

**To:** Commissioner for Environmental Information

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**Date:** 13<sup>th</sup> February 2011

**Re:** Submission with regard to CEI/11/0002 related to Access to Information on the Environment Request with regard to Waste Policy Consultation by the Department of the Environment, Heritage and Local Government

## **1.0 The Principles of the Aarhus Convention**

The United Nations Economic Commission for Europe (UNECE) Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters is a key element in strengthening local democracy. It derived from the 1992 United Nations Rio Declaration on Environment and Development, which stated in Principle 10 that:

- “Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided”.

Pillar I of the Aarhus Convention requires States to provide both access to information on the environment on request and to actively and systematically disseminate it. This ensures that the public can understand what is happening in the environment around them and is able to participate in an informed manner.

Pillar II requires the activity of members of the public in participation with public authorities to reach an optimal result in decision-making and policy-making. As a minimum it requires effective notice, adequate information, proper procedures, and appropriate taking account of the outcome of public participation.

Pillar III requires that the public have legal mechanisms that they can use to gain review of potential violations of Pillar I and II provisions as well as of domestic environmental law. These legal mechanisms must be “fair, equitable, timely and not prohibitively expensive”.

Ireland, essentially alone in Europe with Russia, has failed to ratify the Convention. However, the EU ratified the Convention in February 2005 and in September 2007 the position of the Aarhus Convention on Community legal order in Ireland was clarified<sup>1</sup>, i.e. in theory it applies to Community legal order here. Note: Community legal order includes the 300 of so Directives in the Environmental Sphere, commonly called the Environmental Acquis. Waste policy is clearly part of Community Legal Order as it is regulated by the Framework Directive on Waste 2008/98/EC.

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<sup>1</sup> <http://www.unece.org/env/pp/compliance/C2006-17/Response/ECresponseAddl2007.11.21e.doc>

Furthermore the implications of the EU ratification of the UNECE Aarhus Convention, as was clarified in the European Court of Justice case C-239/03, was that the mere European Community accession would per se introduce the Aarhus obligations into Community legal order as part of the “acquis communautaire<sup>2</sup>”, thus making them binding both for the Member States and for the institutions.

A recent decision of the Aarhus Convention Compliance Committee is leading to a reform of the UK legal system to reduce cost of access, which was considered to be in non-compliance with Pillar III on the Convention on Access to Justice. The 54<sup>th</sup> Case of the Compliance Committee was opened recently in my name against the EU, in relation to the implementation of the Convention in Ireland and renewable energy policy in particular. Note: It is not possible to take a case against the Irish State as it refuses to ratify the Convention and has failed to implement the necessary EU Directives, in particular those related to the necessary reform of the legal system. Therefore the Party, which is under investigation by the Compliance Committee, is the EU. See documentation in the Attachments.

## **2.0 The Department of the Environment, Heritage and Local Government Waste Consultation**

In July 2010<sup>3</sup> the Department of the Environment, Heritage and Local Government opened a public consultation on its Waste Policy<sup>4</sup>. What is deeply disturbing in Ireland, and now the subject of the complaint case with the UNECE Aarhus Convention Compliance Committee, is that the development of policies in Ireland clearly ignores the core principles of the Convention and the EU Environmental Acquis. For instance the proposed Waste Policy is simply a cynical and illegal attempt to force Waste to Energy facilities out of business through excessive levies, thereby leaving the market place for the Mechanical Biological Treatment systems preferred by the Green Party Minister. The documentation for this Policy<sup>5</sup>, was prepared by the same consultants which prepare policy for Greenpeace<sup>6</sup>. Furthermore not only was this documentation technically false and a complete misrepresentation of EU requirements, which are legally binding through the Environmental Acquis, but there was a complete failure to complete a Strategic Environmental Assessment for two of the three elements of this policy, a violation of the legal requirements in Directive 2001/42/EC, see documentation in the Attachments.

