Submissions of the European Commission, on behalf of the European Union, on Communication ACCC/C/2010/54 Concerning the Renewable Energy Progamme in Ireland

I. INTRODUCTION

A. Mr Swords' Complaints

1. In 2009, Mr Pat Swords initiated correspondence with various Commission departments about the application of the Union's environmental law and policy in Ireland. On Sunday 21 February 2010, he lodged a complaint with the Commission ("the initial complaint") in the form of an email to Mr Patrick Wegerdt, an official of the Commission's Directorate-General for the Environment ("DG ENV"). There were no attachments to this email. However, it was part of an email trail containing two messages of 17 February 2010: the first was a complaint of 17 February 2010 from Mr Swords to the Taoiseach (Prime Minister of Ireland) and Mr Eamon Ryan, the then Minister of Communications, Energy and Natural Resources, and others; and the second was an acknowledgement of receipt of the same date from Mr Ryan's Private Secretary. Together with all the subsequent correspondence between the Commission and Mr Swords mentioned in these submissions, the initial complaint is reproduced in Annex I to the present submissions.[1]

2. What is immediately striking about the initial complaint is its general and garbled nature. What does emerge are Mr Swords' allegations that: (i) "the Irish Administration has no intention of complying with the Aarhus Convention"; (ii) Ireland was in breach of Directive 2003/4 on public access to information ("the Directive on access to information"); (iii) Ireland was in breach of Directive 2001/42 on the assessment of the effects of certain plans and programmes (generally known as the "Strategic Environmental Assessment Directive" or "SEA Directive"); (iv) citizens of the Union in Ireland "are being denied access to justice" in breach of the Aarhus Convention; and (v) the Irish administration was infringing the Irish legislation on corruption.

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[1] In Part VII of his Communication to the Aarhus Convention Compliance Committee, he specifically stated: "I have no requirement to keep any of the material confidential". Moreover, while the Commission appreciates that the Compliance Committee does not wish to receive excessive documentation, the Commission is compelled to submit this correspondence in its entirety, given that the Communication relates in large part to the Commission's alleged failure to respond adequately to Mr Swords' complaint.

3. As to point (iv), Ireland – alone amongst the Member States – is not party to the Convention and Article 9(3) of the Convention is not directly applicable.[2] In any case, Mr Swords subsequently appeared to abandon the allegation is point (iv) and crucially it is not mentioned in his Communication to the Aarhus Convention Compliance Committee ("the Communication"). Finally, the allegation in point (v) does not relate to the Aarhus Convention or Union law and is therefore not a matter for the Commission.

4. Neither the initial complaint nor the appended exchange of emails dated 17 February 2010 contained any mention of Directive 85/337 on the assessment of certain public and private projects on the environment ("the EIA Directive"), which has subsequently taken on considerable importance in this case. Nor do they contain any mention of wind energy.

5. Most importantly of all, no attempt was made in the initial complaint to substantiate any of these allegations in any way.

6. Early on Monday 22 February 2010 (the day after the initial complaint was sent), Mr Wegerdt wrote to Mr Swords asking him to specify the details of his complaint. His complaint was duly registered under the CHAP system as CHAP(2010)00645.[3] A voluminous body of correspondence between him and DG ENV followed. He sent approximately 60 emails, some of which contained multiple attachments: requests for clarification from DG ENV prompted further complaints from Mr Swords, so that it would be more accurate to speak of a bundle of complaints rather than of a single complaint; and unfortunately these fresh emails failed to clarify the nature of his grievances. All this correspondence, which runs to hundreds of pages and is to be found in Annex I hereto, is testimony to the diligence showed by DG ENV in handling the complaint. In addition, on 3 December 2010 a group of DG ENV officials working on the file together with their counterparts from the Directorate-General for Energy (DG ENER) had a meeting with Mr Swords.

7. In short, DG ENV devoted considerable time and resources to his complaint despite his failure to clarify his allegations and to supply any evidence to support them.

8. Another feature of Mr Swords' complaint is the virulent hostility to renewable energy, and specifically wind energy, which he expressed. For instance, in his email of 5 April 2010 he speaks of the capital cost of Ireland's renewable

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[2] Case C-240/09 Vlk (judgment of 8 March 2011)

[3] CHAP is short for "Complaints Handling - Acceuil des Plaignants". It was set up in 2009 as an electronic system to register and manage complaints and inquiries regarding the application of EU law by Member States. Each registered complaint is considered by the competent services to decide whether to transform it into a presumed infringement or not.

