

**To:** Secretariat Aarhus Convention Compliance Committee  
**From:** Pat Swords  
**Date:** 26/10/2020  
**Re:** ACCC/M/2017/3 and comments on EU's Third Progress Report

Dear Fiona

## 1.1 General

With regard to your e-mail of October 1<sup>st</sup> and offer to send any comments on the Party concerned 's second progress report, I can only articulate as to how this is complete déjà vu, in like my letter of last year on the Party's Second Progress Report, I can only repeat the same conclusions with respect to Decision V/9g:<sup>1</sup>

In summary, is there the slightest bit of evidence that the EU is making any form of effort to actually comply with its legal obligations under the Convention? I cannot see any such evidence and what is actually happening is not just unprofessional, but also deeply cynical and a systematic abuse of citizens' rights. In this regard, the EU does not act alone, as it clearly has a willing accomplice in its Member States, which are more than happy to bypass complete the obligations inherent to the Aarhus Convention and the rights, which their citizens are supposed to enjoy.

The rule of law simply does not apply, not least as it cannot be enforced, as there is no effective access to justice, a situation which did not develop by accident and for which it is clear that this 'status quo' will be maintained going forward to the next Meeting of the Parties. Decision I/7 'Review of Compliance' states:<sup>2</sup>

- *37. The Meeting of the Parties may, upon consideration of a report and any recommendations of the Committee, decide upon appropriate measures to bring about full compliance with the Convention. The Meeting of the Parties may, depending on the particular question before it and taking into account the cause, degree and frequency of the non-compliance, decide upon one or more of the following measures:*
  - [...].
  - (e) Issue declarations of non-compliance;
  - (f) Issue cautions;
  - (g) Suspend, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, the special rights and privileges accorded to the Party concerned under the Convention;

The Third Progress Report, as is explained in the next few sections, is characterised by multiple examples supporting the above conclusions.

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<sup>1</sup> [https://www.unece.org/fileadmin/DAM/env/pp/compliance/Requests\\_from\\_the\\_MOP/ACCC-M-2017-3\\_European\\_Union/Correspondence\\_with\\_the\\_communicants\\_observers/frCommM3\\_C54\\_13.12.2019.pdf](https://www.unece.org/fileadmin/DAM/env/pp/compliance/Requests_from_the_MOP/ACCC-M-2017-3_European_Union/Correspondence_with_the_communicants_observers/frCommM3_C54_13.12.2019.pdf)

<sup>2</sup> <https://www.unece.org/fileadmin/DAM/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf>

## 1.2 Blatantly False Claims in Relation to Cooperating with the ACCC

The Section of the Party's Third Progress Report documents:

- At the 5<sup>th</sup> 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.

The reality of the situation is very different. The Committee's "Second Progress Review of the implementation of decision V/9g" of February 2017<sup>3</sup> included a series of questions to be answered by 1 April 2017, which included the following:

- *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.*

No reply was received by 1 April 2017 and when a reply was eventually forthcoming a month later on 16 May 2017 it addressed none of the issues, which had been asked above. As the Compliance Committee's report to the subsequent Meeting of the Parties documented that June:

- *42. The Committee expresses its concern that the Party concerned has entirely failed to respond to the Committee's questions as set out in paragraph 40 above. In its further information provided on 16 May 2017, the Party concerned provided examples of four member States that had provided for public participation in the preparation of certain measures in the field of renewable energy, apparently as examples of good practice by its member States. However, the Party concerned did not reply at all to the Committee's actual questions (see para. 40 above). As noted in paragraph 39 above, the Party concerned itself has stated that ten member States had entirely failed to report on public participation in the preparation of their NREAPs and a further six member States had provided insufficient information.*

When I subsequently raised the failure to reply to these questions in teleconference proceedings held on ACCC/M/2017/3, all that results is more obfuscation from the EU as to how they responded to all these questions in their written response of May 2017. Furthermore, it is recorded in Committee's First Progress Review of ACCC/M/2017/3 that:<sup>4</sup>

