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Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union at the seventh session of the Meeting of the Parties to the Aarhus Convention regarding compliance cases ACCC/C/2008/32 and ACCC/C/2015/128

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be taken on the Union's behalf in the seventh Meeting of the Parties to the Aarhus Convention in connection with the envisaged adoption of Decision VII.8f concerning compliance by the European Union with its obligations under the Convention

2. CONTEXT OF THE PROPOSAL

2.1. The Aarhus Convention

The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ("the Aarhus Convention")¹ is a multilateral environmental agreement concluded under the aegis of the United Nations Economic Commission for Europe (UNECE).

The Aarhus Convention was approved on 17 February 2005² by the European Community, which also made a Declaration upon signature³. All Member States are Parties to the Agreement. Regulation (EC) No 1367/2006 ("the Aarhus Regulation") contributes to the implementation of the Convention with regard to the EU institutions and bodies⁴.

2.2. The Aarhus Convention

The contracting Parties to the Aarhus Convention meet every four years and one of the standing items on the agenda concerns Parties' compliance with the Convention. Compliance is assessed by the Compliance Committee established under the Convention according to its Article 15. The findings of the Compliance Committee are final.

The Committee's findings are submitted for endorsement to the Meeting of the Parties to the Aarhus Convention according to Rule 37 of Decision I/7 on review of compliance⁵. If endorsed, they would gain the status of official interpretation of the Aarhus Convention, therefore binding upon the Contracting Parties and the Convention Bodies.

The Meeting of the Parties generally decides by consensus. If all efforts to reach consensus have been exhausted, decisions on substantive matters are taken by a three-fourth majority vote of the Parties present and voting⁶. The EU has 27 votes of the overall 46 votes if all Parties are present.

Prior to the Meeting of the Parties EU positions are established in the Council Working Party on International Environmental Issues.

¹ As published on the UNECE website:

<http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>

² Council Decision 2005/370/EC, OJ L 124 of 17.5.2005, p. 1.

³ The EU Declaration is published on the UNECE website under the heading "Declarations and Reservations", see https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=en

⁴ OJ L 264 of 25.9.2006, p. 13.

⁵ Available at [g0430994.doc \(unece.org\)](http://www.unece.org)

⁶ Decision I/1 on Rules of procedure (cf. notably Rule 35 on decision-making), see <http://www.unece.org/fileadmin/DAM/env/pp/documents/mop1/ece.mp.pp.2.add.2.e.pdf>

2.3. The envisaged act of the Aarhus Convention

On 18 – 20 October 2021, during its seventh session, the Meeting of the Parties to the Aarhus Convention is to adopt Decision VII.8f regarding compliance by the European Union with the Convention ('the envisaged act').

The purpose of the envisaged act is to determine whether the European Union is in compliance regarding notably cases ACCC/C/2008/32 and ACCC/C/2015/128 and set out the conditions necessary to ensure compliance and possibly incur regular reporting obligations and a request to the Party concerned to take urgent measures to ensure compliance.

3. POSITION TO BE TAKEN ON THE UNION'S BEHALF

On 17 March 2017, the Committee issued findings in case ACCC/C/2008/32, brought by the non-governmental organisation (NGO) *ClientEarth*, regarding access to justice at EU level.⁷ The Committee held that the Treaty rules on access to justice before the EU Courts, as interpreted by them, and the criteria for access to administrative review under the Aarhus Regulation are in breach of the Convention.

In a separate compliance case, ACCC/C/2015/128,⁸ whose findings were delivered on 17 March 2021, the Committee found that the EU was in breach of the Convention because of the failure to provide access to administrative or judicial procedures for members of the public to challenge decisions on state aid measures taken by the European Commission.

On 14 October 2020, the Commission adopted a proposal to amend the Aarhus Regulation⁹ and a communication on Access to Justice¹⁰ in response to the Committee's findings in case ACCC/C/2008/32. This was a response to the call by Council¹¹ on the Commission to table a legislative proposal and the Commission's commitments made in the European Green Deal Communication.

As a final result of the legislative process, a political agreement in trilogue was reached on 12 July 2021 that addressed all of the Compliance Committee's concerns in case ACCC/C/2008/32.

Case ACCC/C/2015/128 concerns state aid exceptions under the Aarhus Regulation, which was not part of the Commission's legislative proposal recalled above. However, at the trilogue of 12 July 2021, the Commission issued a statement as part of the compromise leading to the adoption of the revised Aarhus Regulation, in which it committed to assess the findings in this case and publish the outcome by the end of 2022. The Commission also stated that by the end of 2023, if appropriate, it will come forward with measures to address the issue, in light of the obligations of the EU and its Member States under the Aarhus Convention and taking into account the rules of Union law concerning state aid.