Worse, the development of policies in Ireland regularly ignores the Aarhus Convention's requirement, see above in Pillar II, to “take due account of the outcome of the public participation”. It was on this basis that I request on 3<sup>rd</sup> October 2010,

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<sup>2</sup> Acquis communautaire is a French term referring to the cumulative body of European Community laws, comprising the European Community's Objectives, substantive rules, policies and , in particular, the primary and secondary legislation and case law – all of which form part of the legal order of the European Union.

<sup>3</sup> <http://www.environ.ie/en/Environment/Waste/News/MainBody.23402,en.htm>

<sup>4</sup> <http://www.environ.ie/en/Environment/Waste/PublicConsultations/>

<sup>5</sup> International Review of Waste Management Policy and Environmental Report for Section 60 Capping on Incineration (note no Strategic Environmental Assessment was done for the other aspects of the draft Policy): <http://www.environ.ie/en/Environment/Waste/PublicConsultations/>

<sup>6</sup> Eunomia and TBU:  
<http://www.greenpeace.org.uk/files/pdfs/migrated/MultimediaFiles/Live/FullReport/5574.pdf>

under S.I. No. 133 of 2007, to the Department of the Environment, Heritage and Local Government, that in accordance with Article 7 of Directive 2003/4/EC (Pillar I of the Aarhus Convention) they disseminate the Submissions received on their website. In other words a basic check by the public, as to what had been submitted in the public participation exercise and therefore what should be accounted for in the decision making process of the Administration. Note: S.I. No. 133 of 2007 implements in Ireland the Access to Information on the Environment requirements of Directive 2003/4/EC.

On 10<sup>th</sup> November under AIE/2010/026, I was refused access to the Submissions under Article 8 (a) (iv) of the regulations, S.I. No. 133 of 2007. This was clearly a complete abuse of the clause in the regulations, which is limited to circumstances related to the confidentiality of the proceedings of public authorities. On the 5<sup>th</sup> November 2010 as the statutory time period for the Access to Information on the Environment Request had already passed, I requested an Internal Review. I received a reply to this on the 7<sup>th</sup> December which stated that the Department had “decided to post all the records concerned on its website, [www.environ.ie](http://www.environ.ie), subject to certain redactions relating to personal information, legally privileged information or information that might be prejudicial to Garda investigations. The records will be uploaded to the website as soon as they are all available in electronic format. This process is expected to be completed within the next few days”.

Please note on both occasions the Department had failed to comply with the statutory timeframes. Furthermore by the 10<sup>th</sup> January 2011 there was still no sign of the Submissions posted on the website, so I lodged an appeal to the Office of the Commissioner for Environmental Information and paid the fee of €150. One does of course have to allow for the fact that the adverse weather and Christmas period had intervened in this period over December / January, but I considered the one month period defined in the Aarhus Convention (Pillar I) as adequate for the necessary provisions to be made to post the Submissions on the website, this clearly had not occurred by the 10<sup>th</sup> January, furthermore no indication had been given to me as to why this had not happened. This appeal is now registered as CEI/11/0002.

At 5.30pm on the 11<sup>th</sup> January I received an e-mail from Evelyn Downes at the Department of the Environment, Heritage and Local Government stating that the Submissions received had been posted on their website, as I later confirmed when I went in and read them. It was also obvious only then that they had failed to post on the website a section of my Submission on the Waste Consultation, which comprised correspondence with the Garda Bureau of Fraud Investigation over a different Access to Information on the Environment Request, related to the Poolbeg Foreshore Licence. Note: The Department of the Environment Heritage and Local Government were refusing to address this request in accordance with the regulations (S.I. No. 133 of 2007) and this matter is now the subject to a separate appeal to the Commissioner for Environmental Information; CEI/2010/0016.