energy programme which is "in excess of €30 billion ... [and] will rise to €3 billion per annum and at best it will avoid about €10 billion per annum in environmental damage to the planet ...". In the same message, he argues that "the same environmental benefits could have been achieved by incineration of waste and anaerobic digestion of animal slurries at a capital cost of about €1 billion". Another example may be found in his email of 8 May 2011 in which he laments the "unknown economic costs and glaring technical limitations" of wind energy. He appears to believe that the promotion of wind energy is incompatible with the Aarhus Convention, but nothing in the Convention in any way supports that view. What is more, it is generally recognised that renewable energy, and wind energy in particular, is preferable from the environmental point of view to non-renewable energy. That is why Directive 2009/28 of 23 April 2009 on the promotion of use of energy from renewable sources[4] sets national binding targets for the share of renewable energy in gross final consumption and Article 194(1)(c) TFEU lists the development of "renewable forms of energy" as one of the aims of the Union's energy policy.

9. In any event, the fact is that the Commission's investigation has not brought to light any breach of Union law by that State which has any bearing on Mr Swords' complaint (see Part V below). In other words, his allegations are unsubstantiated.

10. On 6 April 2011, DG ENV wrote to Mr Swords stating that, on the basis of the information which he had supplied, it was not in a position to establish clearly any infringement of EU law. The letter also pointed out that Mr Swords' complaint (or complaints) was still not clear and suggested that, if he wished to pursue the matter, he should send a fresh complaint in a more intelligible form with the appropriate attachments. Instead of acting on that suggestion, Mr Swords sent yet another email on 8 May 2011 containing sweeping and unsubstantiated statements. The following passage provides a clear illustration of this:

> "... I have informed yourselves of ...
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> - With regard to the development of policies, the conduct of public participation which can only be described as a farce. This was clearly documented not only with regard .to the absence of any Strategic Environmental Assessment for the renewable energy programme, but also with regard to the public participation for the Offshore Renewable Energy Development Plan, the Climate Change Response Bill and the Waste Policy."

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[4] 2009OJ L140/16.

Such language is not helpful, since it does not enable the Commission to take any action. Accordingly, DG ENV wrote a short letter to Mr Swords on 20 May 2011 announcing that, since his latest missive did not change DG ENV's analysis of the matter, it would propose to the Commission that the file on his complaint be closed.

11. For good measure, it should be recalled that on 18 October 2009 Mr Swords also made a complaint to the Ombudsman that the Commission had failed to deal properly with his correspondence of 5 October 2009 concerning possible infringements of EU environmental and energy law. This complaint was registered by the Ombudsman in January 2010 (Ref 2587/2009/JF). On several occasions, the Ombudsman requested information from the Commission which the latter duly supplied. The Commission has not heard from the Ombudsman since 22 December 2010 when it last wrote to him.

B. Mr Swords' Communication

12. On 15 October 2010, Mr Swords lodged his Communication with the Compliance Committee. As the Commission understands it, his allegations, in so far as they are relevant to the Aarhus Convention at all, are that the Union infringed the Convention in the following ways:

(i) The Commission approved an Irish State aid for wind energy although Ireland had allegedly failed to respect the SEA and EIA Directives (and perhaps also the Directive on access to information);

(ii) The Irish National Renewable Energy Plan under Article 4 of Directive 2009/28[5] failed to comply with the SEA Directive and the Union is responsible for this.

(iii) The Commission granted €110 million for the construction of an interconnector between Ireland and the United Kingdom, despite Ireland's alleged failure to comply with the Directive on access to information and the SEA and EIA Directives with regard to that project (and perhaps also the wind farms intended to feed electricity to that interconnector). (These Directives, which are the instruments by which the Convention has been implemented in Union law, will be referred to here as "the three Directives".)

(iv) The Commission was not sufficiently vigilant in pursuing the alleged infringements by Ireland of the three Directives mentioned in his complaints to the Commission.

Each of these points will be considered in Parts II, III, IV and V below respectively.

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[5] Directive 2009/28/EC of the European Parliament and of the Council on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (2009 OJ L 140).

13. The other assertions in the Communication have no bearing on the substance of the Convention. For a start, it is shot through with virulent criticism of renewable energy, and wind energy in particular. This is evident in the very first sentence which reads: "The Republic of Ireland is progressing a massively expensive renewable energy programme of predominantly wind energy ..." Similarly, the next paragraph begins: "The capital costs alone of this programme at over €30 billion are staggering." Quite apart from the fact that his views on this matter are directly at variance with the established policy of many Governments and of bodies such as the European Union, they have nothing to do with the Aarhus Convention.

