

**REPLY TO UNECE ON AARHUS CONVENTION
COMPLIANCE COMMITTEE COMMUNICATION
ACCC/C/2010/54**

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Non-Technical Summary

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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, in particular 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.

Dedication: This reply is dedicated to Pat's brother Joe, a model European, who passed away in Barcelona after a brief illness in March 2009. Qualified as a practitioner of the law in three European jurisdictions, he would have been pleased to have seen this case - Que en pau descansi!

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1. INTRODUCTION

This document contains an introduction to the Aarhus Convention and its context and importance in the Irish situation. This is followed by a non-technical summary of the main text and conclusions of the Reply to UNECE on this Communication.

1.1 Background

In January 2011 the United Nations Economic Commission for Europe (UNECE) formally posted its 54th Communication to the Aarhus Convention Compliance Committee on its website:

- <http://www.unece.org/env/pp/compliance/Compliance%20Committee/54TableEU.htm>

The 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 Parties to provide both access to information on the environment upon 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 and is not therefore a Party. 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 clarified¹, i.e. in theory it applies to Community legal order in the Republic of Ireland. Note: Community legal order includes the 300 or so Directives in the Environmental Sphere, commonly called the Environmental Acquis².

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”, thus making them binding, both for the Member States and for the Institutions.

Article 15 of the Aarhus Convention relates to review of compliance of the Parties with the Convention. Arrangements have been established for a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of the Convention. These arrangements include for public involvement and the consideration of Communications from members of the public on matters related to the Convention.

It is not possible for UNECE to accept a Communication in regard to the Irish State, as it refuses to ratify the Convention and has failed to implement the necessary EU Directives. Therefore the Party, which is under investigation by the Compliance Committee in this Communication, is the EU. Under Article 2 of the Aarhus Convention, Environmental Information includes factors such as energy and cost-benefit and other economic analyses and assumptions used in environmental decision-making. The 54th Communication relates primarily to the implementation of the renewable energy programme in Ireland, which has been supported by the EU in terms of both approval of State Aid and direct funding. However, the substantive matter of the Communication fundamentally relates to the manner in which policies, programmes and projects are approved in the Republic of Ireland, outside of the core principles of Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

In order to facilitate further consideration of the Communication, the Compliance Committee requested in January 2011 that I, Pat Swords BE CEng, FIChemE CEnv MIEMA, address a number of questions related to the Aarhus Convention in Ireland and the renewable energy programme in particular. Furthermore in a letter to the Party concerned, the EU, the Compliance Committee requested them to address four further questions, to which it was made clear I was also welcome to respond to. The main Document and the Technical Annexes attached to it are the response to those questions.

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

² 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. The Environmental Acquis relate to the body of law regulating environmental issues.

1.2 The Context and Importance of the Aarhus Convention in the Irish Situation

While the phrase, the Environmental Acquis, is not in widespread use in Ireland, unlike the new Member States³, this body of law has enormous influence on planning, energy, agricultural practices, water, waste, air quality, pollution control, industrial risk, etc,. In particular it has been amended to comply with the UNECE Aarhus Convention's requirements of Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. As the World Bank⁴ says about their implementation in the Balkans:

- “Adoption of the Acquis introduces an approach to environmental governance that creates stronger ownership and an opportunity for citizens to influence government decisions, more transparency and local responsibility for natural resources; improved project programming and planning capacity; and a more predictable legal framework for foreign and private sector investors”.

Unfortunately Ireland is by far the Member State with the worst record with regard to implementation of the Environmental Acquis. This is not only reflected in the number of infringement cases being progressed by the European Commission, some 25% of the total which are in second and final phase at the European Court of Justice⁵, but in the disarray in our administrative structures. These non-compliances impact not only at the level of activity at the European Court of Justice, but also at the level of the citizen. For instance it is certainly not an exaggeration that citizens in Ireland are clearly unhappy with their planning system, which as the Irish Academy of Engineering stated in their report in February 2011⁶:

- “Ireland’s planning and permitting processes are dysfunctional, unfit for purpose and lead to a higher cost infrastructure than is warranted. These processes need to be reviewed and streamlined in order to remove the high permitting risk currently perceived by investors”.