- *19. With respect to the European Union's reliance on the information it submitted to the Committee on 16 May 2017, the Committee underlines that it had already examined that information in the context of its review of decision V/9g in the last intersessional period and had informed the European Union*

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<sup>3</sup>[https://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP5decisions/V.9g\\_EU/Second\\_progress\\_review\\_on\\_V.9g\\_EU\\_final.pdf](https://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP5decisions/V.9g_EU/Second_progress_review_on_V.9g_EU_final.pdf)

<sup>4</sup> [https://www.unece.org/fileadmin/DAM/env/pp/compliance/Requests\\_from\\_the\\_MOP/ACCC-M-2017-3\\_European\\_Union/Correspondence\\_with\\_the\\_Party\\_concerned/First\\_progress\\_review\\_on\\_M3\\_EU\\_adopted\\_22.02.2019.pdf](https://www.unece.org/fileadmin/DAM/env/pp/compliance/Requests_from_the_MOP/ACCC-M-2017-3_European_Union/Correspondence_with_the_Party_concerned/First_progress_review_on_M3_EU_adopted_22.02.2019.pdf)

*that it did not meet the requirements of the first and second sentences of paragraph 3 of that decision.*

Indeed, the Committee clarified on two further occasions in the same Progress Review as to how the information received was completely inadequate, while also reiterating as to how that information was to be supplied in the Party's subsequent Second Progress Report, which it was not. As the Committee had then to record in its subsequent Second Progress Review:<sup>5</sup>

- *62. The Committee reiterates its serious concern that, despite having been explicitly invited to do so in the Committee's first progress review, the Party concerned in its second progress report has still not yet replied to the questions put to it in the Committee's second progress review on decision V/9g in the last intersessional period. The Committee regrets the lack of engagement by the Party concerned on this issue.*

The point being made here is that the EU has adopted a clear *modus operandi*, in that it clearly sees itself as solely obligated to send in any old rambling documentation on the relevant date and blatantly ignore the specific questions addressed to it by the Committee. This *modus operandi* follows through into recent specific requests by the Committee in relation to the adoption of the National Energy and Climate Plans (NECP).

### **1.3 Repeated Failures to Provide Information Requested on NECPs**

As the Committee's Second Progress Review of ACCC/M/2017/C records:

- *37. In paragraph 35 of its advice of 28 May 2019, the Committee requested that the Party concerned, together with its second progress report, submit:*
  - *(a) For each member State, the evaluation carried out by the Commission pursuant to article 9(2) of the Governance Regulation regarding the public participation carried out or intended to be carried out by the member State on its draft NECP 2021-2030; and*
  - *(b) For each member State, the text of the customized recommendations relevant to meeting the requirements of paragraph 3 of decision V/9g issued to that member state pursuant to article 9(2) of that regulation.<sup>16</sup>*
- *38. The Committee regrets that, in its second progress report, the Party concerned fails to provide the information requested in paragraph 35 of the Committee's advice of 28 May 2019*

The Committee then concluded with the following:

- *79. The Committee invites the Party concerned, together with its final progress report due on 1 October 2020:*
- *(a) With respect to the first three sentences of paragraph 3 of decision V/9g, to provide evidence that it has adopted a proper regulatory framework or clear*

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<sup>5</sup> [https://www.unece.org/fileadmin/DAM/env/pp/compliance/Requests\\_from\\_the\\_MOP/ACCC-M-2017-3\\_European\\_Union/Correspondence\\_with\\_the\\_Party\\_concerned/Second\\_progress\\_review\\_on\\_M3\\_adopted.pdf](https://www.unece.org/fileadmin/DAM/env/pp/compliance/Requests_from_the_MOP/ACCC-M-2017-3_European_Union/Correspondence_with_the_Party_concerned/Second_progress_review_on_M3_adopted.pdf)