14. Mr Swords' repeated accusation that the Irish authorities were "routinely engaged in disseminating false information" (Parts IV and V of his Communication) is possibly linked to his animosity towards renewable energy. This charge is not readily understandable, even if one reads the Decisions of the Commissioner for Environmental Information referred to in Part IV. In all probability, Mr Swords' grievance is that the Irish authorities published information about the benefits of their renewable energy programme which he believes to be incorrect. Again, such an allegation is unrelated to the Convention. In any case, his claim that Ireland has been "disseminating false information" is both lacking in the requisite clarity and wholly unsubstantiated. Quite apart from those considerations, it is by no means obvious – to put it at its lowest – that the Union would have any power to take action against a Member State which broadcast or published information about the advantages of renewable energy.

15. Similarly, in Part VI of the Communication it emerges that his strictures about Ireland's alleged failure to comply with the Directive on access to information are in reality concerned with the fact that "the information requested does not exist". That is the case, for instance, with respect to his "request for Cost Benefit Analysis in relation to renewables programmes, request for information regarding the economic impacts of the wind energy programme, its costs, subsidies required for job creation and industrial grants, resulting electricity prices, loss of competitiveness in other manufacturing sectors and resulting job losses". Nothing in the Aarhus Convention or the three Directives requires the preparation of such reports or studies, although such documents, if they are created, do constitute "environmental information" within the meaning of Article 2(3)(b) of the Convention.

16. The Commission respectfully submits that the Communication is inadmissible in so far as it relates to matters outside the scope of the Convention. Annexed to the Committee's letter to the Commission of 28 January 2011 is its Preliminary Determination on the Admissibility of the Communication dated 17 December 2010. The Committee made a preliminary finding to the effect that the Communication did not fall under any of the grounds of

inadmissibility set out in paragraph 20 of the annex to Decision I/7. However, it refrained from taking even a provisional position on the "further possible criterion" of inadmissibility mentioned in the opening section of this annex, namely "(e) lack of relevance to the subject matter of the Convention". The Commission would contend: first, that this should indeed be regarded as a ground of inadmissibility, since it is pointless to devote time and energy to considering grievances which have no bearing on the Convention; and, second, that those assertions in the Communication referred to in paragraphs 13 to 15 above are indeed inadmissible on this ground.

17. Furthermore, according to paragraph 21 of the annex to Decision I/7, the Committee "should at all relevant stages take into account any available domestic remedy unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress'". In the above-mentioned Preliminary Determination of 17 December 2010, the Committee has stated:

> "The Committee's view is that this provision does not imply any strict requirement that all domestic remedies must be exhausted, i.e. the Committee would not be precluded from considering a case even where the application of the remedy was not unreasonably prolonged. On the other hand, the failure by a communicant to make use of available domestic remedies might be grounds for the Committee to determine that the matter should be pursued at the level of domestic procedures rather than (for the time being) through the compliance mechanism."

18. Even taking into account the flexible nature of paragraph 21 as applied by the Committee, the Commission questions whether the Communication is fully consonant with that provision. In particular, the proper forum for Mr Swords' claim (or claims) regarding access to documents would have been the Irish courts.

19. Finally, Mr Swords' claim that a breach of Article 5 of the Convention has occurred (Part V of the Communication) is entirely unsubstantiated. Indeed, ironically, the Communication contains numerous links to the websites of various Irish public authorities which are replete with environmental information much of which relates to renewable energy. Consequently, like many assertions in the Communication (see further below), this claim is not "supported by corroborating information" as required by paragraph 19 of the annex to Decision I/7. Besides, the Communication does not specify the matters to which this allegation of a breach of Article 5 relates apart from Ireland's National Renewable Energy Action Plan. Accordingly, nothing further will be said about this accusation in these submissions except in Part III below.

C. The Extent of the Union's Competences and Liabilities

20. By virtue of Article 216(2) TFEU, since the Union has ratified the Convention, all the Member States are bound by it. The extent of the Union's competences and liabilities is spelt out in the Declaration made by the Community on ratification (2005 OJ L124/3). The international responsibility of the Union under the Convention for the acts and omissions of Ireland is commensurate with this competence. To succeed in his claim against the Union in respect of these acts and omissions, Mr Swords would need to establish that these acts and omissions relate to matters for which the Union is responsible under the Aarhus Convention. This he has failed to do.

D. Information as to Developments within Ireland

21. The Communication raises a number of questions of fact relating to developments within Ireland, and in particular to acts of the Irish authorities. Much of this information was not previously in the possession of the Commission. Accordingly, the Commission has inevitably been in regular contact with the Irish authorities in order to obtain that information.

22. Even though Ireland has yet to ratify the Convention, the Commission would venture to suggest that the Compliance Committee might wish to establish direct lines of communication with Ireland, should it wish to obtain further information as to the acts of the Irish authorities and other developments in Irish territory.

