Comments of the European Commission, on behalf of the European Union, on the Committee's draft findings and recommendations Communication ACCC/C/2010/54 Concerning the Renewable Energy Programme in Ireland

---

1. Introduction

1. To begin with, the Commission would thank the Compliance Committee and the Secretariat again for their hard work on this case. The Commission also welcomes the fact that the Committee has dismissed a number of the communicant's complaints. However, for obvious reasons, the present observations will concentrate on the Committee's provisional findings of non-compliance.

2. Before doing so, the Commission would refer to the procedure set out in paragraph 34 of Decision I/7 of the Meeting of the Parties under which it has been consulted. This provision requires the Committee not merely to consult the Communicant and the Party concerned, but also to "take into account" their comments on the draft report. Since by definition the deliberations of the Committee are confidential, it necessarily follows that only the members of the Committee and their staff can know whether it has indeed "taken into account" those comments, unless it sets out its response to them (or at least the salient points in those comments) in the final version of their report. By providing a succinct response to the parties' comments, the Committee would offer them helpful guidance and thus reflect the non-confrontational nature of the procedure. Only then would the principle of transparency – a central pillar of the Aarhus Convention – be fully respected.

3. The Commission therefore trusts that the final version of its report will contain the Committee's response to the present comments, as required by paragraph 34.

2. The Consultation Carried out by Ireland on the NREAP

4. In paragraph 84, the Committee has made the provisional finding that "the public consultation by Ireland was conducted within a very short timeframe, namely two weeks". With respect, this assertion does not do full justice to the facts.

5. In paragraph 33 of its submissions of 28 June 2011, the Commission referred to point 5.4 of the NREAP which Ireland had notified to it pursuant to Article 4 of Directive 2009/28. In a footnote to that paragraph, the Commission supplied the link to the NREAP, as it was available on DG ENER's website. The Commission would draw the Committee's particular attention to the following passage of point 5.4:

> "A targeted consultation was carried out via the Renewable Energy Development Group, which is chaired by the Director General of Energy from the Department of Communications, Energy & Natural Resources. A number of meetings of the group were convened at which this plan was the main topic of discussion (specifically 15th March 2010, 7th May 2010 and 29th June 2010.) Initial draft text relating to section 4 was issued on a section by section basis to the members of the group and feedback was requested and received. A list of the initial consultees (those included in the initial targeted consultation process on section 4) is attached at Appendix 6."

Amongst the various public and private bodies listed in Appendix 6 to the NREAP is the Environmental Pillar of Social Partnership. That body contains representatives of some of the most important and highly respected environmental NGOs in Ireland, including An Taisce, Birdwatch Ireland and Coastwatch. Accordingly, these NGOs were included in the targeted consultation which took place over a period of over 3 months prior to the two-

week consultation of the wider public mentioned in paragraph 84 of the draft report. This is crucial.

6. The very next paragraph of point 5.4 of the NREAP reads:

> "Following this first round of targeted consultation, the entire draft plan was subject to a period of public consultation and was disseminated through the Department's website for views and comment by all interested parties ahead of the final plan being sent to the European Commission. 58 submissions were received in response to the public consultation and all submissions were reviewed. A list of those from whom written feedback was received during the public consultation is attached at Appendix 8."

This was the consultation of the wider public which took place from 11 to 25 June 2010. What the Committee may have overlooked is that amongst the 58 parties listed in Appendix 8 as having lodged submissions were a number of environmental NGOs, including An Taisce, Birdwatch Ireland, and Coastal Concern Alliance. A number of individuals also appear on the list in Appendix 8, although their affiliation, if any, is not known to the Commission.

7. In short, the consultation carried out by Ireland was considerably more far-reaching than the Committee has stated in paragraphs 64 and 84 of its draft report.

8. The Commission would hope that the above comments will lead the Committee to reverse its findings on this key question of fact, and therefore not find the EU in non-compliance. This would inevitably result in a reversal of the Committee's other findings, conclusions and recommendations, including those set out in paragraphs 96 to 98 of the draft report, which rest on the Committee's determination that the consultation was inadequate.

9. The points raised in Parts 3 and 4 below will only come into play if the Committee decides not to follow that course of action.

3. Alleged Lack of Proper Legislative Framework

10. The Commission agrees with the Committee that Parties have a margin of discretion on how to ensure proper implementation of the Convention (paragraph 78).

11. The Committee has provisionally found that the monitoring mechanisms contained in Directive 2009/28 were inadequate (paragraphs 81, 86, 87 and 97). It claims that this constitutes a breach of Article 7 of the Convention, which requires the Contracting Parties to "make appropriate practical and/or other provisions" for public consultation. No mention is made in this provision of legislative action. In keeping with this, the Committee points to the Union's alleged failure to have in place a proper "regulatory" framework (paragraph 86).

