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Subject: 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, ACCC/C/2015/128, ACCC/C/2013/96, ACCC/C/2014/121 and ACCC/C/2010/54

COUNCIL DECISION (EU) 2021/...

of ...

**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, ACCC/C/2015/128,
ACCC/C/2013/96, ACCC/C/2014/121 and ACCC/C/2010/54**

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 United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ('the Aarhus Convention')¹ was approved, on behalf of the European Community, by Council Decision 2005/370/EC.²
- (2) The Union implemented the obligations of the Aarhus Convention with regard to its institutions and bodies notably by way of Regulation (EC) No 1367/2006 of the European Parliament and of the Council³.
- (3) Pursuant to Article 15 of the Aarhus Convention, the Aarhus Convention Compliance Committee ('the Compliance Committee') was established. The Compliance Committee is competent to review compliance by the Parties to the Aarhus Convention with their obligations under that Convention.

¹ OJ L 124, 17.5.2005, p. 4.

² 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).

³ 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 (OJ L 264, 25.9.2006, p. 13).

- (4) At its seventh session on 18-20 October 2021, the Meeting of the Parties to the Aarhus Convention ('the Meeting of the Parties') is to adopt decision VII/8f concerning compliance by the Union with its obligations under the Aarhus Convention ('decision VII/8f'), including, in particular, the findings and recommendations of the Compliance Committee in cases ACCC/C/2008/32 and ACCC/C/2015/128. Decision VII/8f also covers the findings of the Compliance Committee in cases ACCC/C/2013/96 and ACCC/C/2014/121 and in the report on the implementation of request ACCC/M/2017/3 with respect to decision V/9g (case ACCC/C/2010/54).
- (5) The findings in cases ACCC/C/2008/32, ACCC/C/2015/128, ACCC/C/2013/96 and ACCC/C/2014/121 will be submitted to the Meeting of the Parties by way of decision VII/8f by which they would gain the status of official interpretation of the Aarhus Convention and be binding on the Parties of the Aarhus Convention and the Aarhus Convention bodies.
- (6) On 17 March 2017, the Compliance Committee submitted its findings to the Union in case ACCC/C/2008/32 regarding access to justice at Union level. In paragraph 123 of its findings, the Compliance Committee held 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.'

- (7) The Aarhus Convention bodies have been made aware, by the Declaration that the Union made upon signature and which was reiterated upon approval of the Aarhus 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.’
- (8) The administrative review procedure under Regulation (EC) No 1367/2006 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 the fourth paragraph of Article 263 of the Treaty on the Functioning of the European Union (TFEU), and, in accordance with Article 267 TFEU, through requests for a preliminary ruling made by 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 that system. Under Article 267 TFEU, Member States’ national courts are an integral part of the system of judicial protection of the Union as ordinary courts of Union law.¹

¹ Opinion 1/09 of the Court (Full Court) of 8 March 2011, Opinion delivered pursuant to Article 218(11) TFEU, ECLI:EU:C2011:123, paragraph 80.

- (9) Taking into account the concerns expressed by the Compliance Committee in case ACCC/C/2008/32, on 14 October 2020 the Commission submitted a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1367/2006 ('the amendment of Regulation (EC) No 1367/2006'). The co-legislators reached political agreement regarding the amendment of Regulation (EC) No 1367/2006 on 12 July 2021. The amendment of Regulation (EC) No 1367/2006 will ensure 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.
- (10) The Commission has informed the Compliance Committee of the details of the political agreement regarding the amendment of Regulation (EC) No 1367/2006 and has provided the Compliance Committee with a consolidated version of the text of that amendment. Furthermore, the Commission has informed the Compliance Committee of the subsequent steps of the legislative procedure and that the entry into force of the amendment of Regulation (EC) No 1367/2006 is to be expected at the latest in early November 2021. Decision VII/8f should therefore welcome the measures to be introduced with the amendment of Regulation (EC) No 1367/2006 and should note that, once the amendment of Regulation (EC) No 1367/2006 has entered into force, it will respond in full to the findings of the Compliance Committee in case ACCC/C/2008/32.

- (11) On 17 March 2021, the Compliance Committee submitted its findings to the Union in case ACCC/C/2015/128. The Compliance Committee held that the Union was in breach of the Aarhus Convention because of a failure to provide access to administrative or judicial procedures for members of the public to challenge decisions on state aid measures taken by the Commission.
- (12) In acknowledgement of the concerns and findings of the Compliance Committee in case ACCC/C/2015/128, the Commission issued a statement as part of the compromise leading to the political agreement regarding the amendment of Regulation (EC) No 1367/2006, in which it committed 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.’.

- (13) The Union should declare that the Commission has committed to analyse the implications of the findings of the Compliance Committee, to assess the options available, to complete and publish the assessment 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 rules of Union law concerning state aid. Therefore, the Union should acknowledge the findings of the Compliance Committee in case ACCC/C/2015/128 and propose to the Meeting of the Parties that the adoption of a position on those findings be postponed to the next session of the Meeting of the Parties, rather than endorse those findings. In case the Union position acknowledging the findings of the Compliance Committee in case ACCC/C/2015/128 is not accepted by the other Parties to the Aarhus Convention, the Union should propose that the part of decision VII/8f which concerns case ACCC/C/2015/128 be decided on separately and the Union should reject the adoption of that part of decision VII/8f with the aim of postponing the decision-making on those findings of the Compliance Committee. In case it is not possible to decide separately on that part of decision VII/8f, the Union, after having exhausted all means to that effect, and as a last resort, should take the position to postpone the adoption of decision VII/8f in its entirety to the next session of the Meeting of the Parties.
- (14) The findings of the Compliance Committee in case ACCC/C/2013/96 concern the compliance of the Union in connection with the adoption by the Commission of a list of ‘Projects of Common Interest’.