23. In any case, as will be explained in detail below, the Commission has been most assiduous in pursuing alleged or actual breaches of the relevant Directives by Ireland, but Mr Swords has failed to substantiate his allegations.

II. STATE AIDS

24. Mr Swords maintains that the Union is in "non-compliance" with the Aarhus Convention by reason of the fact that the Commission approved Ireland's REFIT programme of aid to support electricity sourced from renewable energy. This scheme, which had been notified pursuant to Article 88(3) EC (now Article 108(3) TFEU), was approved by the Commission by the decision of 25 September 2007 annexed to his Communication. The Commission assessed that aid scheme under the State aid provisions applicable at the time, including the Community Guidelines of 2001 on State aid for environmental protection.[6]

25. Had this aid been linked to any breach by Ireland of the three Directives or the Aarhus Convention, the Commission would have commenced

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[6] 2001 C37/3

infringement proceedings pursuant to Article 258 TFEU. However, as explained at length below, this was not the case.

III. IRELAND'S RENEWABLE ENERGY PLAN

26. In his Communication, Mr Swords criticises the Irish renewable energy programme, in particular the increase in electricity originating from wind energy in Ireland. He argues that the implementation of Directive 2001/77/EC[7] in Ireland "has been nothing but a complete Wind Energy programme" and that the Union has granted financial support to this programme, despite what he regards as its failure to comply with the requirements of Pillars I and II of the Aarhus Convention.

27. Mr Swords further alleges that the Irish Renewable Energy Action Plan "simply does not quantify any environmental benefits, such as greenhouse gas reductions, any alternatives considered to achieve these benefits or any details related to Public Participation". In his view, this alleged shortcoming constitutes a breach by the Union of Article 5 of the Aarhus Convention.

28. In response to these allegations the Commission would first emphasise that it is for Member States to determine which renewable energy sources among those listed in Article 2 of the Directive 2009/28/EC they intend to exploit in order to achieve their binding renewable targets set in Annex I to that Directive. Equally, Directive 2001/77/EC, which was repealed by Directive 2009/28, did not lay down any order of preference among the renewable energy sources listed in Article 2, leaving this choice to the Member States. This is confirmed by Article 194(2) TFEU according to which the Union measures aiming at promotion of development of renewable forms of energy may not affect a Member State's right to determine the choice between different energy sources. In any case, as already mentioned, nothing in the Aarhus Convention in any way precludes the promotion of wind energy.

29. Recital 90 in the preamble to Directive 2009/28/EC recalls that, in implementing that Directive, the Member States must take into account the provisions of the Aarhus Convention, in particular as implemented through Directive 2003/4/EC.

30. Article 4(1) of Directive 2009/28 requires each Member State to adopt a National Renewable Energy Action Plan ("NREAP") laying down detailed roadmaps as to how it expects to reach its legally binding 2020 target for the

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[7] Directive 2001/77/EC of the European Parliament and of the Council on the promotion of electricity produced from renewable energy sources in the internal electricity market (2001 OJ L 283).

share of renewable energy in its final energy consumption.[8] Each Member State is required to set out the following matters in its NREAP: its sectoral targets (i.e. its targets heating and cooling; electricity and transport); the expected technology mix; the trajectory to be followed; and the measures and reforms to be undertaken to overcome the barriers to developing renewable energy.

31. Article 4(2) of the Directive required Member States to notify their NREAPs by 30 June 2010. The Directive does not provide for the Commission (or any other institution of the Union) to approve these plans, but the Commission may issue a recommendation under Article 4(5), if it has misgivings about them.[9] Consequently, NREAPs are attributable to the Member States, not the Union. They also enable the Commission to check pursuant to Article 4(4) whether each Member State is respecting its indicative trajectory for renewable energy; if not, the Member States are required by the same provision to submit an amended NREAP. Article 4(6) imposes on the Commission an obligation to forward these plans to the European Parliament.

32. Specific measures to fulfil the requirements of Directive 2009/28 must be listed in the NREAP. The content of the NREAP must comply with the template adopted by the Commission under Article 4(1) with the aim of providing the information necessary to enable Commission to assess pursuant to Article 3(2) whether the measures envisaged in the NREAP can ensure that the share of energy from renewable sources equals or exceeds the share shown in the indicative trajectory set out in Annex I, part B. This template was adopted in 2009.[10] In point 5.4 of this template decision, the Commission required Member States to explain the public consultation carried out for the preparation of their NREAP.