However, this not only affects them as citizens when they interact with the administrative structure in their own capacity, but in the general economic downturn and resulting loss of employment, as investors relocate projects to jurisdictions, which are clearly more compliant with the Acquis and have as a result a more predictable framework with lower risk.

³ Pat Swords has worked extensively on EU Technical Assistance projects implementing the Environmental Acquis into Romania, Croatia, Macedonia, Slovenia, the Baltic States and Malta. Even to the point of teaching citizens of their Rights under the legislation. Rights, which are sadly lacking in Ireland.

⁴ <http://siteresources.worldbank.org/INTECAREGTOPENVIRONMENT/Resources/511168-1191448157765/Chapter1.pdf>

⁵ <http://ec.europa.eu/environment/legal/law/statistics.htm>

⁶ <http://www.iae.ie/news/article/2011/feb/28/new-report-energy-policy-and-economic-recovery-201/>

However, the failings of the Administration are not just limited to the approval of individual projects; there is disarray in the manner in which policies are developed in Ireland. Both the Aarhus Convention and the Environmental Acquis require environmental assessments of the policies, plans and programmes to be completed, followed by a public participation exercise conducted in a transparent and fair framework, in which due account is taken of the outcome of the public participation exercise in the resulting decision. This is essential, policies must be based on sound fundamentals, there has to be an element of environmental foresight and this must be completed in a clear and transparent framework that is open to public scrutiny.

This clearly is not happening in Ireland in a range of different policies, such as climate change, energy and waste. If we consider the renewable energy programme, which is based predominately on wind energy, this has massive costs, the capital costs alone are projected to be in the region of €30 billion, translating to a financial burden of €8,000 per man, woman and child. Yet Ireland has a modern generating system, which functions perfectly well without any of this investment in wind energy. So why are we doing this? It is not only the enormous financial burden; why are we scarring our landscape with the order of four thousand giant turbines and a doubling of our electricity grid by another 5,000 km of high voltage systems, changing the character of our landscape for ever? Where is the justification for this?

The sad reality, and it is a damning reflection on our system of legislation and administration, is that we do not know. Targets have been developed by 'political consensus', without any attempt to quantify their environmental costs / benefits, coupled with a failure to evaluate the associated technical and economic impacts of an engineering project, which has never been attempted anywhere in the world before and is clearly going to fail dismally to provide the reliable and economically viable electricity structure we have had for decades⁷. Then there is the complete lack of consideration of alternatives. Even if there is a pressing environmental need to reduce carbon dioxide emissions, and in this regard it must be pointed out that a damage cost related to the impact of such emissions has never been quantified, there are many ways, such as in energy efficiency projects, that these emissions could be reduced for less than 10% of the cost associated with wind energy infrastructure. So yet again, why are we doing it?

The only answer to this, is because it is by diktat, from a system which has a major democratic deficit, which has failed to inform its citizens of the costs, benefits, impacts and alternatives to this programme, which has bypassed proper public participation procedures, which has abysmally failed to provide its citizens with access to justice to contest these issues in a manner which is 'fair, equitable, timely and not prohibitively expensive'. As a result the citizen in Ireland is not only being denied his or her Rights, which were enshrined in the Aarhus Convention the EU ratified in February 2005, but is suffering as a result of maladministration, major losses in the quality of life, being denied, among others, of the benefits of the proper implementation of the Environmental Acquis.

⁷ These are not idle words, as the Irish Academy of Engineering stated in the report previously referenced, the 'policy is fundamentally misguided and will significantly damage Ireland's competitiveness in the short term'.

Through all of this runs a common thread, maladministration and the complete disenfranchisement of the citizen to address these matters when they do occur, which inevitably they will, in a system which lacks proper 'checks and balances' and democratic accountability. Compliance procedures by the European Commission to date have been minimal and when they have occurred it has taken in many cases, decades not years, to progress them through the European Court of Justice. So ineffective has the enforcement action against the Irish State been to date, that the very Administration which has failed to ratify the Aarhus Convention and is determined to continue to disenfranchise its citizens of their Rights⁸, boasts of how it has never been fined by the European Court for an infringement of environmental legislation⁹.

