

Compliance Committee to the Convention on
Access to Information, Public Participation
in Decision-making and Access to Justice
in Environmental Matters (Aarhus Convention)

**Progress review of the implementation of decision V/9m
on compliance by Ukraine with its
obligations under the Convention**

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I. Introduction

1. At its fifth session (Maastricht, 30 June–1 July 2014), the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) adopted decision V/9m on compliance by Ukraine with its obligations under the Convention (see ECE/MP.PP/2014/2/Add.1).

II. Summary of follow-up action on decision V/9m

2. By letter of 9 December 2014, the Party concerned provided its first progress report on the implementation of decision V/9m.

3. On 23 June 2015, the communicant of communication ACCC/C/2004/3 provided a brief update on the status of the draft legislation.

4. On 24 June 2015, the secretariat wrote to the Party concerned seeking further information regarding the status of the draft legislation. On 26 June 2015, the Party concerned provided an update on the pending draft legislation as well as the text of two pending legislative proposals, namely a draft law “On environmental impact assessment” and a draft law on “On Strategic Environmental Assessment”.

5. On 2 October 2015, the Party concerned provided a further update including updated versions of both proposals.

6. At the Committee’s request, on 20 January 2016 the UNECE Executive Secretary wrote to the Prime Minister of Ukraine, Chairman of the Verkhovna Rada of Ukraine and Chair of the Parliamentary Committee on issues of European integration. In his letters, the Executive Secretary *inter alia* reminded the Party concerned that paragraph 6 of decision V/9m provided for the caution in place since the fourth session of the Meeting of the Parties to be lifted if Ukraine had adopted the necessary measures to bring its legislation into full compliance with the Convention, in particular fully satisfying the conditions set out in paragraph 5 of the decision, and had notified the secretariat of this fact by 31 December 2015.

7. At its fifty-second meeting (Geneva, 8-11 March 2016), the Committee reviewed the implementation of decision V/9m in open session. The Party concerned took part in the open session by audio conference. During the session, the Committee noted that to date, the Party concerned had not replied to the letters of the UNECE Executive Secretary. The Committee requested the Party concerned to submit the text of the relevant draft legislation currently before the Parliament. The Committee agreed that it would take into account the information received when finalizing its progress review on the implementation of decision V/9m, including on whether the conditions in paragraph 5 of decision V/9m had been fulfilled.

8. At the Committee’s request, on 8 April 2016 the secretariat invited the Party concerned to submit the comments made during the open session during the Committee’s fifty-second meeting in writing as well as updated versions of the draft laws under consideration, by 14 April 2016. The Party concerned provided a written version of its comments during the fifty-second meeting as well as updated version on the draft laws on 12 April 2016.

9. On 20 June 2016, the Party concerned provided a further update on the draft legislation.

10. On 23 November 2016, the Party sent a letter informing the Committee that the proposed EIA law and proposed SEA law had been adopted by the Parliament of the Party concerned on 4 October 2016. The Party concerned also stated that on 31 October 2016, the two laws had been vetoed by the President of the Party concerned. The Party concerned provided the Committee with English translations of the text of the EIA and SEA laws as adopted by the Parliament on 4 October 2016 and vetoed by the President on 31 October 2016 (hereafter “the vetoed EIA law” and “the vetoed SEA law”).

11. On 8 December 2016, the communicant of communication ACCC/C/2004/3 provided comments on the recent legislative developments.

12. At its virtual meeting on 22 December 2016, the Committee reviewed the implementation of decision V/9m, taking into account the text of the vetoed EIA and SEA laws provided by the Party concerned. The Committee thereafter adopted its progress review on the implementation of decision V/9m and requested the secretariat to forward it to the Party concerned and the communicant of communication ACCC/C/2004/3.

Party concerned’s first progress report and further updates

13. In its first progress report submitted on 9 December 2014, the Party concerned informed the Committee that legislative proposals on a new EIA law would be prepared including both draft laws and secondary legislation. The Party concerned further reported that training courses, seminars and other education activities for stakeholders, including business organizations, NGOs, etc., would be organized in 2015 and 2016. The Party concerned also stated that public participation on the draft legislation would be conducted in line with national procedure and on the basis of an annual outline plan prepared by public authorities. The Party concerned further informed the Committee that it would implement a project entitled “Enhancing public awareness on environmental issues” in cooperation with the Organization for Social, Cultural and Economic Issues (OSCE), aimed, inter alia, at awareness-raising among the public and capacity building of the Aarhus Centres and of judges handling cases related to the Convention. The Party concerned also stated that it would provide its draft legislation by 1 March 2015.