33. All notified NREAPs are published on the transparency platform administrated by DG ENER so that everyone has access to their content.[11] The Irish NREAP is available on DG ENER's website.[12] Point 5.4 read with Appendices 5 and 6 sets out in detail the consultation procedure which was followed prior to the adoption of this NREAP. Apart from the involvement of county and city managers as well as other regional and local bodies, a public

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8 In the case of Ireland, the target for the share of energy from renewable sources in gross final consumption of energy in 2020 is 16 %.

9 The Commission has not made any recommendation on Ireland's NREAP.

10 (C(2009)5174) 2009 OJ L182/33

11 http://ec.europa.eu/energy/renewables/transparency_platform/action_plan_en.htm

12 http://ec.europa.eu/energy/renewables/transparency_platform/doc/national_renewable_energy_action_plan_ireland_en.pdf

consultation on the NREAP draft was carried out from 11 to 25 June 2010; 58 submissions were received from parties representing different interests. In the Commission's view, this fully complies with Article 7 of the Convention and the SEA Directive.

34. What is more, the claim in Part V of the Communication of a breach of Article 5 of the Convention is fanciful: since, as mentioned above, the NREAPs are published on the website of DG ENER, the Union has manifestly complied with this provision.

35. For good measure, the Commission would add that, if Mr Swords is alleging breaches by Ireland of the Directive on access to information or the EIA Directive in relation to its NREAP, there is no basis for such a view. As to Directive 2003/4, there is simply no evidence of any breach of this Directive by Ireland in relation to the NREAP. As regards the EIA Directive, the NREAP manifestly does not constitute a "project" within the meaning of Article 1(2) of the Directive, and the Directive is therefore not applicable. For that matter, such plans do not fall within the scope of Article 6 of the Convention.

36. In the light of the above, the Commission submits that, when establishing its NREAP, Ireland committed no breach of any of the three Directives, nor did it commit any act or omission of such a nature as to contravene Articles 4, 5, 6 or 7 of the Aarhus Convention. It follows *a fortiori* that the Union cannot be in "non-compliance" with these provisions by reason of any involvement in Ireland's NREAP.

IV. THE INTERCONNECTOR

37. Mr Swords argues that the EU has granted financial support to the Irish renewable Energy programme despite its failure to comply with the requirements of Pillar II of the Aarhus Convention. In particular, he points to the sum of €110 million which was granted in March 2010.

38. Regulation 663/2009 of the European Parliament and of the Council ("the EEPR Regulation") established a programme to aid economic recovery by granting Community financial assistance to projects in the field of energy.[13] Among the eligible projects for Union assistance in Annex A point 2 to the Regulation was the electricity Meath-Deeside interconnector between Ireland and Wales.

39. By decision of 2 July 2010 the Commission granted financial aid of 110 million euro to EirGrid Interconnector Ltd for this project, known as Action No

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[13] 2009 OJ L 200

EEPR-2009-INTe-IRL.[14] This action involves the construction of a cable capable of carrying 500MW of electricity, from an electricity sub-station in Ireland (Meath) to an electricity sub-station in the United Kingdom (Deeside), and *vice versa*. The Action is broken down into:

1) the construction of two converter stations and

2) the construction and installation of the electricity Interconnector Cable which consists of the construction of two cables:

   - high voltage alternating current (HVAC) cable connecting the converter stations to the respective grid connection sub-stations;

   - the Interconnector itself consisting of 2 submarine cables connecting the two converter stations. These operate under HVDC and have a joint total capacity of 500 MW. The length of submarine cable is approximately 185 km, the length of overland cable in Ireland is 46 km and in Wales 25 km approximately. These cables are to be laid underground and under the sea.[15]

40. Pursuant to Article 23(4) of the EEPR Regulation, projects and actions financed under that Regulation must be carried out in accordance with Union law and take into account any relevant Union policy, in particular those relating to protection of the environment.

41. When assessing the project application, the Commission duly checked whether the project complied with Article 23(4). Point 20 of Annex I to the EIA Directive covers "Constructions of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km." However, all the cables of this interconnector run underground and under the sea and the project at stake therefore falls outside this provision. Nor are subterranean or submarine cables covered by Annex II to the Directive. Accordingly, an interconnector of this type falls outside the scope of the Directive altogether.

42. The project which connects Ireland and Wales reduces the isolation of the less favoured and island regions of the Union. The only electricity interconnection which Ireland has at present is with Northern Ireland; no electricity interconnection with Great Britain or the rest of Europe is currently in place. The interconnector which is now being built under the Irish Sea will facilitate the integration of Ireland's small, and largely isolated, electricity system into the wider European electricity market. Enhanced interconnection

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[14] C(2010)4416 final.

