

**To:** EU Ombudsman

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**Re:** Complaint Ref. 2587/2009/JF

**Date:** 9<sup>th</sup> May 2010

**Note:** This Submission is additional to e-mail clarification of 27<sup>th</sup> April and book submitted by e-mail on 9th May entitled "Bringing the Irish Administration to Heel" (hereafter referred to as the "Book").

### **The Complaint**

In my Complaint of 18<sup>th</sup> October 2009 I stressed that *"one of the founding principles of the EU is the 'principle of proportionality'. This is being routinely abused by Member States inappropriately supporting 'renewable technologies', such as wind turbines, when far better options within the scope of EU legislation exist to achieve the same and even better environmental performance at a far reduced cost basis"*.

I highlighted that *"if the present policies, which are clearly supported by the Energy Commissioner, are allowed to continue the consequences for the economic viability of these Member States, which are inappropriately implementing several Directives within the Acquis relating to:*

- *Dissemination of correct information to the public;*
- *Application of EU guidelines on funding for State Aid for Environmental Protection*
- *The principle of proportionality.*
- *Support for an open economy with free competition, favouring an efficient allocation of resources.*

*will be devastating"*.

I also highlighted the resulting consequences which were having a *"devastating impact on potential career opportunities in Ireland for which there are effectively none and major corporations (Statoil) are having to state publicly that the 'political risks' of doing business there are too high as the implementation of the Environmental Acquis is being so abused"*.

With regard to what I considered the EU Commission had done wrong I stated:

- *Failure to support the proper implementation of the legislation in the relevant Member States in particular the Environmental Acquis and the Directives relating to renewable energy. No evidence of enforcement action is available that should reflect the inappropriate implementation and the inappropriate 'business opportunities' that are occurring.*

## **The Evidence of Improper Implementation of EU Legislation**

When one considers the summary “The Failures to Properly Implement EU Environmental Legislation” included in the e-mail on the 27<sup>th</sup> April and the content of “Book” itself, what is occurring in Ireland is a gross example of maladministration. There is no doubt that EU Environmental and Energy legislation is, as is happening in the other Member States <sup>(1)</sup>, being hijacked for ‘inappropriate business opportunities’ <sup>(2)</sup> and political opportunism.

## **Who is Responsible for the Proper Implementation of EU Legislation?**

There is obviously a duty of the Member State to adhere to the Principles of Good Administration when applying EU and National Legislation. However, it is not a perfect world, especially with regard to compliance of the Irish Republic with EU Legislation. In the summer and autumn of 2008 I was engaged with the dissemination of false information on environmental issues by the Irish media, in particular in relation to the controversial Corrib gas project. As I had exhausted all the complaints processes in Ireland and had seen one element of maladministration after another, I contacted the EU Commission’s office in Dublin on the 6<sup>th</sup> November 2008. I highlighted the prohibitive cost and timeframes involved in taking a legal action through the Irish legal system and stated I was not an expert on media issues and ‘Access to Justice’ in this situation. I therefore requested advice on any areas where the EU would have competency in such matters <sup>(3)</sup>.

My reply from the European Commissions Representation in Ireland (Eurojus Service) on the 9<sup>th</sup> December 2008 was a suggestion that I forward my comments on to Commissioner Wälstrom’s office. This I did on the 18<sup>th</sup> December 2008, summarising the issues, including the cost of ‘Access to Justice’ in Ireland and the failure of Ireland to ratify the Aarhus Convention. I received a reply from the Head of Cabinet of Vice President Wälstrom on the 21<sup>st</sup> January 2009 (PC/erw A(08)3591D(09)19).

In late 2009 I was also researching and highlighting the enormous financial implications associated with the Irish wind energy programme and the devastating impact it would have on the Irish economy, see Sections 6.2 and 7.2 of the “Book”. However, at national level nobody in the Administration was interested or willing to respond. Therefore on the 7<sup>th</sup> February 2009 I replied to the Head of Cabinet at Commissioner’s Wälstrom’s office, highlighting the dissemination of false information not only on the Corrib project, but repeatedly by the Irish Administration with regard to the wind energy programme and the fundamental breach of the Principle of Proportionality by this programme, i.e. *“while targets can of course be set in terms of emissions of greenhouse gases to atmosphere the measures that implement them must be proportionate and in accordance with the principles of an open market economy with free competition, favouring an efficient allocation of resources (Article 120)”*.

