

1. QUESTION

The Committee understands that it is common ground between the Party concerned and the communicant that:

- The National Renewable Action Plan (NREAP) is a plan under article 4 of the renewable energy directive (Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC).
- Strategic environmental assessment does not apply and there is no legal requirement in the Directive for public participation.
- The Commission has prepared a template and requires Member States to report on the process of preparation of plans, including public participation (Commission Decision of 30 June 2009 establishing a template for National Renewable Energy Action Plans under Directive 2009/28/EC of the European Parliament and of the Council).
- This template, including the requirement for public participation, appears to be a “practical provision for the public to participate during the preparation of plans”, and thus the NREAP seems to be a plan under article 7.
- In addition, according to article 4, paragraph 5, of the Directive, the Commission evaluates the action plans and the measures envisaged by the Member States, and issues recommendations.
- Upon approval of the Convention, the EU declared that it would be responsible “for the performance of those obligations resulting from the Convention which are covered by Community law in force”.

Considering all the above, it would seem that there is EU law in force relating to the public participation requirements of article 7 in this case. Could you please explain why the Commission says that it is not responsible for the actions of the Member State in this case?

2. REPLY

The European Union agrees that the NREAP¹ can be considered to be a "plan" within the meaning of Article 7 of the Convention and that this plan is required by EU law. It does not however follow that the European Union would be responsible for any failure by Ireland to conduct public participation on the NREAP in accordance with the requirements of the Convention; and in any case, no such failure has occurred.

¹ The Commission would recall that the NREAPs are available on http://ec.europa.eu/energy/renewables/transparency_platform/action_plan_en.htm

Since the European Community concluded the Aarhus Convention, it is binding on the Community (now the Union). However, as the Community made clear in its Declaration on ratifying the Convention, it is only responsible for "the performance of those obligations resulting from the Convention which are covered by Community law in force". To this extent the Convention is also binding as a matter of Union law on all Member States, including Ireland (Article 216(2) TFEU). Recital 90 in the preamble to Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources (which replaced Directives 2001/77/EC) (the "renewables directive") recalls that the "Member States' implementation of this Directive should reflect, where relevant, the provisions of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ...". Moreover, this obligation is implicitly recalled once again by point 5.4 of Commission Decision 2009/548/EC establishing a template for National Renewable Energy Action Plans.

Even though Ireland has not ratified the Convention, information which the Commission has received from Ireland shows that that State did in fact comply with its obligations under Article 7 of the Convention. According to that information, the procedure followed by the Irish authorities was as follows.

The Department of Communications, Energy and Natural Resources first undertook a targeted consultation (between March and June 2010) with those listed at Appendix 6 of the NREAP (some 47 different bodies which have a particular interest in the sector). This included three meetings of the Renewable Energy Development Group (bodies 1-33 of Appendix 6). All of those listed in the Appendix 6 targeted consultation received emails of each draft section of text relating to section 4 of the NREAP (the main text) and were able to provide feedback. With each email was a reminder that, if those in the targeted consultation felt there were others who should be included in the distribution list, they should advise DCENR. All of this feedback was reviewed in advance and the draft version that was issued for public consultation had already taken extensive account of the initial feedback.

Due to the deadline for submission of the NREAP, the draft document was open for public consultation for 2 weeks on DCENR's website (11/6/2010-25/6/2010). The consultation was highlighted at the start of the energy homepage of the Department's website, so that anyone clicking onto it would immediately see it. 58 responses were received, many of them very substantial. The level of comment in a consultation that was open for 2 weeks is an indication that the document was easily accessible, widely viewed and that there was a very good level of awareness among that the NREAP was being compiled. Furthermore, because the targeted consultation had taken place with those involved in the sector, the document had been subject to significant input at earlier stages.

The draft NREAP was published on the website as a "stand alone" document. The document contains extensive explanations of policy and links to all relevant back-up documentation that anyone reading it would need to access.

Accordingly, the reality is that Ireland did in fact comply with Article 7. In those circumstances, the question posed by the Compliance Committee does not arise. In the Commission's submission, the Committee's task in this case is not to rule *in abstracto* on whether any breach could or may have been committed, but whether Mr Swords' allegations against the Union in relation to alternative energy in Ireland are well founded.