[15] See http://www.eirgridprojects.com/projects/east-westinterconnector/overview/

is among the priorities of the Commission and the Member States in the energy sector.[16]

43. The interconnector will provide the capacity and stability that is required to support the increased penetration of renewable generation including wind generation and may facilitate the achievement of 2020 renewable target for Ireland (16% of gross final consumption of energy). The Union's financial aid does not concern any specific wind energy projects in Ireland, as Mr Swords appears to believe. This is confirmed by the EEPR-Regulation, Annex I Part A of which clearly distinguishes between "interconnectors" and "wind projects". Moreover, the same distinction is reflected in the EIA Directive: whereas certain overhead power lines are listed in Annex I thereto, wind farms are separately listed in point 3(i) of Annex II.

44. In short, the electricity Meath – Deeside Interconnector was not subject to the EIA Directive.[17] As to Article 6 of the Convention, paragraph 1(a) is not engaged because interconnectors which run underground and/or under the sea are not listed in Annex I to the Convention. Nor does paragraph Article 6(1)(b) come into play because the Union's "national law", namely the EIA Directive, does not apply to such projects either, although the Union has chosen pursuant to that paragraph to bring within the scope of the Directive a large number of categories of project not listed in Annex I to the Convention (e.g. the agricultural and aquaculture projects listed in Annex II to the Directive).

45. In addition, there can no room for any suggestion that the Commission's subsidy for the construction of the interconnector was in breach of the Convention because the electricity to be transmitted by it will be generated by wind farms which themselves were allegedly built in breach of the EIA Directive. There are two separate reasons for this:

    (i) First, evidence received from the Irish authorities confirms that certain wind farms have been subject to EIA and others have been subject to screening. This is to be found in the email sent on 26 May 2011 by an official of Ireland's Department of Environment, Community and Local Government together with the two lists appended thereto (Annex II to these submissions). The wind farms which were subject to an EIA (or "EIS" as the EIA-related developer information is referred to in Ireland) are to be found in the first list. The second list covers those wind farms for which screening was carried out but no EIA was found necessary for

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[16] Apart from EEPR Regulation which supports the financing of energy infrastructure projects listed in its Appendix the improvement of European energy infrastructure is one of the priorities set up in "Energy 2020 Strategy" of 10 November 2010 (COM 2010 639 final).

[17] In any case, the EirGrid website http://www.eirgrideastwestinterconnector.ie/ .gives details of the planning procedure followed.

one of the three reasons set out in the email. The Commission has not identified any systematic failure to comply with the EIA Directive in relation to wind farms in Ireland. Moreover, in as much as any evidence comes to light of a deficiency in the application of the EIA Directive to an individual wind farm, the Commission has demonstrated its willingness to investigate and, where necessary, take appropriate action (for example in the case of the Derrybrien wind farm, see paragraph 60 below).

(ii) In any event, while it follows from Article 23(4) that the Commission must check whether the project or action itself (*in casu* the interconnector) is compatible with Union law, this does not extend to every conceivable measure or step which is directly or indirectly linked to it. Otherwise, it would be impossible to grant such subsidies at all. In the present case, wind energy is only one of the forms of energy which is set to be fed into this interconnector. Surely, it would be absurd if the Commission were to be debarred from funding the interconnector because one of many wind farms had been built in breach of the EIA Directive. Moreover, to take a purely hypothetical case, the same would apply if the materials used for constructing the wind farm were transported along a road which had itself been built in contravention of the EIA Directive. In the Commission's submission, common sense suggests that the same must apply to the Aarhus Convention, and in particular Article 6 thereof.

46. What is more, since the interconnector cannot be regarded as a "plan or programme" within the meaning of the SEA Directive or Article 7 of the Convention, those provisions are plainly not engaged.

47. It follows from the above that all Mr Swords' allegations with regard to the grant of EEPR financial aid in violation of the "second pillar" of the Aarhus Convention are unfounded.

48. Finally, there is no evidence of any breach by Ireland of the Directive on access to information in this regard. Accordingly, the Union cannot be in "non-compliance" for being in any way involved in a breach by Ireland of that Directive or of Article 4 of the Convention.

V. INFRINGEMENT PROCEEDINGS

A. The Commission's Treatment of Infringements

49. At the end of 2010, the total number of active cases being handled by the Commission in all the areas of Union law combined was 2092, of which 883 cases (42.2%) originated as complaints. The environment accounts for a high proportion of cases: at the end of 2010, there were 444 active cases (21.2% out of the total). It is also worth noting that in the course of 2010, 120 fresh infringement actions were lodged with the Court of Justice, of which 36 (30%) were within the remit of DG ENV.

50. DG ENV has devoted considerable resources to ensuring that Ireland complies with the Union's environmental law. Although it only accounts for less than 1% of the population of the Union and 1.6% of its territory, Ireland accounts for approximately 10% of infringement proceedings brought by the Commission in the environment. Many of these proceedings relate to matters falling within the scope of the Aarhus Convention.