Clearly the EU Commission enjoys discretionary powers on what it enforces within its role as 'Guardian of the Treaties'. Even if the citizen was to document a case of non-compliance, there is absolutely no guarantee that the EU Commission will address it. Indeed the EU Commission is clear in its Communication on implementing European Community Environmental Law COM(2008) 773¹⁰, on the role the Aarhus Convention plays in the better and more consistent enforcement of Community environmental law. In this respect the Commission made it clear it should be easier to bring cases before a national judge to enable problems to be resolved closer to citizens. As the document clarifies; "It should also reduce the need for Commission intervention".

While this may be admirable, as the Reply to UNECE on this Communication documents, the Irish State has not only failed to ratify the Aarhus Convention, but the administration is outright hostile towards adopting its principles in its day to day activities. Furthermore, the EU Commission has failed with regard to ensuring enforcement of the principles of the Convention in Ireland. As a result, given that the citizen is effectively disenfranchised from addressing non-compliances in the Irish Courts, which are among the most expensive and unpredictable in the World, there is in effect little or no enforcement of environmental legislation in Ireland. This has the consequence that the citizen is being denied the rights and benefits associated with this legislation and is seeing as a result major losses in the quality of his or her life.

⁸ Despite the European Court of Justice in July 2009 in case C-427/07, relating to Directive 2003/35/EC on public participation and access to justice, requiring reforms of the legal system with regard to cost of access, no efforts were made to initiate these legal reforms. The EU Commission therefore in March 2010 had to send a final warning in this regard. Yet the reforms have yet to take place.

⁹ Year after year there is obfuscation, but no actual progress to achieve the measures, see for example: http://www.inshore-ireland.com/index.php?option=com_content&task=view&id=729&Itemid=164

¹⁰ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0773:FIN:EN:PDF>

2. NON-TECHNICAL SUMMARY OF REPLY TO UNECE

2.1 General

The Reply to UNECE on this Communication is a comprehensive narrative of how I and others have attempted to exercise our Rights confirmed under Pillars 1, 2 and 3 of the Aarhus Convention, both at National and EU level. The results clearly demonstrate that that administrative procedures and practices are systematically flawed and very much at variance to the provisions of the Convention. More than six years after the EU ratified the Convention, there are not only major gaps in legislative and administrative compliance, but also major flaws in the manner in which the Convention is enforced. Without major reforms and administrative efforts, the principles of the Convention and the Rights bestowed on the Citizen by ratification of the Convention, will remain simply as text of an international agreement.

Therefore with regard to the situation of the Aarhus Convention in Ireland and the responsibilities of the EU as a Party to the Convention, it is respectfully submitted that it is not incumbent on myself or others, to exhaustively document the myriad of ways, in which the Irish regime and the EU's compliance with its responsibilities as a Party to the Convention, are systemically flawed and deficient. It would be humanly, financially and logistically impossible for a very limited number of individuals to do this. In effect, the Reply to UNECE on this Communication documents how the system was tested and found wanting. The efforts to test the system were neither random nor sporadic. Indeed there was a level of professional expertise, based on both interest and experience in the subject matter and the information which was sought to be acquired. Furthermore the initiatives have been meaningful and sincere. One can also add that extensive efforts were made to seek documentation demonstrating compliance with the Convention at both National and EU level; the fact is that to an overwhelming extent, this documentation simply failed to be available. One can only comment; that it is with great interest the reply by the EU to the four questions presented by the Compliance Committee is awaited. Are they in a position to present documentation demonstrating compliance, which was previously unavailable?

If we consider the implementation of the Convention in Ireland in general, as opposed to the specific issues related to renewable energy, which will be addressed latter, then major deficiencies have been documented in the Reply to UNECE on this Communication in regards to the implementation of the Convention in general. These deficiencies stretch across all three pillars of the Convention, in particular:

- Public Authorities in Ireland, both at a primary (decision maker) and secondary (dissemination and regulatory review) level, are resistant to both dissemination of information about, and participation by the public in, the making of policy and planning decisions that affect the environment.
- The effectiveness and or cost of enforcing an individual's right to dissemination and participation are at least limited or at most prohibitive.

