Agenda item 4 (a): Compliance mechanism

The EU and its Member States would like to thank the Compliance Committee for its close engagement with the Parties in assisting the implementation of the three pillars of the Aarhus Convention and for the preparation of its meeting reports since the 22nd Working Group of the Parties.

The EU and its Member States appreciate the continuous work done by the Compliance Committee in revising the Guide, adopted at its 63rd meeting, as an important tool for both Parties and stakeholders.

We take note that the Guide is a living document and may be subject to further development, but meanwhile it will be applied in practice until the preparation of the Compliance Committee’s report for the 7th Meeting of the Parties in 2021.

We acknowledge and appreciate the efforts made by the Chair of the Compliance Committee to consider our previous comments in his reflections and to reach a compromise text on certain issues in the adopted version of the Guide.

However, we note that some concerns previously expressed by the EU and its Member States have not been fully taken into account.

In this context, we would like to remind that the legal basis for the compliance mechanism is laid down in decision I/7. The recently drafted guide is currently presented as an internal, non-legally binding document, setting the practicalities of how the Committee works and assists the Parties to reach compliance.

However, we consider that a number of matters encompassed by the Guide, would need to be adopted by the MoP in the form of a decision in order to be legally binding to all Parties to the Convention.

Although we acknowledge the Chair’s concerns in regard to the efficient and timely proceedings of the compliance mechanism, in the context of the increasing caseload, the EU and its Member States would like to emphasize the following issues:

**Use of domestic remedies**

The EU and its Member States take note of the changes to the section regarding „Use of domestic remedies”, but we maintain some concerns and therefore we reiterate the comments which were previously provided during the 62nd meeting of the ACCC in November 2018.

We consider that the provision regarding the exhaustion of domestic remedies by other members of the public could allow the Committee to conclude in compliance cases where the communicant itself has not used any other means of redress. Each individual communication has its own unique facts and circumstances and we do not think it is appropriate to conclude
that all domestic remedies have been exhausted on the basis of conclusions which relate to other cases.

In line with the non-confrontational, non-jurisdictional and consultative nature of the system of compliance review provided for in Article 15 of the Aarhus Convention, the compliance mechanism cannot be compared with rulings and jurisprudence of international courts and the findings of the Compliance Committee are not court decisions, as referred to in paragraph 17 of the Reflections by the Chair.

**Where needed, a hearing with the parties concerned**

We consider that hearings play an essential role to the compliance process, and we appreciate the step forward made by the Chair in proposing the so-called “careful approach”. However, we would like to be reassured that any decision of the ACCC to reserve its right not to hold a hearing should be in line with the general principles of environmental democracy and the rule of law.

Since the compliance system is a mechanism to assist Parties to comply with the Convention, a decision to proceed without a hearing should only be taken in consultation with the parties to the case. Therefore, we are of the view that if one or both of the parties consider that a hearing is necessary, providing a substantive reason for that, the hearing should be held.

**Preparation of draft findings**

We believe that a Party concerned needs enough time in order to prepare its formal position on the upcoming compliance decision to be adopted by the next MOP. We consider that a certain amount of time is required to start internal coordination, which involves not only the authorities already involved in the specific case but also the higher levels of administration or other Ministries (such as for Foreign Affairs). Only when the draft findings are made available, the Party concerned is able to consider its positioning on a compliance decision because it is by then that the Parties know the exact legal grounds why they are deemed to be in non-compliance.

**Comments and information submitted during the proceeding**

In accordance with the current provisions of the Guide, observers can play an important role in the different phases of the process before the Compliance Committee, so that they should receive the same treatment given to communicants and parties. In this context, the extent of their comments should be limited to a maximum number of words and addenda. On the other hand, the Compliance Committee, of its own accord or alternatively, at the request of a party, should have the possibility of dismissing any observer’s comments as inadmissible when they are not closely related to the main issue on the process, as well as when the observer's comments include new points not necessarily connected to the original matter or at least, being able to declare such new issues unacceptable.

**Committee’s review of the implementation of decisions of the Meeting of the Parties on compliance (paragraphs 211-215)**

We consider that the provisions represent changes to the Compliance Committee procedure in preparing the progress review and further undermines the functionality of Parties’ progress reports to comment on the Committee’s recommendations and findings in the progress review.
The Committee deleted in the 5th draft of the Guide the text that referred to progress review session taking place at “one of its meetings each year”. The adopted version of the Guide maintains this change and prefers the wording “periodic” meetings.

If this resulted in multiple progress reviews per year, this would be excessively burdensome for the Parties.