates the **right framework for public involvement** in the planning but also for monitoring by the Commission at an early stage of compliance with the obligation under Article 7 of the AC, given that there will be a structured dialogue already with Member States of the draft NECP.
- Recital 20 completes the provisions above by establishing that "*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, 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.*

At the last open session, the ACCC enquired on why the Commission had not explicitly used terminology from the Aarhus Convention as in some other pieces of legislation, and about the interaction with the SEA Directive. We, hereby, confirm that this is a matter of legislative technique and that the terminology of **Article 10 ("early and effective" consultation) and Annex I** has to be read together with the explicit text and reference to the Aarhus Convention **in recital 20**. This is a consolidated **interpretative technique by the Court of Justice of the European Union**. We consider this is the most effective way for the content of the Aarhus obligations to be captured. Furthermore, Article 10 required compliance with Article 7 of the Aarhus convention wherever the SEA Directive may not be applicable.

As regards the evolution of the legislative process negotiations are proceeding both in the European Parliament and Council. It is difficult to predict adoption dates by co-legislators, but there is clear will around the table that Governance is a key pillar to the Energy Union.

IV. Conclusion

The Commission services trust that,

- i. the three progress reports submitted to the ACCC by the European Commission from 2013 to 2015, as well as
- ii. the present information note summarizing:
 - the latest developments as regards the Union legislative framework, namely the Commission proposal for a Regulation on the Governance of the energy Union,
 - the further reporting of the national measures to implement Article 7 of the Aarhus Convention, following the last renewables Concerted Action, as regards those countries which had not reported in time for the Commission third progress report to the ACCC,

will satisfy the ACCC in showing the progress achieved by the European Union in implementing the MoP Decision V/9g.