⁷ Findings and advice under ACCC/C/2008/32 available at: https://unece.org/env/pp/cc/accc.c.2008.32_european-union and at https://unece.org/env/pp/cc/accc.m.2017.3_european-union

⁸ https://unece.org/sites/default/files/2021-03/C128_EU_findings_advance%20unedited.pdf

⁹ COM(2020) 642

¹⁰ COM(2020) 643

¹¹ Council Decision (EU) 2018/881 of 18 June 2018 requesting the Commission to submit a study on the Union's options for addressing the findings of the Aarhus Convention Compliance Committee in case ACCC/C/2008/32 and, if appropriate in view of the outcomes of the study, a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1367/2006, ST/9422/2018/INIT, OJ L 155, 19.6.2018, p. 6–7.

The present initiative concerns a draft Council Decision covering these two cases; accordingly, the EU can express a united position at the Meeting of the Parties on 18 – 20 October 2021.

On case ACCC/C/2008/32, the EU expects that the Meeting of the Parties will agree that the EU's measures, once they will be adopted and will have entered into force, will ensure compliance with the Aarhus Convention. Since the draft MOP Decision has been prepared before the legislative procedure on the Aarhus Regulation was formally concluded, it may be necessary that the EU will need to request that the draft MOP Decision is updated to fully reflect this very significant development in the EU.

On the state aid-related case, the EU will accept a decision acknowledging, but not endorsing, the findings and will revert to the matter at the next Meeting of the Parties, expected in 2025, while reporting to the Convention by the deadlines set forth in the Commission's Statement.

In view of the above considerations, at the upcoming seventh session of the Meeting of the Parties the EU should accept the findings in case ACCC/C/2008/32, subject to the provisions of this draft Council decision. Further, the EU should acknowledge the findings in case ACCC/C/2015/128 but request the postponement of the endorsement of these findings to the eight session of the Meeting of the Parties.

In addition, it is also essential that the Convention acknowledges the central role of EU national courts as ordinary courts of EU law,¹² and recognise the system of preliminary rulings under Article 267 TFEU as a valid means of access to justice and redress in environmental matters. This should be reflected in the text of the decision adopted at the MOP.

4. LEGAL BASIS

4.1. Procedural legal basis

4.1.1. Principles

Article 218(9) of the Treaty on the Functioning of the European Union (TFEU) provides for decisions establishing *'the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.'*

The concept of *'acts having legal effects'* includes acts that have legal effects by virtue of the rules of international law governing the body in question. It also includes instruments that do not have a binding effect under international law, but that are *'capable of decisively influencing the content of the legislation adopted by the EU legislature'*¹³.

4.1.2. Application to the present case

The Aarhus Convention is a body set up by an agreement under the auspices of the United Nations Economic Commission for Europe.

The act which the Meeting of the Parties is called upon to adopt constitutes an act having legal effects. The envisaged act will be binding under international law in accordance with

¹² Opinion 1/09, *Creation of a Unified Patent Litigation System*, EU:C:2011:123, paragraph 80.

¹³ Judgment of the Court of Justice of 7 October 2014, *Germany v Council*, C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

Article 15 of the Aarhus Convention and the provisions of decision I/7 on the review of compliance, in particular, its Rule 37¹⁴.

In turn, the envisaged act does not supplement or amend the institutional framework of the Agreement.

Therefore, the procedural legal basis for the proposed decision is Article 218(9) TFEU.

4.2. Substantive legal basis

4.2.1. Principles

The substantive legal basis for a decision under Article 218(9) TFEU depends primarily on the objective and content of the envisaged act in respect of which a position is taken on the Union's behalf.

4.2.2. Application to the present case

The main objective and content of the envisaged act relate to environmental policy.

Therefore, the substantive legal basis of the proposed decision is Article 192(1).

4.3. Conclusion

The legal basis of the proposed decision should be Article 192(1) TFEU, in conjunction with Article 218(9) TFEU.