This separate request must be placed in the context that the Minister of the Environment John Gormley has refused to process a foreshore licence for the Dublin City Poolbeg Waste to Energy Plant, which was applied for in February 2008, thereby obstructing the legally compliant project and causing huge delays and costs to the developers, Dublin City and the US Company Covanta. Even worse the failure to bring this waste to energy capacity on-stream will result in Ireland being unable to meet the targets set in the Landfill Directive 1999/31/EC, which in time will lead to fines for non compliance being imposed by the EU. Note: Already Poland is being fined €40,000 a day for non-compliance with the Landfill Directive, which will in 2013

rise to €250,000 a day<sup>7</sup>. Currently there are thirty four ongoing infringement cases against the Irish State related to EU Environmental Legislation alone. However, fourteen of these are proceedings for fines to enforce earlier judgements made against the Irish State in the European Court of Justice<sup>8</sup>. No other Member State comes near in have such a poor compliance record and this must be placed in the context that; not only is the Irish State one of the smallest Member States in terms of population and size, but also only nine times in the history of the European Community has a Member State been fined by the European Court of Justice.

Furthermore the Prevention of Corruption (Amendment) Act of 2001 is clear in that<sup>9</sup> an omission in relation to his or her office for the purpose of a consideration is an offence. Note, 'consideration' includes valuable consideration of any kind. The Department of the Environment, Heritage and Local Government refused to reply to the Access to Information on the Environment Request in accordance with the Regulations (S.I. No. 133 of 2007) with regard to:

- On what basis of public interest has the foreshore licence not been awarded, given that under the 1933 Foreshore Act the grounds for refusal are limited to the likelihood of an obstruction to navigation or to fishing?
- What is the official position of the Department of the Environment, Heritage and Local Government with regard to the processing of licenses and permits, such as a foreshore application, within an appropriate timeframe and the 2001 Prevention of Corruption (Amendment) Act of 2001?

This matter had been recorded on the Garda Bureau of Fraud Investigation complaint file (FB 11.242/09) and complaint file CHAP(2010)00645 with the European Commission, both of which had been opened in my name. Part of this correspondence had been contained in my Submission on the Waste Consultation, which as has been previously mention, had not been posted on the website on the 11<sup>th</sup> January<sup>10</sup>, along with the other components of my Submission.

Even more incriminating is the fact that the Submissions from the Environmental Protection Agency (EPA), the County & City Managers' Association, the Regional Authorities for Waste Management, myself and many others, all now available on the website, clearly outlined the failings of this Draft Waste Policy with regard to compliance with the Environmental Acquis, in particular the application of punitive levies to Waste to Energy facilities. However, this has been ignored with the

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<sup>7</sup> <http://www.ask-eu.com/Default.asp?Menu=161&Bereich=7&SubBereich=0&KW=0&NewsPPV=8769>

<sup>8</sup> <http://ec.europa.eu/environment/legal/law/statistics.htm> and [http://www.irishenvironment.com/irishenvironment/articles/Entries/2010/6/1\\_Andrew\\_L.R.\\_Jackson,\\_The\\_Emerald\\_Isle\\_Ireland's\\_environmental\\_compliance\\_record\\_in\\_cross-EU\\_terms.html](http://www.irishenvironment.com/irishenvironment/articles/Entries/2010/6/1_Andrew_L.R._Jackson,_The_Emerald_Isle_Ireland's_environmental_compliance_record_in_cross-EU_terms.html)

<sup>9</sup> 1-(1) An agent of any other person who - (a) corruptly accepts or obtains, or corruptly agrees to accept or attempts to obtain, for himself or for herself, or for any other person, any gift, consideration or advantage as an inducement to, or reward for, or otherwise on account of, the agent doing any act or making an omission in relation to his or her office or position or his or her principal's affairs or business shall be guilty of an offence.

<sup>10</sup> <http://www.environ.ie/en/Environment/Waste/PublicConsultations/SubmissionsReceived/>

publishing of the Bill to introduce the levies on Waste to Energy<sup>11</sup>. Even more incriminating is that the Minister for the Environment John Gormley recently sent a letter to his constituents in the Sandymount region informing them that the nearby Poolbeg Waste to Energy plant can no longer go ahead due to the new levies, which would now be introduced<sup>12</sup>. See Attachment. Clearly political ‘considerations’ apply and, as required, both the Minister and the Department of the Environment, Heritage and Local Government have clearly demonstrated that they will act outside the law to put legitimate businesses out of operation and hand the market place over to their preferred operators.