B. The Commission's Discretion

51. The system of infringement proceedings enshrined in Articles 258 and 260 TFEU is unique: it enables the Union to ensure the application of Union law by the Member States in a way which has no parallel elsewhere.

52. According to consistent case law, the Commission has absolute discretion in deciding whether to commence or pursue infringement proceedings and cannot be compelled to do so. This case law includes the following judgments and orders: Cases 247/87 Star Fruit v Commission [1989] ECR 291, paragraphs 10 to 14; Case T-84/94 Bilanzbuchhalter v Commission [1995] ECR 11-101, para. 23, and C-59/96P Koelman v Commission [1997] ECR I-4809, para. 58. Having said that, as mentioned earlier, the exercise of the Commission's discretionary powers with regard to Mr Swords' complaint is currently under review by the Union's Ombudsman.

53. In any case, in the present case, after making detailed enquiries from the Irish authorities on Mr Swords' complaints, the Commission found no evidence of any breach in relation to the matters raised by him. That is explained at length in the present submissions, notably in Part V.C below.

54. There are a broad range of reasons why it might be inappropriate for the Commission to take such action in a particular case. For instance, it would be absurd if the compliance procedure could be used with respect to a decision by the Commission not to act on a complaint that a Member State had refused to grant access to information contrary to Directive 2003/4 in an isolated case. Such a matter is more appropriately dealt with before the national courts than by infringement proceedings. Thus the Commission sometimes applies on an *ad hoc* basis an exhaustion of local remedies rule not unlike that applied by the Compliance Committee itself, as noted in paragraph 17 above. This is just one of many factors which may justify a decision by the Commission not to take action on a particular case.

C. The Present Case

a. Access to Documents

55. Prior to Mr Swords' complaint, there was a dearth of complaints lodged with the Commission alleging breaches of Directive 2003/4. To date, no infringement proceedings have been instituted against Ireland (or indeed

against any other Member State) with respect to this Directive. However, DG ENV has commissioned a study on the implementation of this Directive in all the Member States. This study indicates that a number of Member States, including Ireland, are in breach of the Directive. The Irish legislation is said to be incompatible with the Directive in a number of respects, and this has since been corroborated in correspondence between DG ENV and the Irish authorities. Consequently, DG ENV is giving active consideration to submitting to the College of Commissioners a proposal to institute infringement proceedings against the Member States concerned, including Ireland, in the near future.

56. However, none of the breaches by Ireland in its implementation of Directive 2003/4 which has come to light has any bearing on Mr Swords' complaint or his Communication. What is more, nothing in his voluminous correspondence with DG ENV constitutes evidence of an infringement of this Directive. Moreover, as far as the Commission can tell, if it were well founded, this would be a case of bad application of Union law as opposed to failure by the Member State to adopt the requisite legislation. It should be stressed that infringement proceedings for bad application must be based on very solid evidence if they are to succeed.

57. In addition, as indicated earlier, even if Mr Swords can prove that the Irish authorities failed to abide by this Directive when handling his requests for access to information, the Irish courts are clearly the proper forum for pursuing that claim.

b. Environmental Impact Assessment

58. The Commission has been particularly vigilant with respect to infringements of the EIA Directive by Ireland. A total of 200 files have been opened in relation to infringements of this Directive by that Member State, of which at least 34 reached the stage of the letter of formal notice.

59. The following cases were pursued to judgment: Cases C-392/96 Commission v Ireland [1999] ECR I-5901, C-216/05 C-392/96 Commission v Ireland [2006] ECR I-10787, C-66/06 Commission v Ireland [2008] ECR I-158 (summary publication), C-215/06 Commission v Ireland [2008] ECR I-4911, C-427/07 Commission v Ireland [2009] ECR I-6277 and C-50/09 Commission v Ireland (judgment of 3 March 2011).

60. The Commission won most of these cases in their entirety and (leaving aside Case C-216/05 which it lost altogether) the others in part. In the present context, Case C-215/06 is especially important: it was held there *inter alia* that Ireland was in breach of the EIA Directive in that had failed to take all the measures necessary to ensure that the development consents given for, and the execution of, wind farm developments and associated works at

Derrybrien, Count Galway, were preceded by an assessment with regard to their environmental effects.

61. What is more, Case C-392/96 gave rise to a second action brought pursuant to what is now Article 260 TFEU (Case C-294/03 Commission v Ireland, which was withdrawn after Ireland complied with the initial ruling). In addition, since Ireland partially failed to comply with the judgment in Case C-66/06, the Commission has recently lodged another Application pursuant to Article 260 TFEU (Case C-279/11 Commission v Ireland (pending)). What is more, Ireland has not yet complied with the Court's rulings in Cases C-215/06 and C-50/09. Should this persist, further actions may ultimately be lodged with the Court under Article 260.