14. In its letter dated 26 June 2015, the Party concerned informed the Committee that the draft EIA law had been registered as No. 2009a of 3 June 2015. The Party concerned reported that the draft EIA law had been open to public comment from 16 March to 16 April 2015 and that public meetings to discuss the draft law had been held on 2 April and 12 June 2015. The Party concerned also informed the Committee that a draft SEA law was under consideration by the ministries.

15. As noted in paragraph 10 above, by letter of 23 November 2016, the Party concerned reported that the Parliament had adopted both the EIA and the SEA law on 4 October 2016 and that on 31 October 2016 the President had vetoed both laws.

Communicant’s comments of 7 December 2016

16. In its letter submitted on 7 December 2016, the communicant of communication ACCC/C/2004/3 commented on the recent legislative developments, including the presidential vetoes of the proposed EIA and SEA laws. The communicant alleged that the grounds for the veto were broadly formulated, partially based on versions of the law that had since been changed, constituted a compilation of issues discussed during the earlier hearings in Parliament and demonstrated a lack of understanding of the proposals.

III. Considerations and evaluation by the Committee

17. In order to meet the requirements of decision V/9m, the Party concerned would need to provide the Committee with evidence that it has implemented the measures requested by the Meeting of the Parties in decision II/5b, and in particular that the Party concerned has implemented measures that:

- (a) Provide for public participation of the kind required by article 6 of the Convention (article 6, paragraph 1 (a), and, in connection with this, article 6, paragraphs 2 to 8, and article 6, paragraph 9 (second sentence));
- (b) Ensure that information is provided by public authorities upon request (article 4, paragraph 1);
- (c) Address the lack of clarity with regard to public participation requirements in environmental impact assessment and environmental decision-making procedures for projects, such as time frames and modalities of a public consultation process, requirements to take its outcome into account and obligations with regard to making information available in the context of article 6, in order to ensure a clear, transparent and consistent framework for the implementation of the Convention (article 3, paragraph 1).

18. The Committee expresses its serious concern at the long-standing nature of the Party concerned's non-compliance, which has now been the subject of four consecutive decisions of the Meeting of the Parties, namely decision II/5, III/6f, IV/9h and V/9m.

19. The Committee recalls that, with a view to assist the Party concerned to come into compliance, in its findings on decision III/6f of the Meeting of the Parties, adopted at its twenty-third meeting (Geneva, 31 March – 3 April 2009) ("the Committee's findings on decision III/6f"), the Committee had provided a checklist of points for the Party concerned to address in its draft legislation (see paragraph 10 of those findings). The Committee's findings on decision III/6f were sent to the Prime Minister of the Party concerned by the Executive Secretary of the United Nations Economic Commission for Europe on 16 April 2009.

20. The Committee considers that the checklist set out in paragraph 10 of its findings on decision III/6f stands as a useful reference of the points that the Party concerned should address in order to fulfil decision V/9m. Paragraph 10 of the Committee's findings on decision III/6f stated that the Committee would like to review, at the earliest opportunity, the draft legislation on the following points:

- (a) The proposed wording requiring that public authorities obtain environmental information relevant to their functions, including that on which they base their decisions;
- (b) The proposed wording requiring that information within the scope of article 4 of the Convention is provided regardless of its volume;
- (c) The proposed wording concerning the detailed requirements for informing the public, as required under article 6, paragraph 2, of the Convention, about the initiation of the procedure and possibilities for the public to participate. In particular:
 - (i) The required form of the public notice;
 - (ii) The required contents of the public notice (as compared with the requirements specified in paragraph 2 (a) to (d) of article 6); and
 - (iii) How, in case of projects having transboundary impact, the public concerned abroad is to be notified, in accordance with paragraph 2 (e) of article 6.

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- (d) The proposed wording setting specific timeframes for the public consultation process. In particular:
- (i) The time for the public to study the information on projects and to prepare to participate effectively; and
 - (ii) The time for the public to prepare and submit comments.
- (e) The proposed wording requiring that sufficient time is available for the public officials to take any comments into account in a meaningful way;
- (f) How the Government will prevent short-cutting in the decision-making procedure, i.e. parts of the Environmental Impact Assessment (EIA) being provided for evaluation and approval by the decision-making authority prior to any information being made publicly available;
- (g) The proposed wording requiring that public authorities do not limit the provision of information under article 6, paragraph 6, and article 4 of the Convention to publication of the environmental impact statement but include other relevant information to ensure more informed and effective public participation;
- (h) The proposed wording clarifying that information that applicants are required to provide in the course of the public authorities' decision-making on decisions under article 6 is generally not exempt from disclosure;
- (i) The proposed wording requiring disclosure of EIA studies in their entirety as the rule (with the possibility for exempting parts being an exception to the rule) and
- (j) The proposed wording requiring that text of decisions, along with the reasons and considerations on which they are based, are publicly available.