### 3.0 The Violations of the Aarhus Convention

Article 5 of the Aarhus Convention relates to Collection and Dissemination of Environmental Information, in which public authorities must ensure that they possess and update environmental information which is relevant to their function. Furthermore, within the framework of national legislation, the Parties to the Convention must ensure the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible.

In the Republic of Ireland the relevant national legislation is S.I. No. 133 of 2007, which implements Directive 2003/4/EC on public access to environmental information. This Directive is clear in that “environmental information is progressively made available and disseminated to the public in order to achieve the widest possible systematic availability and dissemination to the public of environmental information. To this end the use, in particular, of computer telecommunication and/or electronic technology, where available, shall be promoted”. Article 8 of the Directive on the quality of environmental information is clear in that: “Member States shall, so far as is within their power, ensure that any information that is compiled by them or on their behalf is up to date, accurate and comparable”.

Clearly the two official documents from the Department of the Environment, Heritage and Local Government used as the basis for the Public Consultation on Waste, namely the International Review of Waste Management Policy and Environmental Report for Section 60 Capping on Incineration, which were a false reflection of technical facts and EU Environmental Legislation, are a **violation of Article 5 of the Aarhus Convention**.

Furthermore the Public Consultation on Waste contained three components, namely;

- The Draft Statement of Waste Policy;
- The Draft Regulations on requiring provision of food waste collection and;

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<sup>11</sup> <http://www.merrionstreet.ie/index.php/2011/01/gormley-welcomes-publication-of-environment-miscellaneous-provisions-bill-2011/>

<sup>12</sup> “I have always been opposed to the incinerator, as it would undermine the development of a more sustainable waste policy in Ireland. “This new waste policy will be published shortly, as well as the Hennessy Report, an independent analysis which I commissioned on the contract for the Poolbeg incinerator. “It is clear that the proposed incinerator cannot go ahead. The new international waste review highlights more sustainable ways of dealing with our waste. And this is the policy which our local authorities will now have to pursue,”

- The re-opening of Public Consultation on Proposed Section 60 Policy Direction on a proposed cap to incineration capacity as a proportion of municipal waste arisings (MSW) and other matters.

Article 5 paragraph 7 (a) of the Aarhus Convention requires that; “each party shall publish the facts and analyses of facts which it considers relevant and important in framing major environmental policy proposals”. The Aarhus Convention: An Implementation Guide<sup>13</sup> is clear with regard to Article 5 paragraph 7 (a) that:

- “If a party considers that certain facts and analyses of facts are relevant and important in framing major environmental policy proposals, it must publish them, parties have the liberty to decide which facts and analyses of facts are relevant and important. In implementing this provision, Parties can consider facts such as water and air quality data, natural resource use statistics, etc. and analyses of facts, such as cost-benefit analyses, environmental impact assessments, and other analytical information used in framing proposals and decisions”.
- “Paragraph 7 (a) requires Parties to publish background information underlying major policy proposals, and thus contribute to effective public participation in the development of environmental policies. This is information that the Party considers “relevant and important” in framing policy proposals. Since article 7 provides for public participation during the preparation of policies, article 5, paragraph 7, is intended to ensure that the public will be properly equipped with the information necessary to take advantage of this opportunity”.

Article 7 of the Aarhus Convention on Public Participation Concerning Plans, Programmes and Policies Relating to the Environment states that:

- “Each party shall make appropriate practical and / or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. Within this framework, article 6, paragraphs 3, 4 and 8, shall be applied. The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention. To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment”.

Note: Article 6, paragraphs 3, 4 and 8 states:

- “The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making”.
- “Each party shall provide for early public participation, when all options are open and effective public participation can take place”.
- “Each Party shall ensure that in the decision due account is taken of the outcome of the public participation”.

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<sup>13</sup> <http://www.unece.org/env/pp/acig.pdf>



The Aarhus Convention: An Implementation Guide states:

- “While the Convention does not oblige Parties to undertake assessments, a legal basis for the consideration of the environmental aspects of plans, programmes and policies is a prerequisite for the application of article 7. Thus, proper public participation procedures in the context of Strategic Environmental Assessment is one method of implementing article 7. Strategic Environmental Assessment provides public authorities with a process for integrating the consideration of environmental impacts into the development of plans, programme and policies. It is, therefore, one possible implementation method that would apply to both parts of article 7 – the provisions covering public participation in plans and programmes, and the provision covering public participation in policies”.