¹⁴ Quoted above.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 192(1), in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) On 17 February 2005, the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ("the Aarhus Convention")¹⁵ was approved, on behalf of the European Community, by Council Decision 2005/370/EC.¹⁶
- (2) Pursuant to Article 10(2) of the Aarhus Convention, the Meeting of the contracting Parties may adopt decisions concerning compliance with the Convention.
- (3) The Aarhus Convention, during its seventh session on 18 – 20 October 2021, is to adopt Decision VII.8f concerning compliance by the European Union with its obligations under the Convention, including the findings in case ACCC/C/2008/32 and case ACCC/C/2015/128.
- (4) It is appropriate to establish the position to be taken on the Union's behalf in the Aarhus Convention, as Decision VII.8f concerning compliance by the European Union with its obligations under the Convention will be binding on the Union.
- (5) The Union implemented the obligations of the Convention with regard to its institutions and bodies notably by way of Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies ("the Aarhus Regulation").
- (6) Pursuant to Article 15 of the Aarhus Convention, the Aarhus Convention Compliance Committee ("the Committee") was established and is competent to review the Parties' compliance with the provisions of the Convention. In turn, under Rule 37 of Decision I/7 on the review of compliance, the findings of the Committee have to be endorsed by the Meeting of the Parties.

¹⁵ <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>

¹⁶ Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (OJ L 124, 17.5.2005, p. 1).

- (7) On 17 March 2017, the Union received findings in case ACCC/C/2008/32 regarding access to justice at EU level.¹⁷ The Committee held in paragraph 123 of its findings that *"the Party concerned fails to comply with Article 9, paragraphs 3 and 4, of the Convention with regard to access to justice by members of the public because neither the Aarhus Regulation, nor the jurisprudence of the CJEU implements or complies with the obligations arising under those paragraphs."*
- (8) The Aarhus Convention bodies have been made aware by the Declaration that the EU made upon signature and reiterated upon approval of the Convention that *"[w]ithin the institutional and legal context of the Community [...] the Community institutions will apply the Convention within the framework of their existing and future rules on access to documents and other relevant rules of Community law in the field covered by the Convention."*
- (9) The administrative review procedure under the Aarhus Regulation complements the overall Union system of judicial review that enables members of the public to have administrative acts reviewed via direct judicial challenges at Union level, namely under Article 263(4) TFEU, and, in accordance with Article 267 TFEU, via national courts, which form an integral part of the Union system under the Treaties. The power of national courts to make a request to the Court of Justice of the European Union for a preliminary ruling under Article 267 TFEU plays an essential role in this system. According to Article 267 TFEU, Member States' national courts are part and parcel of the system of judicial protection of the EU as ordinary courts of EU law.¹⁸
- (10) Taking into account the concerns expressed by the Committee in case ACCC/C/2008/32, on 14 October 2020 the Commission put forward a legislative proposal¹⁹ aiming to amend the Aarhus Regulation, which was informally agreed by co-legislators in a trilogue on 12 July 2021. The amended Aarhus Regulation ensures now that Union law is compliant with the provisions of the Aarhus Convention on access to justice in environmental matters in a way that is compatible with the fundamental principles of Union law and with its system of judicial review.
- (11) The Commission has informed the Compliance Committee of the details of the political agreement on 16 July 2021, provided the Committee with a consolidated version of the text on 23 July 2021 following its endorsement in Coreper, and communicated the final outcome of the legislative procedure to the Compliance Committee, including the text published in the *Official Journal of the European Union* on [xxx October 2021]. The Decision of the Meeting of the Parties should therefore welcome these new measures and note that, once in effect, they respond in full to the findings of the Compliance Committee in case ACCC/C/2008/32.
- (12) The Committee in case ACCC/C/2015/128²⁰, in its findings of 17 March 2021, found that the EU was in breach of the Convention because of the failure to provide access to administrative or judicial procedures for members of the public to challenge decisions on state aid measures taken by the European Commission.

¹⁷ http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/Findings/C32_EU_Findings_as_adopted_advance_unedited_version.pdf

¹⁸ Opinion 1/09 of the Court (Full Court) of 8 March 2011, pursuant to Article 218(11) TFEU, Creation of a unified patent litigation system, ECLI:EU:C2011:123, para 80.

¹⁹ COM(2020) 642

²⁰ https://unece.org/sites/default/files/2021-03/C128_EU_findings_advance%20unedited.pdf