21. The Committee welcomes the Party concerned's progress report, received on 9 December 2014, as well as the updates provided on 26 June and 2 October 2015 and on 12 April, 20 June and 23 November 2016.

22. The Committee examines below the extent to which the vetoed EIA law meets each of the points listed in paragraph 20 (a)-(j) above.

(a) Obtain environmental information relevant to their functions

23. The Committee notes that in its report dated 22 June 2011, the Party concerned stated that it had adopted the Law "On Access to Public Information" in January 2011. According to the Party concerned, article 13 and 14 of the Law "On Access to Public Information" regulates the acquisition and dissemination of environmental information. Article 13 of the Law requires information providers, as defined in article 12, to inter alia maintain and regularly update registers of documents and to maintain chronological files of copies of official documents and records for public access. Article 14(1) of the Law sets out a list of information that information providers are obliged to disclose while article 14(2) further requires that the information identified in article 14(1) must be published on the information provider's website immediately following its emergence.

24. In the light of the above, Committee finds that the Party concerned has fulfilled the requirements of paragraph 20(a) above.

(b) Information is provided regardless of its volume (article 4 of the Convention)

25. In its report dated 22 June 2011, the Party concerned stated that the Law "On Access to Public Information" of January 2011 prevents public authorities from refusing an access to information request on the basis that it relates to a large volume of information. Having examined the grounds for refusing access to information set out in article 23 of that Law, the Committee notes that these do not seem to include a possibility to refuse access on the

basis of the volume of information requested. Rather, pursuant to article 21, paragraph 4, of the Law, if the request is for a large volume of information or requires processing a large amount of data, information providers may extend the term for addressing the request to 20 business days, specifying the reason for the extension.

26. Taking into account the above, the Committee finds that the Party concerned has fulfilled the requirements of paragraph 20(b) above.

(c) Notification of the public (article 6, paragraph 2 of the Convention)

27. The Committee notes that article 4, paragraph 1, of the Party concerned's vetoed EIA law requires that the public must be informed in an adequate, timely and effective manner in the EIA process.

(i) Form of the public notice

28. With regard to the form of the public notice, the Committee notes that article 4, paragraph 2, of the vetoed EIA law requires that notification of the proposed activity and the commencement of public consultations is published on the official website of the competent authority. In addition, article 4, paragraph 3 of the vetoed EIA law requires the developer to publish notification on the proposed activity and the commencement of public consultations in the printed mass media (at least two), the territory of dissemination of which covers the administrative territorial units likely to be affected by the proposed activity. Furthermore, article 4, paragraph 3 requires the notice to be placed on the notice boards of the local self-governing authorities or in other public places in the location of the proposed activity. The Committee further notes with appreciation that article 8, paragraph 3 of the vetoed EIA law requires that the notification is to be kept up for the entire period of the public participation.

(ii) Content of the public notice

29. As regards the content of the public notice, the Committee considers that article 8, paragraph 2 of the vetoed EIA law covers all the requirements of article 6, paragraph 2(a)-(d).

(iii) Notification in case of transboundary impacts

30. The Committee notes that article 14 of the vetoed EIA law sets out the requirements for a transboundary environmental impact assessment procedure. Article 14, paragraph 14, of the vetoed EIA law requires that the competent central authority shall disclose its decision to carry out a transboundary environmental impact assessment procedure and shall inform the public of that decision in accordance with article 4 of the vetoed EIA law.

31. In the light of the above, the Committee finds that, if the vetoed EIA Law was finally enacted in its current form, the Party concerned would meet each of the requirements set out in paragraph 20(c)(i)-(iii) above.

(d) Timeframes for public participation (article 6, paragraph 3, of the Convention)

32. Regarding the time for the public to prepare and submit comments, article 5, paragraph 7 of the vetoed EIA law provides for a timeframe of 20 working days for the public to prepare and submit comments during the EIA procedure. With respect to public consultations on the proposed activity after the submission of the EIA report, pursuant to article 7, paragraph 6 of the vetoed EIA law, the timeframe for public comments shall not be shorter than 25 working days and longer than 35 working days.