I did comment in the letter of the 7<sup>th</sup> February that while I had referred to the content of the Lisbon Treaty, I fully acknowledged that while this treaty had been signed by

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<sup>1</sup> The “Book” also contains a number of references to the situation in Germany.

<sup>2</sup> See Sections 5.5 and 6.4 of the “Book”.

<sup>3</sup> After the June 2008 rejection of the Lisbon Treaty in Ireland the EU Commission even prepared a document on “The Changing Media Landscape in Ireland and its implication for public opinion about the European Union”. However, very little else has been done about the incessant reporting of false information in the Irish Media.

the Irish State it has not yet been ratified by the Irish State. However, many of the issues in the Lisbon Treaty highlighted in that letter were contained in previous treaties. Furthermore I referred to the Right to Good Administration which included:

- The right to write to the Union and receive a reply.
- That the Union must make good any damages caused by its institutions or its servants in performance with its duties, in accordance with the general principles common to the laws of the Member States.

I also referred to:

- Article 173 (Industry) which requires that the actions of the Union and Member States shall be aimed at encouraging an environment favourable to initiative and to the development of undertakings throughout the Union, particularly small and medium-sized undertakings.
- Article 41 of the Charter of Fundamental Rights of the European Union (Lisbon Treaty). This clearly states that the administration has to give reasons for its decisions.

COM(2002) 725 on “Better Monitoring of the Application of Community Law” clearly highlights how the Commission is the Guardian of the Treaties and has a duty to remind the Member States of their commitments and to seek the best instruments at all times. The document clearly states that merely enforcing the law against infringement is not enough; there is a need for prevention also. This is in fact the kernel of my complaint; not only was the evidence of active enforcement of the Environmental Acquis in Ireland extremely limited, but there was no evidence of enforcement to ensure the proper implementation according to the Principle of Proportionality of EU Directives relating to renewable energy in Europe as a whole. When I raised these issues with the EU Commission there was no active engagement to investigate them. Instead that burden was left to me as a concerned citizen.

I fully accept that COM(2002) 725 states that “it is not only the European and national institutions that are concerned by all this. Ultimately this communication in many respects concerns the citizens themselves. Through information, participation and access to justice, they are to be actors of a Community based on the rule of law”. However, in my complaint to the EU Ombudsman I did highlight *“the Aarhus Convention, designed to be a check and balance, is clearly not functioning - the Irish State for instance simply can't be bothered and a 'gangster' administration is siphoning off enormous sums of money from the taxpayer, providing huge 'financial support to friends' and refusing to provide access to information, public participation and access to justice”*.

In my opinion not only is the situation in Ireland with regard to the Aarhus Convention unacceptable, see Chapters 4 and 6 and Sections 7.2, 7.4, 7.6, 9.1 and 9.2 of the “Book”, but every evidence points to the fact that there was a hands off approach by the EU Commission to ensuring Aarhus Convention ratification and implementation in Ireland. I am pleased that finally on the 18<sup>th</sup> March 2010 my information has been registered as a complaint in CHAP and is currently being examined by the Commission services. However, a huge amount of effort and not inconsiderable expense has been involved in compiling the amount of documentation to date, such as my summary of 24<sup>th</sup> February 2010 to Patrick Wegerdt (Enclosure 1b – annex of the reply from Commission S2010-120127). There is also a considerable timeframe involved, for instance with regard to my Appeal against the State Broadcaster

(CEI/09/0015) this was accepted on the 5<sup>th</sup> November 2009, yet I only received a preliminary judgement on 20<sup>th</sup> April <sup>(4)</sup> and am awaiting the final judgement to be published on the website of the Commissioner for Environmental Information. This certainly helps with addressing some of the media concerns I raised back in late 2008, but it takes a considerable amount of time, effort and money to demonstrate this and other systematic non-compliances with the EU Environmental Acquis.