If we consider the draft waste policy statement for public consultation, then this clearly states that it “outlines the key principles and actions which it is envisaged will inform Irish waste policy for the coming decade and beyond”. The document ‘pulls no punches’, e.g. “using all appropriate legislative and fiscal measures, our aim is to move away from traditional landfill and mass burn incineration, towards higher levels of recycling and mechanical / biological treatment”. Furthermore if one considers the Draft Regulations on requiring provision of food waste collection, these Regulations require waste collectors to provide or arrange for the phased provision of a separate collection for household food waste from 1<sup>st</sup> July 2011.

Directive 2001/42/EC on assessment of the effects of certain plans and programmes on the environment defines plans and programmes as those:

- Which are subject to preparation and / or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by parliament or Government, and
- Which are required by legislative, regulatory or administrative provisions.

Clearly the Draft Waste Policy is a plan or programme subject to preparation and adoption by the Department of the Environment, Heritage and Local Government at the national level and is required by administrative provisions. Note: Such Government Policy Documents form a key role in the planning process, in particular through the decisions of the Planning Appeals Board; An Bord Pleanála. They also have to be taken into account in the licensing procedures of the Environmental Protection Agency for waste infrastructure.

Similarly the Draft Regulations on food waste collection were prepared by the Department of the Environment, Heritage and Local Government for adoption by a legislative procedure and are required in relation to the development and regulation of additional waste facilities. Directive 2001/42/EC is clear in that an Environmental Assessment, in accordance with Articles 4 to 9, is required for those plans and programmes, which are likely to have significant environmental effects. In particular where they are related to waste management and set the framework for future development consent of projects, which fall under Annex I and II of the Environmental Impact Assessment Directive 85/337/EEC. Note: Installations for the disposal of waste are listed in both Annex I and Annex II of this Directive. Furthermore there are significant human health and environmental impacts associated with the collection and treatment of both municipal waste and food waste.

By failing to complete the necessary strategic environmental assessment required by both EU and National<sup>14</sup> legislation, or indeed any environmental assessment for these two plans and programmes, the Department of the Environment, Heritage and Local Government is in clear **violation of Article 7 of the Aarhus Convention**. As regards Article 6, paragraph 8 of the Convention:

- “Each Party shall ensure that in the decision due account is taken of the outcome of the public participation”.

In their letter of the 11<sup>th</sup> October 2010 to me, see Attachments, the Department of the Environment, Heritage and Local Government clearly thanked me for my Submission and stated that the large number of submissions received were currently being considered by the Minister, who would be bringing forward proposals to Government at the earliest opportunity. On the 11<sup>th</sup> January 2011, when the Environment (Miscellaneous Provisions) 2011 Bill was published, it was clear in that the Submissions received in the Public Consultation had been clearly ignored, as the Bill’s focus was to introduce the power to charge a waste facility levy on incineration facilities. Indeed as Minister Gormley wrote shortly afterwards to his constituents as John Gormley TD, Minister for the Environment, Heritage and Local Government, Dublin South East Constituency Custom House, Dublin 1<sup>15</sup>, see Attachments:

- “I have just published new legislation, which will introduce, as promised, levies on incineration for the first time. This Bill will be introduced into the Dail in the coming weeks. I am aware of claims in the media that the American private company contracted to build and operate the 600 tonne mass-burn incinerator at Poolbeg<sup>16</sup> will pull out of the project when the levies are introduced. These claims will not affect my determination to introduce incineration levies”.

The role of the Environmental Protection Agency includes under Section 52 of the Environmental Protection Agency Act of 1992:

- “The provision of support and advisory services for the purposes of environmental protection to local authorities and other public authorities in relation to the performance of any function of those authorities”.