33. The Committee finds that the above timeframes are reasonable and accordingly, if the vetoed EIA law was finally enacted in its current form, the Party concerned would meet the requirements set out in paragraph 20(d) above.

(e) Sufficient time for public authorities to take comments into account (article 6, paragraph 8, of the Convention)

34. Article 2, paragraph 1(3), of the vetoed EIA law requires the competent authority to examine inter alia the information received from the members of the public through the public consultations. Article 7, paragraph 7, of the vetoed EIA law requires the competent authority to ensure the preparation of the report on the public participation process and article 11, paragraph 1 of vetoed EIA law requires the report on public consultations to be submitted to the competent authorities. Article 9, paragraph 3, of the vetoed EIA law requires the competent authority to consider and take note of the report on the public consultations when taking the EIA decision.

35. The Committee further notes that, in accordance with article 9, paragraph 6, of the vetoed EIA law, the EIA decision is to be submitted to the developer within 25 days from the end of the public participation period. The Committee considers that this timeframe should generally give the public authorities sufficient time to consider the outcome of the public participation.

36. In the light of the above, the Committee finds that, if the vetoed EIA law was finally enacted in its current form, the Party concerned would meet the requirements set out in paragraph 20(e) above.

(f) Preventing short-cutting in the decision-making procedure (article 6, paragraph 4, of the Convention)

37. With regard to preventing short-cutting in the decision-making by parts of the EIA being approved prior to being made publicly available, the Committee notes that article 4, paragraph 3 of the vetoed EIA law requires that notification of the activity subject to EIA and notice of the commencement of public consultations on the EIA report shall be made public by the developer no later than 3 working days following the submission to the competent authority. Moreover, pursuant to article 4, paragraph 9 of the vetoed EIA law, at the time of submitting the EIA report, the developer shall simultaneously provide the competent authority with the data proving the fact and date of publication of the notification on the proposed activity and the notice of the commencement of public consultations on the EIA report. Article 4, paragraph 9 also requires the competent authority to verify and add the above information to the report on public consultations.

38. The Committee considers that the above provisions should serve as useful measures to prevent short-cutting of the decision-making procedure. The Committee accordingly finds that, if the vetoed EIA law was finally enacted in its current form, the Party concerned would meet the requirements set out in paragraph 20(f) above.

(g) Information other than environment impact statement to be provided (article 6, paragraph 6 of the Convention)

39. With regard to making information other than the environmental impact statement available, the Committee notes that article 4, paragraph 5, of the vetoed EIA law requires not only the EIA report but also other information requisite for the environmental impact assessment to be made available at locations accessible to the public. Moreover, pursuant to article 4, paragraph 7 of the vetoed EIA law, the competent authority shall ensure public access to all information relevant to the decision-making process free of charge as it becomes available (subject to article 4, paragraph 8 of the vetoed EIA law, which is discussed in para. 41 below).

40. Based on the above, the Committee finds that, if the vetoed EIA law was finally enacted in its current form, the Party concerned would meet the requirements set out in paragraph 20(g) above.

(h) Information provided by developer not exempted from disclosure (article 6, paragraphs 4 and 6 of the Convention)

41. Concerning information that the developer is required to provide in the course of the public authorities' decision-making on decisions under article 6 of the Convention, article 4, paragraph 5 of the vetoed EIA law requires the EIA report and other documentation required for the EIA to be open (subject to the requirements of article 4, paragraph 8 of the vetoed EIA law) and provided by the competent authority, local self-governance authority and the developer for examination. Article 4, paragraph 8 of the vetoed EIA law stipulates that, in exceptional cases, where the documentation on the proposed activity or the EIA report contain confidential information of the developer, such information may be detached upon the reasoned request of the developer and the remaining information provided to the public. Article 4, paragraph 8 states, however, that information on the environmental impact, including quantitative and qualitative indicators of emissions and discharges, physical and biological factors of impact, use of natural resources and waste management, shall be open and access thereto shall not be restricted.

42. In the light of the above, the Committee finds that the vetoed EIA law contains no general exemption on disclosure of information that the developer is required to provide in the course of the public authorities' decision-making. Rather, article 4, paragraph 8 of the vetoed EIA law makes it clear that such information may be exempted only in exceptional cases, upon the reasoned request of the developer. Moreover, article 4, paragraph 8, makes clear that certain types of environmental information can never be kept confidential. Based on the above analysis, the Committee finds that, if the vetoed EIA law was finally enacted in its current form, the Party concerned would meet the requirements set out in paragraph 20(h) above.