The appalling compliance record of the Irish State has been self evident for many years, as has been the complete failure to address Aarhus related Rights of EU Citizens in this jurisdiction. There should have been a pro-active approach by the EU Commission with regard to enforcement and prevention of infringements in Ireland. There wasn't and I consider it unreasonable that essentially paid officials are 'sitting back' waiting for a citizen with the professional skills and drive, such as myself <sup>(5)</sup>, to provide them with this level of detail before they are examined by the Commission services.

### **Right to Write to the Union and Receive a Reply**

The European Code of Good Administrative Behaviour was adopted by the European Parliament in September 2001.

#### *Article 13 - Reply to letters in the language of the citizen*

*The official shall ensure that every citizen of the Union or any member of the public who writes to the Institution in one of the Treaty languages receives an answer in the same language. The same shall apply as far as possible to legal persons such as associations (NGOs) and companies.*

#### *Article 14 - Acknowledgement of receipt and indication of the competent official*

*1. Every letter or complaint to the Institution shall receive an acknowledgement of receipt within a period of two weeks, except if a substantive reply can be sent within that period.*

*2. The reply or acknowledgement of receipt shall indicate the name and the telephone number of the official who is dealing with the matter, as well as the service to which he or she belongs.*

*3. No acknowledgement of receipt and no reply need be sent in cases where letters or complaints are abusive because of their excessive number or because of their repetitive or pointless character.*

I consider the above as completely fair and reasonable. I do not consider my letter of 7<sup>th</sup> February 2009 fell into the category of Article 14 (3) above. Furthermore I consider it should have been dealt with by a reply given the seriousness of the matter which was raised and the evidence of systematic dissemination of false information by the Administration of the Irish State. This did not occur.

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<sup>4</sup> RTE claimed exemption from Directive 2003/4/EC due to their 'Journalistic Functions' and refused to reply to my request for information. The preliminary judgement stated that such functions had no bearing on the implementation of the Directive and clarified that RTE had no established benchmarks for reporting on environmental issues, such as definitions of pollution or risk or defined training of personnel. Furthermore they had no policy with regard to their obligations under the Aarhus legislation for dissemination of environmental information.

<sup>5</sup> See Chapter 2 of the "Book".

When I again contacted the EU Commission's office in Dublin on 10<sup>th</sup> August 2009 I finally received a reply from DG Environment Unit A.2 Infringements on 18<sup>th</sup> September. I had already transmitted a considerable amount of information relating to breaches of EU Environmental Legislation in Ireland, especially the inappropriate wind energy programme, which threatened the economic viability of the State. I expected this to be investigated.

*Article 15 - Obligation to transfer to the competent service of the Institution*

- 1. If a letter or a complaint to the Institution is addressed or transmitted to a Directorate General, Directorate or Unit which has no competence to deal with it, its services shall ensure that the file is transferred without delay to the competent service of the Institution.*
- 2. The service which originally received the letter or complaint shall notify the author of this transfer and shall indicate the name and the telephone number of the official to whom the file has been passed.*
- 3. The official shall alert the member of the public or organisation to any errors or omissions in documents and provide an opportunity to rectify them.*

The bottom line is that well over a year after I first contacted the EU Commission's services with clear evidence of improper implementation of the renewable energy programme in Ireland and other countries, I am still awaiting to be contacted by the relevant 'competent service' of the institution. Furthermore with regard to the reply of the 18<sup>th</sup> September:

- "If you have a specific complaint concerning a potential breach of EU environmental legislation in Ireland then you may also raise this directly with us, providing us with a summary of the issues and the relevant environmental legislation you consider has been breached".

There was simply no indication that the level of input required by myself amounted to what was finally accepted on 24<sup>th</sup> February 2010 (Enclosure 1b – annex of the reply from Commission S2010-120127). Furthermore as I highlighted on my e-mail clarification to your office on 27<sup>th</sup> April, a considerable fraction of the documentation submitted was simply ignored, in particular the highly relevant correspondence of 13<sup>th</sup> November 2009.