With regard to the section of the Draft Waste Policy on introduction of a levy on incineration, the Environmental Protection Agency’s Submission was clear in that:

- “The Environmental Protection Agency believes levies should be applied based on equitable, transparent and validated economic principles (e.g. environmental externalities / cost benefit / cost effectiveness). Moreover all waste management residuals technologies of a given tier should be levied at the same time, otherwise the legislation will deliberately influence the market in a manner that is not based on environmental or economic concerns”.

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<sup>14</sup> <http://www.environ.ie/en/DevelopmentandHousing/PlanningDevelopment/EnvironmentalAssessment/EIASEALegislation/>

<sup>15</sup> The address of the Department of Environment, Heritage and Local Government.

<sup>16</sup> The Poolbeg site is located in his constituency and John Gormley of the Green Party barely got elected there in 2007, the winning margin for the fourth and last seat being a mere 200 votes. In the 1997 election John Gormley took the fourth and last seat by a mere 27 votes. It has been his ‘obsession’ to obstruct the Waste to Energy project earmarked for Poolbeg.



- “The implications of an uneven approach to the application of levies could result in technologies considered less environmentally favourable – from the perspective of Best Available techniques (BAT) and the EU waste hierarchy – being given a financial advantage. This would not represent sound eco-governance, nor would it be considered environmentally sustainable”.

Clearly this was ignored in the preparation of the Environment (Miscellaneous Provisions) 2011 Bill, as was the similar position articulated in other Submissions, such as from the County and City Managers and the Regional Waste Authorities. After all as Minister Gormley stated in his letter to his constituents:

- “It is clear that the proposed incinerator cannot go ahead. The new international waste review highlights more sustainable way of dealing with our waste. And this is the policy which our Local Authorities will now have to pursue<sup>17</sup>”.

However, how did this legislation get to this point? After all where was the involvement of the staff of the Attorney General and other Civil Servants? It is worth pointing out that on the 3<sup>rd</sup> December 2010, on my own expense and time, I went to Brussels to meet with officials of the EU Commission (DG Environment and DG Energy), to discuss the repeated abuses of EU environmental legislation, which were occurring in Ireland. Unfortunately the behaviour of the staff there was unsatisfactory, for instance they had not prepared themselves in advance of the meeting, such as with the details on the CHAP(2010)00645 complaints file. Furthermore I considered it unprofessional that I had to listen to Liam Chapman, Deputy head of Unit ENV A.2, Compliance Promotion, Governance and Legal Issues, repeatedly ‘whining’ about how difficult it was to take the Irish State into a legal process at the European Court of Justice, as they always had the best team of lawyers and fought every step of the way.

So what scrutiny had occurred during the preparation of this Bill by this best team of lawyers? Clearly the outcome of the public participation process had been ignored, in **violation of Article 6, paragraph 8 of the Aarhus Convention**. Is this surprising? After all Ireland is ‘premier league’ for breaches of EU Environmental Legislation, so clearly the development of legislation in this manner is ‘standard practice’. Indeed in late 2009 I repeatedly requested under S.I. No. 133 of 2007 from the Attorney General, the legal policy of the Irish Administration for compliance with the Environmental Acquis. The Attorney General refused to comply with the regulations, see Attachments. I gave up; clearly there is no policy for compliance.

While we are now in an election situation this Bill will not go forward to the Dail (Parliament). However, it may well resurface in the next Dail. It is also worth pointing out the statements of Emily O’Reilly the Ombudsman, who made it very clear on the 9<sup>th</sup> March 2010 that there is a serious democratic deficit:

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<sup>17</sup> As an aside, for somebody once professionally involved in languages, (<http://www.johngormley.com/about/>) his standard of English writing leaves a lot to be desired.

- “For all practical purposes, and I very much regret having to say this so bluntly, parliament in Ireland has been sidelined and is no longer in a position to hold the executive to account<sup>18</sup>”.