12. Consequently, it comes as a surprise when the Committee transforms this obligation into an obligation to have a "legislative" framework, by mentioning out of the blue the "lack of [an] appropriate legislative framework" (paragraph 87) and alleged non-compliance by the Union with Article 3 of the Convention (*ibid.*). The latter provision is referred to merely as an adjunct to Article 7, and is not mentioned in the conclusion (paragraphs 96 to 98). On the other hand, both paragraphs 97(a) and 98 repeat the supposed need to amend the "legislative framework".

13. This calls for two points.

14. First, what matters is that the Party concerned should put an end to the alleged breach. Whether it does so by legislative means or by recourse to other mechanisms is of no consequence, as the Convention does not explicitly prescribe a remedy of a legislative nature. In the present instance, the alleged deficiency could be corrected by amending the Commission

Decision on the Template or by some other non-legislative procedure or by some form of guidance. .

15. Second, even if reference to Article 3 were needed – *quod non* – that provision does not require legislative action either. The opening words are: "Each Party shall take the necessary legislative, regulatory,and other measures [to comply with the Convention]".

16. In short, to require the Union to make any changes to its legislation would go beyond the text of the Convention.

17. At all events, taking into account the general comments made by the Committee as well as the non-confrontational nature of the compliance mechanism, the Commission is currently reflecting on possible ways of improving the implementation of Article 7 of the Convention by Member States when they draft NREAPs under Directive 2009/28. Regrettably, the outcome of this reflection cannot be decided by the deadline for the submission of those comments, but the Commission will revert to the Committee if and when any decision is taken.

4. Allegedly Inadequate Monitoring by the Union

18. The Commission is puzzled by the last sentence in paragraph 86 which reads:

> "The Party concerned cannot deploy its obligation to monitor the implementation of Article 7 of the Convention in the development of Ireland's NREAP by relying on complaints received from the public, as it suggested it does during the public hearings conducted by the Committee."

19. This statement is based on a misconception of the relationship between the Union and its Member States. the Committee's statement is based on a fundamental misconception of the relationship between the Union and its Member States. In international law (including the law under the Aarhus Convention), a State is responsible for every act or omission of every one of

its public authorities, even the smallest parish council. But the Union is a different entity from the Member States: it is not responsible for their every act or omission.

20. Moreover, while the Commission monitors the compliance by Member States with Union law notably under Articles 258 and 260 TFEU, it was never envisaged that it – let alone any other institution of the Union – would monitor every single possible failure by every Member State to comply with Union law.

5. Excessive documentation

21. Finally, the Commission would point out that paragraph 9 of the draft report appears to contain a clerical error. That paragraph reads:

> "The Committee also expressed its disapproval at the fact that **both** the communicant **and the Party** concerned provided immense amounts of information for its consideration, often in a disorganised and unstructured manner." (emphasis added)

22. The word "expressed" in this passage is used in the past tense. In the context, this paragraph appears to refer to the Committee's letter of 16 August 2011 in which it stated:

> "... the Commission noted that in its submissions of 21 June 2011, the communicant had significantly expanded the scope of the original communication ... The Committee expressed its disapproval of this approach, because it raises procedural issues with regard to admissibility and fairness to the Party concerned to respond to the allegations ..."

This rebuke was prompted by the communicant's response to the Committee's written questions, which ran to no less than 188 pages and was accompanied by 17 annexes.

In its letter of 16 August 2011, the Committee did not criticise the Union on this account.

23. For good measure, it should be stressed that the communicant put the Commission in great difficulty at every stage of the procedure by continually sending a mass of documentation, accompanied by countless arguments of a garbled nature. Apart from anything else, this compelled the Commission, so as to defend itself, to lodge more documents with the Committee than it would have wished. Nevertheless, the Commission was constantly at pains, within those constraints, to limit the documentation lodged as much as possible.

24. The Commission does not believe that the Committee means to criticise it on this count. If the Committee were to do so, that would amount to a failure by the Committee to have full regard to the fundamental principle of equality of arms.

6. Conclusion

25. For all the above reasons, the Commission would request the Committee to modify its provisional findings for the reasons set out above.

26. For the same reasons, the Party concerned cannot give its agreement to the recommendations in their present from, but would inform the Committee that it is currently reflecting on possible non-legislative ways of improving the implementation by Member States of Article 7 of the Convention when they draft NREAPs under Directive 2009/28.