**The Renewable Energy Directives and the Principle of Proportionality**

As I stated in my complaint form with regard to what the Institution should do to put things right: *Apply proper and effective enforcement action in the Member States. The principle of proportionality must be applied on a daily basis, particularly when 20% of the EU energy market has been 'removed' from the normal checks and balances of the 'social market economy'.*

I have dealt the Principle of Proportionality and the Renewable Energy programme in Sections 3.3, 3.4, 5.8, 5.9, 6.9, 8.1 and 9.1 of the "Book". If we consider the recital to Directive 2001/77/EC it states:

- "The Community recognises the need to promote renewable energy sources as a priority measure given their exploitation contributes to environmental protection and sustainable development. In addition this can also create local

employment, have a positive impact on social cohesion, contribute to security of supply and make it possible to meet Kyoto targets more quickly”.

Despite there being a clear linkage to environmental protection, DG Environment clearly abdicates any connection with the Directive and states it is a matter for DG Energy. While all the above aims are clearly admirable, they have to be completed in a transparent manner, such that when considerable additional charges are levied on a consumer, the benefits can clearly be demonstrated on request.

#### *Article 6 - Proportionality*

*1. When taking decisions, the official shall ensure that the measures taken are proportional to the aim pursued. The official shall in particular avoid restricting the rights of the citizens or imposing charges on them, when those restrictions or charges are not in a reasonable relation with the purpose of the action pursued.*

*2. When taking decisions, the official shall respect the fair balance between the interests of private persons and the general public interest.*

#### *Article 18 - Duty to state the grounds of decisions*

*1. Every decision of the Institution which may adversely affect the rights or interests of a private person shall state the grounds on which it is based by indicating clearly the relevant facts and the legal basis of the decision.*

*2. The official shall avoid making decisions which are based on brief or vague grounds or which do not contain individual reasoning.*

*3. If it is not possible, because of the large number of persons concerned by similar decisions, to communicate in detail the grounds of the decision and where standard replies are therefore made, the official shall guarantee that he subsequently provides the citizen who expressly requests it with an individual reasoning.*

As I have clearly highlighted over and over again in all the documentation I have produced to date, a MW from one renewable energy source is not the same as a MW from another, even when they are feeding into the same electricity grid. There are enormous differences not only in cost, but in environmental benefits. There are means of assessing these; the EU has methodologies for internal and external costs. As the recital to Directive 2001/77/EC states:

- “The need for public support in favour of renewable energy sources is recognised in the Community guidelines for State aid for environmental protection, which, amongst other options, take account of the need to internalise external costs of electricity generation. However, the rules of the Treaty, and in particular Articles 87 and 88 thereof, will continue to apply to such public support”.

If we consider Ireland under the REFIT I scheme (State aid N 571/2006 – Ireland RES-E Support Scheme) then 1,450 MW of RES-E have been approved by the EU Commission. Yet the current situation is that:

- In March 2010 there were 1,260 MW of wind energy connected to the Irish grid. In addition, there were 1,300 MW under construction and a further 3,990 MW would be sanctioned under the next round of allocations.

- As per the Appeal to the Commissioner for Environmental Information (CEI/09/0016), there is no Strategic Environmental Assessment (Directive 2001/42/EC) for the Renewable Energy Programme, pricing basis and justification for the tariffs or specific details on alternatives available on request.

Simply put why is the consumer expected to pay for these contracts that extent to a 15 year supply period? This is not a question that is solely limited to REFIT I in Ireland. There is simply no adequate documentation to justify the enormous costs that have and will continue to be incurred in many Member States or any evidence that proportionality was applied by officials of the EU Commission. In Ireland the evidence is clear in that the necessary environmental legislation was not complied with.

### **Working together with other Environmental NGOs which share similar aims to myself**

I accept that this is indeed an admirable issue. However, not only is there a vacuum of NGOs in Ireland, as recognised by Representatives from DG Environment. The ones that are established are characterised by a generally "anti-development" approach, which does not in any way reflect my views, which are entirely in favour of "sustainable development carried out within EU and national legislation leading to a well protected environment and sustainable employment, which is so badly needed in Ireland". Indeed when I contacted the European Environmental Bureau (several times) and the Irish Environmental Network, highlighting the Aarhus related documentation I was generating, they declined to reply to my e-mails.

As I stated in my reply to Patrick Wegerdt on 19<sup>th</sup> September:

- However, there are also others in Ireland, some who have worked on EU Technical Aid projects, are realising with horror the extent of non-compliance in this country in which many elected and non-elected paid officials of the State are acting with total disdain for the legal framework and cherry picking what suits them with no accountability to the public.