- (13) In acknowledgement of the concerns and the findings of the Committee in case ACCC/C/2015/128, the Commission issued a statement as part of the compromise leading to the adoption of the revised Aarhus Regulation committing to *‘analysing the implications of the findings and assessing the options available. The Commission will complete and publish this assessment by the end of 2022. If appropriate, by the end of 2023, the Commission will come forward with measures to address the issue, in light of the obligations of the EU and its Member States under the Aarhus Convention and taking into account the rules of Union law concerning state aid.’*
- (14) The findings in cases ACCC/C/2008/32 and ACCC/C/2015/128 will be submitted to the seventh session of the Meeting of the Parties to the Aarhus Convention to take place in October 2021 in Geneva, Switzerland, by way of draft Decision VII.8f ²¹ by which they would gain the status of official interpretation of the Aarhus Convention, therefore binding upon the Contracting Parties and the Convention Bodies.
- (15) However, as regards case ACCC/C/2015/128, in accordance with the Statement recalled above, the Union should commit to analysing the implications of the findings and assessing the options available within the framework and specificities of the EU legal order. This should then allow the Commission to complete and publish the assessment indicated in the Statement and to come forward with measures, if appropriate, to address the issue raised by the Compliance Committee, within the timelines indicated in the Statement and taking into account the specificities of the EU legal order on State aid matters. Therefore, the Union should also propose the Meeting of the Parties to postpone the endorsement of the findings in case ACCC/C/2015/128 to the eighth session of the Meeting of the Parties, rather than endorse these findings.

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the seventh session of the Meeting of the Parties to the Aarhus Convention with regard to draft Decision VII.8f concerning compliance by the Union with its obligations under the Aarhus Convention in case ACCC/C/2008/32 shall be to accept the above-mentioned draft Decision and endorse the findings. The Union, however, should ensure that the following points are reflected in the decision:

- The decision should welcome that the EU has taken all necessary steps to ensure compliance with the findings and to provide the public concerned with access to justice in environmental matters in accordance with Article 9, paragraphs 3 and 4, of the Convention. The decision should also clarify that once all provisions of the revised Aarhus Regulation will have come into effect, the EU will no longer be in non-compliance in case ACCC/C/2008/32.
- In case the draft Decision reiterates the dismissal by the Compliance Committee of the preliminary ruling procedure, this should be rejected. It is essential that the Decision acknowledges the central role of EU national courts as ordinary Courts of EU law, and recognise the system of preliminary rulings under Article 267 TFEU as a valid means of redress.

²¹ <https://unece.org/environment/documents/2021/08/item-7-b-draft-decision-vii8f-concerning-compliance-european-union>.

Article 2

The position to be taken on the Union's behalf in the seventh session of the Meeting of the Parties to the Aarhus Convention with regard to draft Decision VII.8f concerning compliance by the Union with its obligations under the Aarhus Convention in case ACCC/C/2015/128 should be to acknowledge the concerns and findings of the Compliance Committee. The Decision should also reiterate the wording of the Commission's Statement, issued at the last trilogue on the revision of the Aarhus Regulation on 12 July 2021.

According to this Statement:

“The Commission remains committed to ensuring that the EU respects its international obligations in matters pertaining to the Aarhus Convention and in that context acknowledges the concerns expressed and findings adopted by the Aarhus Convention Compliance Committee in case ACCC/C/2015/128²² as regards state aid on 17 March 2021. The findings call on the EU to ‘take the necessary legislative, regulatory and other measures to ensure that the Aarhus Regulation is amended, or new European Union legislation is adopted, to clearly provide members of the public with access to administrative or judicial procedures to challenge decisions on state aid measures taken by the European Commission under article 108(2) TFEU which contravene EU law relating to the environment, in accordance with article 9(3) and (4) of the Convention’.

The Commission is currently analysing the implications of the findings and assessing the options available. The Commission will complete and publish this assessment by the end of 2022. If appropriate, by the end of 2023, the Commission will come forward with measures to address the issue, in light of the obligations of the EU and its Member States under the Aarhus Convention and taking into account the rules of Union law concerning state aid.”

Accordingly, the Union should commit to analysing the implications of the findings and assessing the options available within the framework and specificities of the EU legal order. It should also commit to complete and publish this assessment by the end of 2022. Further, if appropriate, by the end of 2023, it should commit to come forward with measures to address the issue, in light of the obligations of the EU and its Member States under the Aarhus Convention and taking into account the rules of Union law concerning State aid.

This should then allow the Commission to complete and publish the assessment indicated in the Statement and to come forward, if appropriate, with measures to address the issue raised by the Compliance Committee, within the timelines indicated in the Statement.

Therefore, the Union should also propose the Meeting of the Parties to postpone the endorsement of the findings in case ACCC/C/2015/128 to the eighth session of the Meeting of the Parties, rather than endorse these findings.

Article 3

Other minor amendments in line with the approach of this Decision can be agreed during coordination on the spot and in light of possible negotiations on draft Decision VII.8f.

²² See https://unece.org/env/pp/cc/accc.c.2015.128_european-union, para 132.

Article 4

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*