62. In short, it is quite possible that the Commission has never brought so many successful actions against a single Member State for breach of one legislative act.

63. Nevertheless, as explained above, the Commission has found no evidence of any systematic breach by Ireland of the EIA Directive in relation to wind farms.

c. Strategic Environmental Assessment

64. In 2008, the Commission launched infringement proceedings against 11 Member States, including Ireland. The case against that Member State falls into two parts. First, it relates to Ireland's failure to subject its National Development Plan for 2007-2013 to a prior environmental assessment. Second, there are several conformity issues with respect to Irish legislation purporting to transpose the SEA Directive: (i) Articles.2(a) and 3(2),(3), (5),(6) and (7) in as much as the Irish legislation does not cover all categories of plan and programme or modifications of them or does not cover them correctly; (ii) Article 6 in as much as the Irish legislation fails to provide for consultation of all relevant environmental authorities and the provisions for consulting the public are too limited; and (iii) Article 5 as there is inadequate provision for consulting environmental authorities on the content of environmental reports.

65. The Commission sent its reasoned opinion on 3 November 2009 and Ireland replied on 5 February 2010. The new legislation adopted by Ireland on 3 May 2011, the Planning and Development (Strategic Environmental Assessment) (Amendment) Regulations 2011 (SI 201 of 2011) has yet to be evaluated by the Commission and indeed Ireland has not even notified it officially to the Commission.

66. None of this has any bearing on the issues raised by Mr Swords in his complaint or his Communication. Indeed, as indicated in paragraph 33 above, the evidence is that the Irish national renewable energy plan

underwent appropriate public consultation for the purposes of the Aarhus Convention.

D. Conclusion on Part V

67. In summary, the Commission submits that the Union is not in breach of the Convention by reason of any failure to bring infringement proceedings against Ireland as alleged in the Communication: no breach by Ireland of the three Directives nor any act or omission by that State in the nature of an infringement of the Convention relating to the matters raised by the Communication has come to light.

68. Quite apart from that, the Commission has been highly vigilant with regard to Ireland's breaches of Union environmental law, especially those falling within the scope of the Aarhus Convention. The Union would only act in a manner incompatible with the Convention in a purely hypothetical and extreme case where the Commission persistently failed to take action over a long period of years with respect to an exceptionally grave infringement which has the most serious consequences for the environment and which has been repeatedly brought to the Commission's notice.

VI. THE FOUR QUESTIONS

69. Annexed to the Compliance Committee's letter of 28 January 2011 are four questions to the Commission.

70. Question 1 asks what activities or steps the Union (and the Commission in particular) has taken to monitor the implementation of the Convention in Ireland and how they relate to the subject matter of the Communication. The answer to this question is that the Union (in practice the Commission) only enjoys such power as regards the application of Union law in the Member States. This is spelt out in the Declaration mentioned in paragraph 20 above which, in so far as is relevant, states in clear terms:

> "The European Community [now the European Union] is responsible for the performance of those obligations resulting from the Convention which are covered by Community law in force."

As explained at length above, the Commission has been particularly assiduous in monitoring the application by Ireland of the areas of Union law falling within the subject matter of the Communication.

71. The answers to questions 2, 3 and 4 above are integrated into Parts II to V above.

VII. OVERALL CONCLUSION

72. The cornerstone of Mr Swords' case, namely that Ireland infringed the Convention and the three Directives with respect to its wind energy programme, is wholly unsubstantiated. It follows inexorably that the Union did not commit any breach of the Convention. In any case, the Union displayed the utmost diligence in ensuring that Ireland was in compliance.

73. Not only has Mr Swords signally failed to support his Communication with "corroborating information" as required by paragraph 19 of Decision I/7, but also the Commission's subsequent enquiries have failed to bring to light any evidence which could support his case.

74. Having regard to all the above considerations, the Commission submits that the Compliance Committee should dismiss the Communication as being inadmissible in part and unfounded in its entirety.

75. Finally, the Commission looks forward to supplementing the present submissions once it has received Mr Swords' answers to the questions which the Committee posed to him on 28 January.

List of Annexes

I. Mr Swords' complaint to, and correspondence with, the Commission (in view of the highly voluminous nature of this annex, it has been forwarded to the Committee separately under cover of a letter dated 21 June 2011)

II. Email of 26 May 2011 sent by an official of Ireland's Department of Environment, Community and Local Government together with the two lists appended thereto