*instructions for implementing article 7 with respect to the adoption of post-2020 NECPs, pursuant to which member States are clearly instructed to put in place arrangements to meet each of the elements of article 7 set out in paragraph 3 of decision V/9g;*

- *(b) With respect to the final sentence of paragraph 3 of decision V/9g, the Committee invites the Party concerned to provide, together with its final progress report:
  - (i) *For each member State, the relevant sections of its final 2021-2030 NECP which address the public participation carried out thereon;*
  - (ii) *For each member State, the evaluation carried out by the Commission regarding the public participation carried out with respect to the final 2021-2030 NECP;*
  - (iii) *An explanation of the specific measures it has by that date taken with respect to each member State whose information on the implementation of article 7 in its final 2021-2030 NECP was either (i) insufficient or (ii) reveals a possible failure to carry out public participation that fully met the requirements of article 7 of the Convention.**

Regretfully, and once again, the EU in their Third Progress Report of this October failed to comply with this request, as is explained in the following sections.

#### **1.4 When “All Options are Open”**

Article 7 of the Convention on Public Participation on Plans and Programmes Related to the Environment engages Article 6(4) in that:

- *4. Each Party shall provide for early public participation, when all options are open and effective public participation can take place.*

Despite the above legal obligations being repeatedly pointed out to the Party concerned, the Governance Regulation<sup>6</sup> does not specifically provide for public participation, when “all options are open”, see in particular its Article 10. No such wording or equivalent wording can be deduced from its legal text. This is also clear from Points 21 to 27 of the Party’s Third Progress Report, as they were unable to point to any ‘proper regulatory framework and/or clear instructions’ related to the above being contained within the Governance Regulation. Hence, the Party has yet again failed to respond to Point 79(a) of the Committee’s Second Progress Review.

#### **1.5 For each member State, the relevant sections of its final 2021-2030 NECP which address the public participation**

In answer to this specific question from the Committee, the following was stated by the Party:

- *44. This assessment is expected to be published mid October 2020 and will contain observations on how the obligations of the Governance Regulation, including Articles 10 and 11, have been applied by Member States, how the recommendations of June 2019 have been taken into account by Member States in the final NECPs, and how the Member States report that the public*

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<sup>6</sup> Regulation (EU) 2018/1999 on the Governance of the Energy Union and Climate Action: [https://eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ:L:2018:328:TOC&uri=uriserv:OJ.L\\_.2018.328.01.0001.01.ENG](https://eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ:L:2018:328:TOC&uri=uriserv:OJ.L_.2018.328.01.0001.01.ENG)

*has been involved in the preparation of the final NECPs, pursuant to the obligations of Member States as parties to the Aarhus Convention in their own right.*

We are now at the end of October and there is no such assessment published. If we consider the final Irish NECP and its Section on “Consultations of stakeholders, including the social partners, and engagement of civil society and the general public” it is stated:<sup>7</sup>

- *An initial public consultation on the NECP was held in late 2018. This consultation explained the NECP template and process and asked a series of open questions. These were considered as the draft NECP was being compiled. A further public consultation was held in January and February 2019 on the detail of the draft NECP. Those public consultation responses together with the measures set out in the Oireachtas Committee Report, the All of Government Climate Action Plan, further analytical work by Departments and Agencies and the iterative process with the Commission all inform this final version of the NECP. The responses to the third, final consultation will inform the final Plan. A summary report of the public consultations held during 2018 and 2019 will be submitted to the European Commission together with the final plan.*

No such summary report has been published, while despite the claim above, only two such public consultations actually occurred.<sup>8</sup> Furthermore, as is summarised in an EU website in relation to these final NECPs:<sup>9</sup>

- *Member States had to submit their draft NECPs by the end of 2018 and final versions by end of 2019, taking account of recommendations from the European Commission.*
- *Germany’s delay was a result of its decision to phase out coal, and its climate protection law, both of which were adopted in September 2019, whilst Ireland’s was delayed by the February election and the formation of a new government in June, committed to higher levels of climate ambition.*