Clearly this Bill, like so many others in Ireland, would have been rushed through the Dail and passed into law. So where would that have left the situation? Under the Planning and Development (Amendment) Act 2010<sup>19</sup>, Section 33 appears to allow for a High Court Judicial review of a law of the State that gives effect to Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment. However, as highlighted earlier, the manner in which the strategic environmental assessments associated with this Waste Consultation were either ignored or not even completed, would certainly leave an applicant for a Judicial Review in a difficult situation with regard to achieving Standing in the High Court.

Article 9 paragraph 2 of the Aarhus Convention relating to provisions on Access to Justice is clear in that access to a review procedure before a court of law and / or another independent and impartial body established by law has to be provided, to allow a challenge to the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6. In theory then this is provided by Section 33 of the Planning and Development (Amendment) Act 2010, but a question mark remains as to whether one would achieve a Right to Standing in the High Court when irregularities occur with regard to compliance with Directive 2001/42/EC. Furthermore what happens if irregularities occur in relation to; taking due account of the outcome of the public participation, .i.e. Article 6 paragraph 8 of the Aarhus Convention? **I am not an expert in this field but it appears to me that there is a violation of Article 9 paragraph 2 of the Aarhus Convention<sup>20</sup>.**

Article 9 paragraph 4 of the Aarhus Convention is clear in that the legal procedures shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. The Planning and Development (Amendment) Act 2010<sup>21</sup>, Section 33, for the first time in Irish Legal history, has specified for Judicial Reviews related to Directive 85/337/EEC on Environmental Impact Assessment, Directive 2001/42/EC on Strategic Environmental Assessment, Directive 2008/1/EC on Integrated Pollution Prevention and Control that each party (including any Notice Party) shall bear its own costs.

The UNECE Aarhus Convention Compliance Committee<sup>22</sup> has recently found that the United Kingdom does not comply with the necessary provisions of the Convention with regard to Access to Justice. However, the costs and timescales for Access to Justice in the United Kingdom are far lower than in the Republic of Ireland, not to

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<sup>18</sup> <http://www.independent.ie/breaking-news/national-news/watchdog-slams-the-political-class-2093183.html>

<sup>19</sup> <http://www.environ.ie/en/DevelopmentandHousing/PlanningDevelopment/Planning/PlanningLegislation-Overview/PlanningActs/>

<sup>20</sup> The Irish Planning Acts must be one of the most appalling pieces of legislation ever written, with endless modifications and amendments, which make it even more difficult to read, i.e. they don't even exist as a single text.

<sup>21</sup> <http://www.environ.ie/en/DevelopmentandHousing/PlanningDevelopment/Planning/PlanningLegislation-Overview/PlanningActs/>

<sup>22</sup> <http://www.unece.org/env/pp/ccBackground.htm>

mention the capricious nature of the Irish Judiciary, who are clearly not trained in Environmental Legislation. Estimates of what a Judicial Review in the High Court would cost vary, from €30,000 per day to four times that amount, for an unlimited number of days<sup>23</sup>. These excessive costs and barriers to Access to Justice are clearly outlined in the report prepared for the Environmental Protection Agency<sup>24</sup>, or as the European Environmental Bureau ([www.eeb.org](http://www.eeb.org)), which is the main European Non-Governmental Organisation (NGO) on environmental issues and works with the EU Commission and Parliament, concluded in its Aarhus Convention in Operation report on Ireland, with regard to compliance with Pillar 3 on Access to Justice:

- “Quite definitely not. Access to Justice is for the rich or for the very poor, takes as much as years to resolve cases, there is no expertise amongst the judiciary and there is a lack of enforcement in particular cases”.

Clearly then there is a **violation of Article 9 paragraph 4 of the Aarhus Convention**.

The Aarhus Convention is clear in that environmental information shall be available upon request without an interest having to be stated (Article 4 paragraph 1a). A request may only “be refused if disclosure would adversely affect” (article 4 paragraph 4) confidentiality of the proceedings of public authorities, national defence or public security, the course of justice, intellectual property rights and confidentiality of personal data or commercial and industrial information. However, “the aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment”. With regard to commercial and industrial information the Convention provides that “information on emissions which is relevant for the protection of the environment shall be disclosed” in any case (Article 4 paragraph 4d).