There is an enormous 'pool' of talent in individuals who work in industry and industrial development to aid in the proper implementation of EU legislation, I have not seen any efforts by the EU Commission or the existing NGOs to cultivate this resource. I believe it should be developed and the documentation I have prepared to date and articles I have published, are aiding in this regard. Hence my specific request that my complaint be treated in public. One example relates to a request under Directive 2003/4/EC submitted by Oisín O'Sullivan, see Section 7.6 of the "Book", he failed to get a reply. Since then he has resubmitted the request and this time a reply was received on the 27<sup>th</sup> April, an internal review is now being requested. Another request has been submitted by the engineer Jerry Waugh, this related to environmental justification for the ban on generation of electricity from nuclear fission under the 1999 Electricity Act. This has been to two Government Departments and the reply received on 4<sup>th</sup> May demonstrated that no such environmental information was ever generated. I have also advised the NGOs, ProGas Mayo and BENE, on EU environmental legislation. BENE are now submitting a request to demonstrate non-compliance of the Irish State with the Euratom Treaty <sup>(6)</sup>.

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<sup>6</sup> See attached letter from BENE highlighting the assistance I have provided them on understanding the scope and content of EU Environmental Legislation.

In my own case it took me two months of requesting information and referring to Aarhus before I finally got a reply that acknowledged the Irish implementation in S.I. No. 133 of 2007. The overwhelming number of requests I submitted since then were not replied to. Indeed I am not alone in this regard; the public simply have not been informed of their Rights under this legislation. Neither have Public Bodies implemented the necessary measures for compliance with the legislation. Even when the information relating to non-compliance is obtained, often at a cost of €150 per Appeal, what does one do with it? There is no Access to Justice available in Ireland and when one sends the resulting information to DG Environment, there does not seem to be any real interest. Not all individuals are as persistent as myself. If the EU Commission wants NGOs to contribute to enforcement of EU Legislation in Ireland then they aren't giving them much incentive. People are entitled to see how the system works in practice and will benefit the situation; to date this is not the case. To me it is just completely unacceptable that after an enormous amount of work highlighting non-compliances with several Directives, all I have got is a commitment that:

- Where information provided by the complainant identifies cases where issues of non-compliance with the provisions of Directive 2003/4/EC are raised and the review mechanisms of Article 6 of the Directive have been exhausted, the Commission will raise these with the Irish authorities directly under the EU Pilot scheme”.

I would also point out that Directive 2003/4/EC has two components, (a) Access to Information on Request and the (b) Dissemination of Information on the Environment in order to achieve the widest possible systematic availability. Since the end of 2008 I have been repeatedly highlighting to the EU Commission the dissemination of false information on the environment by Irish public bodies. However, Article 6 of Directive 2003/4/EC solely relates to component (a), i.e. refusal to provide access to information. It is certainly not clear from the above if the Commission intends to finally take measures related to failures to disseminate correct information on the environment, such as informing the public of the rights they enjoy under Directive 2003/4/EC, self evident failures which never needed to be highlighted by Irish NGOs.

## **Conclusion**

The definition of maladministration in the Ombudsman's 1997 report is

- "Maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it".

The situation in Ireland and several other Member States is that a massively expensive renewable energy programme has been implemented, with even more to follow, in which there has been simply no regard to the Principle of Proportionality or ensuring the “principles of an open market economy with free competition, favouring an efficient allocation of resources (Article 120).”

If we consider the implementation of the Environmental Acquis in Ireland, the regulatory system is now so politically compromised that there is no inward investment and NGOs are constantly frustrated that they have no means to improve the situation. Ireland has the worst compliance record in the EU and there is no evidence of improvement. Preventive and enforcement measures have been of such limited nature that the Administration takes pride in that it has never been fined by the EU for environmental non-compliance.

However, the most disturbing aspect is that there is simply no appreciation that what we are dealing with is real people not documentation. People, who have lost major investment of time and money in business ventures due to maladministration related to EU legislation. Who are expected to pay for many years to come, huge additional costs for energy, costs that could have been avoided by proper application of the legislation. Indeed many of us in industrial development in Ireland see no future prospects of work here and a number of personal friends are now unemployed with limited opportunities and the prospects of uprooting their families.