The finalised Irish NECP, which is now only published on the EU website, clarifying:

- *Ireland is submitting this NECP in order to facilitate the ongoing analysis at EU level. It will be revised to bring it in line with the 7% trajectory and to include policies and measures currently being developed to achieve the 7% trajectory.*

Indeed, in my “Comments on the Party concerned’s second progress report” of 13 December 2019, I provided quite a comprehensive review of the public participation, which occurred on the Irish NECP, concluding:<sup>10</sup>

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<sup>7</sup> [https://ec.europa.eu/energy/sites/ener/files/documents/ie\\_final\\_necp\\_main\\_en.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/ie_final_necp_main_en.pdf)

<sup>8</sup> <https://www.gov.ie/en/publication/0015c-irelands-national-energy-climate-plan-2021-2030/>

<sup>9</sup> <https://www.interregeurope.eu/policylearning/news/9617/final-national-energy-and-climate-plans-submitted/>

<sup>10</sup> [https://www.unece.org/fileadmin/DAM/env/pp/compliance/Requests\\_from\\_the\\_MOP/ACCC-M-2017-](https://www.unece.org/fileadmin/DAM/env/pp/compliance/Requests_from_the_MOP/ACCC-M-2017-)

- As regards “*taking due account of the public consultation*”, the written documentation related to evaluation of the initial consultation held in October 2018 was incorporated into the Draft NECP.<sup>11</sup> However, this was solely answers to defined specific questions. Those who raised other relevant issues were simply ignored.<sup>12</sup> No documentation exists as to how the later February 2019 consultation of the draft NECP was ever evaluated.

This begs the question, how can one utilise access to justice procedures to challenge the plan or programme, when no documentation is ever made available to the public, as to how the outcome of the public participation was taken in the final decision? Equally, one can ask, what is the purpose of the public participation other than a box ticking exercise?

### **1.6 For each member State, the evaluation carried out by the Commission**

Clearly, the Commission has not provided in its Third Progress Report this evaluation requested. Even though the draft NECPs were submitted to it by the Member States in 31 December 2018 and Article 3 of the Regulation requires an integrated national energy and climate plan to be submitted by 31 December 2019. The Commission published a Communication assessing the 28 draft NECPs in June 2019 (COM/2019/285), together with specific recommendations and a detailed "Staff Working Document" for each Member State.<sup>13</sup> As I pointed out already in my correspondence of 13 December 2019 in relation to the Party's Second Progress Report:

- Despite this clear advice given by the ACCC to the EU Commission, when one reads the evaluation by the EU Commission of the draft NECP for Ireland, SWD(2019) 230 final,<sup>14</sup> no such evaluation of public participation measures occurred. Neither does the Commission address this issue in 'Recommendation of 18 June 2019 on the draft integrated National Energy and Climate Plan of Ireland covering the period 2021-2030', C/2019/4407,<sup>15</sup> in any of the nine recommendations raised.

### **1.7 An explanation of the specific measures it has by that date .....**

Clearly, the Commission has not provided this information requested by the Committee in its Third Progress Report. This then raises a number of very

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[3 European Union/Correspondence with the communicants observers/frCommM3 C54 13.12.2019.pdf](#)

<sup>11</sup> See page 46 of the above entitled: “*Consultations of stakeholders, including the social partners, and engagement of civil society and the general public*”

<sup>12</sup> For example: <https://www.dccae.gov.ie/en-ie/energy/consultations/Documents/37/submissions/Liz%20Collins.pdf> and <https://www.dccae.gov.ie/en-ie/energy/consultations/Documents/37/submissions/SVP.pdf>

<sup>13</sup> [https://ec.europa.eu/energy/topics/energy-strategy/national-energy-climate-plans\\_en](https://ec.europa.eu/energy/topics/energy-strategy/national-energy-climate-plans_en)

<sup>14</sup> [https://ec.europa.eu/energy/sites/ener/files/documents/ie\\_swd\\_en.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/ie_swd_en.pdf)