Furthermore the Convention provides for collection and dissemination of environmental information (Article 5). Environmental information held by public authorities shall not only be available upon request, but distributed actively by public authorities. It is clear that the Submissions received as part of a public consultation process on an issue of such importance, as the future direction of waste policy, should have been disseminated by due course. The fact that when I request this through the Access for Information on the Environment Regulations and was refused on the basis of confidentiality<sup>25</sup>, **clearly demonstrates there was a deliberate violation of Articles 4 and 5 of the Aarhus Convention**.

Article 9 paragraph 1 of the Aarhus Convention requires each party to ensure that any person who considers that his or her request for information under Article 4 has been ignored, wrongly refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial

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<sup>23</sup> See page 5 in relation to Ireland of:

[http://ec.europa.eu/environment/aarhus/pdf/conference\\_summary.pdf](http://ec.europa.eu/environment/aarhus/pdf/conference_summary.pdf)

<sup>24</sup> <http://www.environmentaldemocracy.ie/pdf/finalreport.pdf>

<sup>25</sup> Article 8 (a) (iv) of S.I. No. 133 of 2007 relating to the confidentiality of the proceedings of public authorities, where such confidentiality is otherwise protected by law (including the Freedom of Information Acts 1997 and 2003 with respect to exempt records within the meaning of those Acts).

body established by law. Under Article 12 of S.I. No. 133 of 2007 I am in a position, after payment of €150, to lodge an appeal to the Commissioner for Environmental Information. This I have done to highlight that the refusal of the Department of the Environment, Heritage and Local Government to provide access to the item in my Submission, related to correspondence with regard to the Access to Information on the Environment Request over Poolbeg (CEI/10/0016), is invalid. In conclusion a pretty pathetic result of the effectiveness of the Aarhus Convention, as it applies to the Republic of Ireland, given the abuses that have occurred in this and many other cases<sup>26</sup>.

#### 4.0 Conclusion

I have no hesitation in concluding that what this document clearly demonstrates is a number of senior elected and non-elected officials, clearly running the affairs of State as a personal fiefdom. In which legitimate businesses will clearly be put out of operation to achieve personal objectives, such as re-election or promotion, and in which the Attorney General and his staff will be absent, until as such time as they have to go to Brussels, to obstruct the necessary implementation of the Environmental Acquis or the necessary measures for EU Citizens in this country to achieve their Rights under the UNECE Aarhus Convention<sup>27</sup>.

**Biography:** Pat Swords is a Fellow of the Institution of Chemical Engineers and a Chartered Environmentalist. Since graduation from University College Dublin in 1986 Pat has worked in developing the high technology manufacturing industry in Ireland. His work experience has also included projects in over a dozen other countries throughout Europe and North America. Since 1999 he has worked extensively on EU Technical Aid Projects in Central and Eastern Europe helping to implement EU Industrial Pollution Control and Control of Major Accident Hazards legislation.

#### Attachments:

1. UNECE Letter to the EU Commission Re. Aarhus Convention Compliance Committee ACCC/C/2010/54
2. Correspondence with regard to Aarhus Convention Compliance Committee with EU Ombudsman (Case 2587/2009/JF), EU Commission Complaint Investigation CHAP (2010)00645, Garda Bureau of Fraud Investigation (Case FB 11/242.09).
3. Clarification related to Strategic Environmental Assessment with Waste Consultation section of Department of the Environment, Heritage and Local Government, 19<sup>th</sup> July 2010.
4. Letter from Minister for the Environment, Heritage and Local Government John Gormley to his constituents in January 2011.
5. Letter of 11<sup>th</sup> October 2010 from Department of the Environment, Heritage and Local Government relating to consideration of Waste Submissions received by the Minister.
6. Reply from Attorney General on 7<sup>th</sup> December 2009 – Failure to reply to an Access to Information Request related to the legal policy of the Irish Administration for compliance with the Environmental Acquis.

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<sup>26</sup> <http://www.ocei.gov.ie/en/DecisionsOfTheCommissioner/>

<sup>27</sup> In other words a bloody Banana Republic.