The initiatives taken through Pillar I, by requesting access to information, have provided extensive examples of:

- Public authorities, which have wilfully disseminated information on the environment to the public, which is non-transparent to the point of being false, and when this has been brought to their attention have singularly failed to correct the information. Indeed, in some cases senior elected and non-elected officials have made important statements on environmental matters to the media, which were clearly inaccurate. When this was followed up by an access to information request, their officials then obliged by providing documentation, which was non-transparent and inadequate in supporting the statements made.
- Particular mention has to be made of the State Broadcasters, from which the general public derive the overwhelming bulk of their information on the environment. The State Broadcasters simply ignore their requirements under the Convention; as a result information on the environment is frequently inaccurate and non-transparent¹¹. With regard to the Broadcasting Authority of Ireland and their role in media complaints, they simply edited out and ignored references to the Convention. As far as the Department of Communications, Energy and Natural Resources was concerned, the Convention had no domestic legal effect and they had no compliance role in respect of the broadcasting agencies and the requirements of the Convention.
- Furthermore there are repeated examples in the Reply to UNECE on this communication of public authorities failing to possess and update environmental information which is relevant to their function. Even when this has been formally recorded through the appeals process, no attempt has been made by the public authorities to prepare and disseminate the relevant environmental information.
- With regard to the Corrib Gas Project, which is not only the most controversial but largest and most significant infrastructure project in the State in several decades, the planning authority failed to disclose information on which it was basing its decision, even when requested to do so by the Ombudsman as part of the appeals process. Indeed it covertly withheld information from the Ombudsman.
- There are essentially no corrective remedies in relation to the above. Firstly there are no dedicated disciplinary procedures of the Irish State for officials who obstruct or prevent proper dissemination of information related to the environment. Secondly, the Ombudsman, who is the impartial body for adjudicating on appeals related to access to information, has made it clear that her office will not comment on the quality of environmental information, but only provided access to what is there, if it is there. In relation to the Corrib situation, where it was later proved that the planning authority had covertly withheld information, the Ombudsman refused to take retrospective action.

¹¹ In one request for Access for Information on the Environment, RTE refused to respond to a request for technical content related to the claims made about offshore wind energy, claiming exemption under the Freedom of Information legislation in relation to journalistic sources.

In relation to the implementation of Pillar II on public participation in decision-making, such exercises, where they have occurred in Ireland, have already been described by other Non-Governmental Organisations as like being a charade. The evidence in the Reply to UNECE on this communication certainly strongly reinforces this position, for example:

- There are repeated failures to complete the necessary environmental assessments required by law for major policies and programmes. Where they are completed they are often grossly inadequate. For instance the climate change legislation to cut Ireland's greenhouse gas consumption by 80% had, in its assessment, no facts or figures relating to costs and benefits or even how this would be technically achieved. Instead only journalistic statements were used, such as; "Social benefit – better quality of life and well being".
- When Submissions are made by the public, there is an enormous unwillingness to make them accessible for review by the public. Even requesting through Pillar I, that they are made available through the consultation website is fraught with obstacles and in most occasions unlikely to succeed.
- Clearly there is no structured manner for 'taking account of the public participation exercise' or disseminating those conclusions to the public. In both the climate change and waste policy legislation it is clear that submissions from key state agencies and departments, which disagreed with the proposed measures, were clearly ignored. Furthermore the justification related to this was never made available.
- The Department of the Environment for instance is refusing to provide access to its procedures and norms for preparing documentation for public participation and for conducting the public participation exercise, until as such time as a fee for 'search and retrieval' is paid. They have clearly communicated, that they see their responsibilities as limited to advertising for and collecting submissions. Indeed their position is that "Ireland has not ratified the Convention and it is understood that the Convention does not have direct effect in Ireland".

The planning system in Ireland has quite rightly been described by others as dysfunctional and unfit for purpose, in reality it is even worse; the system is simply not even compliant with the law. Twenty six years after the introduction of the Directive on Environmental Impact Assessment, 85/337/EC, it is not even properly transposed into Irish law. Instead of the competent authority basing its decisions on a structured assessment of the environmental impacts, arbitrary decisions are made "in the interest of proper planning and sustainable development".

In the Corrib 9.2 km pipeline planning case, which ran for more than two years, the competent authority completely failed to comply with the most basic principles of public participation. There was an outright refusal to issue the main reports and advice on risk on which the decision would be made, there were no records demonstrating compliance with the Environmental Acquis, the decision that a 'full bore rupture' of a 27 mm thick pipe had to be considered, had no basis in either legislation or the body of technical knowledge and was not justified by a single fact or figure. Sadly this decision was then kept from the public record and not even recorded on the competent authority's schedule of correspondence.