(i) Disclosure of EIA studies in their entirety as a rule (article 6, paragraph 6 of the Convention)

43. With regard to the disclosure of EIA studies in their entirety, as noted in paragraph 41 above, article 4, paragraph 5 of the vetoed EIA law requires the EIA report and other documentation required for the EIA to be open (subject to the requirements of article 4, paragraph 8 of the vetoed law) and provided by the competent authority, local self-governance authority and the developer for examination. Also as noted above, article 4, paragraph 8 of the vetoed EIA law stipulates that in exceptional cases where the documentation on the proposed activity or the EIA report contain confidential information of the developer, such information may be detached upon the reasoned request of the developer and the remaining information provided to the public. Article 4, paragraph 8 states, however, that information on the environmental impact, including quantitative and qualitative indicators of emissions and discharges, physical and biological factors of impact, use of natural resources and waste management, shall be open and access thereto shall not be restricted.

44. After examining the above provisions, the Committee finds that, if the vetoed EIA law was finally enacted in its current form, the Party concerned would meet the requirements set out in paragraph 20(i) above.

(j) Making available of the decisions and underlying reasons (article 6, paragraph 9, of the Convention)

45. The Committee notes that article 9, paragraph 4, of the vetoed EIA law stipulates that the descriptive part of the EIA decision shall contain information on, inter alia, the taking into account of the EIA report and accepted and rejected comments and suggestions obtained through the public consultations. Article 9, paragraph 7 of the vetoed EIA law requires that the competent authority make the EIA decision public within 3 working days of the adoption thereof by the means set out in article 4 of the vetoed law. The same

paragraph requires that the decision be added within that timeframe to the single environmental impact assessment registry.

46. With respect to the final decision on the proposed activity, article 11, paragraph 4, of the vetoed EIA law requires the public authorities to publish “information on the final decision” within three working days of the decision and to ensure opportunities for the public to examine it. In addition, article 11, paragraph 5 of the vetoed EIA law requires that information on the decision on carrying out the proposed activity shall be added to the single environmental impact assessment registry by the competent authorities that granted the EIA decision within 3 working days of them receiving the final decision.

47. Based on the above, the Committee finds that, if the vetoed EIA law was finally enacted in its current form, the Party concerned would meet the requirements set out in paragraph 20(j) above.

Summary of the Committee’s findings

48. In the light of the above, the Committee finds that the Party concerned has fulfilled the requirements of paragraph 20(a)-(b) above.

49. The Committee further notes that if the vetoed EIA law was finally enacted in its current form, the Party concerned would meet the requirements set out in paragraph 20(c)-(j) above. The Committee therefore calls upon the Party concerned to finalize the enactment of the vetoed EIA law as soon as possible.

50. However, in the absence of the final enactment of the vetoed EIA law or any other legislative measures that meet the requirements set out in paragraph 20(c)-(j) above, the Committee finds that the Party concerned has not yet fulfilled the requirements of paragraph 20(c)-(j) above and accordingly has not yet fulfilled the requirements of decision V/9m.

IV. Conclusions and recommendations

51. In the absence of the final enactment of the vetoed EIA law or any other legislative measures that meet the requirements set out in paragraph 20(c)-(j) above, the Committee finds that the Party concerned has not yet fulfilled the requirements of decision V/9m.

52. Moreover, in the absence of legislative measures fulfilling the requirements of decision V/9m, the Committee finds that the Party concerned has not met the requirements of paragraph 6(b) of decision V/9m that, if met, would have enabled the caution in place since the fourth session of the Meeting of the Parties to be lifted. The caution thus remains in place.

53. In order for the Committee to prepare its report to the sixth session of the Meeting of the Parties on the implementation of decision V/9m, the Committee invites the Party concerned by 20 February 2017 to finalise the enactment of the vetoed EIA law or otherwise to adopt alternative legislative measures that will ensure full compliance with the requirements of the Convention, including those set out in paragraph 20(c)-(j) above.

54. The Committee informs the Party concerned that all measures necessary to implement decision V/9m must be completed by, and reported upon by no later than 20 February 2017, as that will be the final opportunity for the Party concerned to demonstrate to the Committee that it has fully met the requirements of decision V/9m.

55. The Committee also informs the Party concerned that, in the light of the long-standing nature of the Party concerned’s non-compliance, if legislative measures to fully meet the requirements of decision V/9m are not by that date in place it may recommend to

the Meeting of the Parties at its sixth session to maintain the caution currently in place and in addition, to suspend the special rights and privileges accorded to Ukraine under the Convention.