<sup>15</sup> [https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1576058251741&uri=CELEX:32019H0903\(07\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1576058251741&uri=CELEX:32019H0903(07))

fundamental questions with respect to the relationship between the EU and its Member States, where joint competency arises in matters related to the Environment and in particular with respect to this Regulation (EU) 2018/1999 on the Governance of the Energy Union and Climate Action. The plans are legally adopted and binding, so who is responsible for ensuring that they are in compliance with obligations of International Law inherent to the UNECE Aarhus Convention? Recital (28) of the Regulation states:

- *Member States should therefore ensure that (...) with the provisions (...) 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').*

This simply does not make sense. The Regulation is EU law and therefore for which the EU is responsible for, while the integral part of this Regulation is the NECPs, which are legally binding and used as a basis for the approval of the energy projects listed in each NECP. Furthermore, Chapter 5 of the Regulation outlines the legal measures the EU will take if objectives and targets in these NECPs are not met. Yet as the failure to answer the questions set by the Committee demonstrate, the EU simply has no documentation to demonstrate that the legally required public participation for these now legally binding plans was ever completed before their adoption. The EU as a full Party to the Convention cannot simply go around and offload its obligations in International law to its Member States. The Regulation and associated NECPs are EU law and it has the ultimately responsibility for ensuring that in the adoption of those plans, the requirements of Article 7 was complied with.

### **1.8 Proposal to amend the Aarhus Regulation**

Fifteen years after they ratified the Aarhus Convention and assumed obligations in International Law and three years after their disgraceful behaviour at the last Meeting of the Parties, where they blocked a ruling of non-compliance against them, the EU presents a proposal to amend the Aarhus Regulation. Note, a proposal, nothing more and nothing less, which could take many more years before it comes to adoption, if at all. Not least, as it clearly has not been a priority of the EU to date to ensure that it fulfils its legal obligations in respect of environmental democracy, while I cannot see any timeframe provided in the proposal for its adoption.

While I am not by profession a lawyer, so 'access to justice' is not my area of competency, I have concerns upon reading the proposal. For example:

- *Accordingly, under the Proposal, those provisions of an administrative act for which EU law explicitly requires implementing measures at national level would not be subject to administrative review. As regards these provisions, it is possible to seek remedy before the national jurisdiction, with further access to the CJEU under Article 267 TFEU.*

The Committee has already ruled that in matters of EU law, the national Courts do not provide 'remedies', which are timely. There is considerable time required to progress a case at National level, particularly so here in Ireland, which when it involves interpretation of EU law, has then to be referred to the CJEU, which frequently involves a period of two years before a decision on the matters referred is reached. This cannot be considered 'timely' and once again, we have the situation where there is a clear intent by the EU to both devolve its responsibilities in International Law to the Member States and deprive EU citizens of their rights.

Finally, once again I would like to thank yourselves for all the hard work at the Compliance Committee and wish you the best for your forthcoming meeting in these strange and difficult times. The weather here in Ireland is as always completely normal,<sup>16</sup> while the death rate is thankfully also normal compared to other years,<sup>17</sup> although regrettably we have lost the major part of our civil liberties, as there is an alleged 'emergency'. This brings the wise words below of Harry Truman to mind, while for all those advocates of rebuilding society because of imminent weather catastrophes, we have not addressed the 'zero option' yet in a legally compliant manner. So where do we go next? Suppress 'civil liberties' in the name of emergencies, just like in the 1930s and 2020.

- *Once a government is committed to the principle of silencing the voice of opposition, it has only one way to go, and that is down the path of increasingly repressive measures, until it becomes a source of terror to all its citizens and creates a country where everyone lives in fear.*

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<sup>16</sup> <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12381-EU-Strategy-on-Adaptation-to-Climate-Change/F525450>

<sup>17</sup> As articulated very well by another UCD chemical engineer:  
<https://www.conservativewoman.co.uk/debunked-a-covid-scare-story-of-mass-deaths/>