Planning in Ireland is clearly a system which occurs behind 'closed doors' and is subject to clear manipulation.

With regard to Pillar III of the Convention on Access to Justice, it is the role of the Ombudsman to provide Access to Justice in regard to violations of the Access to Information provisions of the Convention. She has repeatedly pointed at the administrative charge of €150 as a reason for the low uptake of appeals to her office, but the reality is that the public are simply not aware of the access to information on the environment regulations. The reason being, despite the obligation under the Convention on public authorities to provide guidance to the public in seeking access to information, is that the Irish public haven't been informed. Neither does the Office of the Ombudsman comply with Pillar III in that Access to Justice is not timely; it can take from five months to a year from first requesting information to conclusion of an appeal by the Ombudsman.

However, when one considers Access to Justice with regard to violations of the public participation provisions of the Convention as well as violations of domestic environmental law, this access is simply not available to the Citizen in Ireland. In their decision on Communication ACCC/C/2008/27, the Compliance Committee found that the quantum of costs awarded in a planning case in Belfast of £39,454, rendered the proceedings prohibitively expensive and that the manner of allocating costs was unfair. In relation to taking a Judicial Review in the Irish High Court, the cost, for each day in Court, would easily amount to a significant five figure sum (in €), for an unlimited number of days. While the EU ratified the Convention in 2005, it has singularly failed to ensure the necessary Access to Justice Provisions in Ireland, and it is completely unreasonable for the EU to expect individuals to commit substantial financial resources to enforce their Rights under the Aarhus Convention, or to leave them disadvantaged by not doing so. In particular, given that the EU as a Party to the Convention has singularly failed to ensure those Rights in the first place.

2.2 Renewable Energy

There is also a strong focus in this Communication on programmes related to renewable energy and wind energy in particular. It is therefore necessary to provide some brief background to this programme and clarify the key environmental parameters in relation to compliance with the Aarhus Convention.

Unfortunately it is only over time that the consequences of badly thought out and conceived policies start to become obvious to the general public, as Der Spiegel on-line reported on the 17th March 2011¹², in relation to "German's Eco-Trap: Is Environmentalism really working?"

¹² <http://www.spiegel.de/international/germany/0,1518,751469,00.html>

- “Not everything that looks green serves the environment. The ecological principle of proceeding with care doesn't seem to apply to environmental policy. The more, the better, seems to be the principle. No one is calculating whether all the billions being invested in protecting the environment are actually being spent wisely. Ordinary citizens can't judge it and many experts have no interest in shedding any light on this aspect because their livelihoods are at stake. A large amount of money flows into studies, risk assessments and providing seals of approval. In many cases, a closer look at environmental measures reveals that they're expensive and don't have much effect”.

While the Aarhus 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 on public participation concerning plans, programmes and policies relating to the environment. Note: EU legislation has required since 2004 that Member States completed detailed Strategic Environmental Assessments of plans and programmes.

As has been mentioned previously Ireland's electricity grid functions perfectly well without any investment in wind energy, the justification for which is strictly related to policies to implement renewable energy, which in turn are based on environmental considerations, in particular the need to reduce emissions of greenhouse gases from thermal power stations.

However, as engineers, who understand the complexity of power plant design and grid operation, it is all too clear the disastrous results of policies which are not properly assessed and rooted in proper fundamentals. Indeed, there has been a clear failure to inform the citizen of the true costs, technical limitations and enormous environmental impact of wind generation on a massive scale; to the point which inaccuracies are deliberately used to suit the purpose of deception.

With regard to the technical background, it is necessary to point out that traditionally generation plants have always been designed to be dispatchable. This means the generating systems can supply power to the grid when the grid requires it, based on demand by the consumer. Wind energy is completely different; it can only supply significant power when the wind speed is very strong. Indeed the turbine will only reach its full output when the wind speed is 50 kph, which is typically twice Ireland's average wind speed of about 22 to 25 kph. Furthermore, the power output of a wind turbine, is related to the cube of the wind velocity, so if the wind speed is halved, the power output goes down by a factor of eight. They may turn, but they don't produce significant power.