- (15) The findings of the Compliance Committee in case ACCC/C/2014/121 concern the compliance of the Union in connection with the reconsideration or updating of permits under Directive 2010/75/EU of the European Parliament and of the Council.¹
- (16) The findings of the Compliance Committee in the report on the implementation of request ACCC/M/2017/3 concern the follow-up to decision V/9g (case ACCC/C/2010/54, endorsed by the Meeting of the Parties in 2014).
- (17) It is appropriate to establish the position to be taken on the Union's behalf in the seventh session of the Meeting of the Parties, as decision VII/8f will be binding on the Union,

HAS ADOPTED THIS DECISION:

¹ Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (OJ L 334, 17.12.2010, p. 17).

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 ('the Meeting of the Parties') with regard to decision VII/8f concerning compliance by the Union with its obligations under the Aarhus Convention ('decision VII/8f') as regards case ACCC/C/2008/32 shall be to accept decision VII/8f and to endorse the findings and recommendations of the Compliance Committee. The Union, however, shall ensure that the following points are reflected in that decision:

- decision VII/8f shall welcome that the Union has taken all necessary steps to ensure compliance with the findings of the Compliance Committee; and
- decision VII/8f shall confirm that the Union will have fully met the recommendations of the Compliance Committee with regard to case ACCC/C/2008/32 once the amendment of Regulation (EC) No 1367/2006 has come into force.

In the statement on decision VII/8f as regards case ACCC/C/2008/32, the Union shall emphasise the central role of the Union's national courts as ordinary courts of Union law and the system of preliminary ruling under Article 267 TFEU as a valid means of redress.

Article 2

1. The position to be taken on the Union's behalf in the seventh session of the Meeting of the Parties with regard to decision VII/8f as regards case ACCC/C/2015/128, shall be to not endorse the findings of the Compliance Committee, but instead to acknowledge the concerns and findings of the Compliance Committee and to propose to postpone the adoption of the position on the findings in that case to the next session of the Meeting of the Parties.
2. With a view to justifying the request for such a postponement and proving its readiness to follow-up without delay to the findings of the Compliance Committee in case ACCC/C/2015/128, the Union shall declare that in the context of the legislative procedure concerning the amendment of Regulation (EC) No 1367/2006, the Commission made a statement by which:
 - it stated that it is currently analysing the implications of the findings and assessing the options available;
 - it committed to complete and publish that assessment by the end of 2022;
 - it committed to come forward, if appropriate, by the end of 2023, with measures to address the issue, in light of the obligations of the Union and its Member States under the Aarhus Convention and taking into account the rules of Union law concerning State aid.

The Commission's statement shall be made available to the other Parties to the Aarhus Convention and the Compliance Committee ahead of the seventh session of the Meeting of the Parties.

3. In the event the other Parties to the Aarhus Convention do not accept the position taken on behalf of the Union in case ACCC/C/2015/128 referred to in paragraph 1 of this Article, the position to be taken on the Union's behalf in the seventh session of the Meeting of the Parties with regard to decision VII/8f as regards case ACCC/C/2015/128 shall, instead, be to decide separately on the part of decision VII/8f which concerns ACCC/C/2015/128 and to reject the adoption of that part of decision VII/8f with the aim of postponing the decision-making on those findings of the Compliance Committee until the next session of the Meeting of the Parties.
4. If, despite intensive consultations with the Bureau of the Aarhus Convention and the other Parties to the Aarhus Convention, it is not possible to decide separately on the part of decision VII/8f which concerns case ACCC/C/2015/128 and to postpone decision-making on that case, while endorsing those parts of decision VII/8f which concern cases ACCC/C/2008/32, ACCC/C/2013/96, ACCC/C/2014/121 and ACCC/C/2010/54, and the Union comes to the conclusion, in on-the-spot coordination, that all means to that effect have been exhausted, the position to be taken on the Union's behalf in the seventh session of the Meeting of the Parties with regard to decision VII/8f as regards case ACCC/C/2015/128 shall, as a last resort, be to postpone the adoption of decision VII/8f in its entirety to the next session of the Meeting of the Parties.

Article 3

The position to be taken on the Union's behalf in the seventh session of the Meeting of the Parties with regard to decision VII/8f as regards cases ACCC/C/2013/96 and ACCC/C/2014/121 and request ACCC/M/2017/3 with respect to decision V/9g (case ACCC/C/2010/54) shall be to endorse the findings and recommendations of the Compliance Committee in decision VII/8f.

Article 4

Minor changes to the positions referred to in Articles 1, 2 and 3 may be agreed by the representatives of the Union, in consultation with Member States, at coordination on the spot and in light of possible negotiations on decision VII/8f at the seventh session of the Meeting of the Parties, without a further decision of the Council.

Article 5

This Decision shall enter into force on the date of its adoption.

Done at ...,

For the Council

The President