The net result is that a wind turbine will only supply in Ireland at best about 30% of its design capacity in a variable manner over the year. The thermal plants will therefore not be replaced; the wind energy simply isn't there to match the demand. Instead the huge variability of this wind energy input has a massive impact on the thermal plants on the grid, which are now struggling to balance this constantly varying input. In essence as more and more rapidly varying wind input is put on the grid, the thermal plants are operating like cars, which have been taken off nice steady motorway driving and placed on stop / go, variable urban driving. As a result their fuel consumption and emissions start to rise.

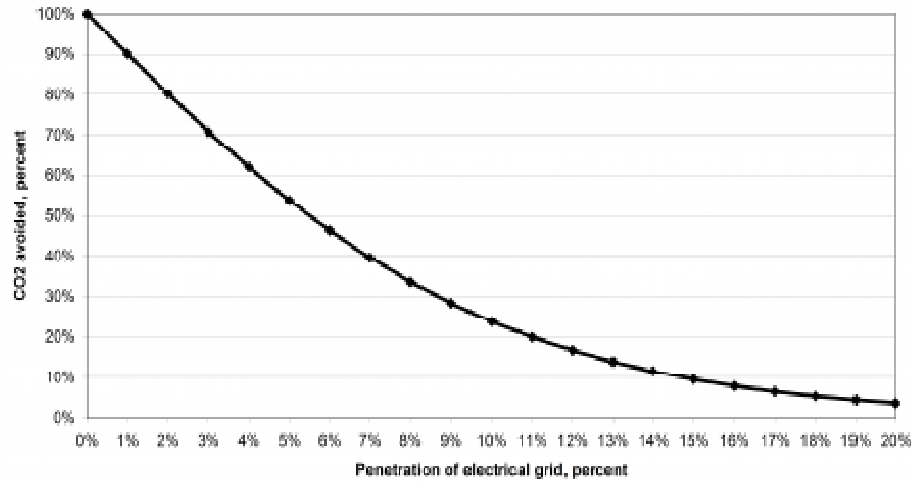
Currently the amount of electricity produced by wind energy in Ireland is about 12% of the total generated, i.e. a 12% penetration of wind energy on the Irish electricity grid. There is considerable reason to believe from engineering analysis done elsewhere, that due to the induced inefficiencies, we will soon be reaching the point where the addition of any further wind turbines will lead to no reductions in fuel or carbon dioxide emissions, indeed increased emissions and fuel consumption could occur. Yet we have a policy of 40% of our electricity in Ireland to be generated by renewables, with some 37% of that coming from wind energy.

So how did we end up with this programme? What are the environmental objectives of this massive expansion in wind energy? If it is savings of greenhouse gases, then what is the environmental damage avoided by these reductions in emissions? Furthermore what are reductions in emissions which occur at different penetrations of wind energy on the grid? If we don't know this then there has been a complete failure to fulfil the legal obligation to provide a proper environmental assessment for the objectives of the programme. Secondly, how much does it cost to reduce greenhouse gases by wind energy? This is also essential; proper environmental assessment requires consideration of alternatives. There are many ways of reducing carbon dioxide, many significantly more cost effective than wind energy. However, without this key emissions reduction cost for wind energy, how was the consideration of alternatives completed?

Unfortunately it is a shocking indictment of how Governments develop policy, that nobody anybody in the World has completed a proper assessment, of how wind energy is actually functioning on an actual grid in terms of carbon dioxide abatement and how it will function with increased levels of penetration proposed by Government policies. Indeed articles aimed for the public, produced both by Irish Government agencies and projects funded by the EU Commission, frequently suggest or imply that a unit of carbon dioxide free renewable energy from wind will replace a unit of fossil fuel energy, with its carbon dioxide emissions. The reality is of course not true, as the level of penetration of wind energy increases, so too do the inefficiencies in the thermal power plants that are now having to compensate for the variability in the wind energy input that has been added to the grid. The net result can be seen below from the graph, adapted from an article by Herbert Inhaber, who with the very limited information on this subject which is available, derived some simple approximations for what is happening on various grids worldwide.

CO2 avoided versus wind's share of electricity generation

Adapted from: Herbert Inhaber (2011), "Why wind power does not deliver the expected emissions reduction?"



The graph above is adapted from Herbert Inhaber: "Why wind power does not deliver the expected emissions reductions"; Renewable and Sustainable Energy Reviews 15 (2011) 2557-2562

This is a clear simple relationship, as more and more turbines are installed; the carbon dioxide emissions potential reduces as the thermal plants are being forced to operate more and more inefficiently, thereby burning more fuel. One can also point out that as the level of penetration by wind energy increases, which in turn leads to an ever decreasing reduction in carbon dioxide savings, the cost per tonne of carbon dioxide emissions avoided rapidly starts to rise. One may question the actual calibration of the curve in the graph above, but that the grid is actually behaving in this manner is indisputable, even data from Eirgrid related to the Irish grid and its modelled carbon dioxide emissions are confirming it.

So what is the rationale for this massive expenditure, which clearly with the installation of every additional turbine is less and less effective, to the point of achieving no emission savings long before the targets set by Government policy are reached? The only answer to this provided by politics and the perception that it would work, fuelled by the negligence of the administration to complete the necessary provisions required by the Aarhus Convention.

At the EU level, targets were set for electricity from renewable energy in Directive 2001/77/EC, which predated the EU ratifying the Aarhus Convention. However, the Irish Energy Policy which followed, predominately constructed from the 2006 Energy Green Paper, was subject to the terms of the Convention. Furthermore, when the EU implemented its programme of 20% of Europe's energy to be from renewable sources by 2020 through Directive 2009/28/EC, which in turn led to the Renewable Energy Action Plans, the development of this programme at EU level was fully subject to the terms of the Aarhus Convention.

Yet, in mid 2011 the situation is that there has **NEVER** been the most rudimentary environmental assessment completed for this major policy decision having huge economic and budgetary significance, which clearly has been taken at EU and National level without any apparent ability to demonstrate compliance with the terms of the Aarhus Convention. Unless of course the EU in their Reply to this Communication can produced documentation to this effect and demonstrate that it was disseminated and relied upon.

Article 5 paragraph 7 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. Furthermore the implementation of public participation concerning plans, programme and policies under Article 7, requires that each Party shall provide for early public participation, when all options are open and effective public participation can take place. However, if one considers that under Directive 2009/28/EC Ireland was assigned a mandatory target of 16% of its energy to be derived from renewable sources by 2020. This target was, as for other Member States, based on the existing level of renewable energy plus a factor based on GDP, in which the overall target of 20% was 'shared' between the 27 Member States. No assessment was completed as to what technologies would be used, what greenhouse gas savings would occur, where the infrastructure would be built, what would be the cost to Irish consumers, etc. Furthermore the Irish public were not consulted and allowed to participate in the decision-making related to this mandatory target, indeed the decision was clearly taken without due account of any public participation.

At National level Directive 2001/42/EC on Strategic Environmental Assessment applied to this renewable energy programme. No such assessment, a detailed review of the environmental objectives, alternatives and impacts, has ever been completed. Furthermore, this assessment should then have been followed by the obligatory public participation exercise specified in that Directive. The EU Commission has been made fully aware of this but refused to take action. Indeed when the EU became a Party to the UNECE Kyiv Protocol on Strategic Environmental Assessment in November 2008, it was on the basis that Directive 2001/42/EC was binding on its Member States. Not only have the requirements of Directive 2001/42/EC not been complied with by the Irish Administration on a regular basis, but this has occurred twice on climate change legislation and waste policy since the Kyiv Protocol entered into force in July 2010.

With regard to the public participation in decision making in relation to National energy policy, the Energy Green Paper of 2006 was not transparent. The section on nuclear energy was inaccurate; there was a failure to inform the public of the huge costs associated with the proposed renewable programme, the massive intrusions on the landscape from the thousands of turbines and additional kilometres of high voltage grids, etc. There is no record of how the due account of the public participation exercise was taken into account in the decision making, which lead to the 2007 Energy White Paper. Indeed the Submission from the Irish Academy of Engineering, which pointed out the inaccuracies in the section on nuclear energy and the limitations with regard to renewables, was clearly not considered.

In the 2007 White Paper it was projected that 33% of electricity generation would be generated by renewables by 2020. This policy document was then followed by a highly inadequate, to the point of being flawed, technical assessment called the All Island Grid Study. Following the finalisation of this Study in October 2008, the Government raised the renewable target to 40%. No environmental assessment or public participation exercise occurred in relation to this revised target.

The implementation of this programme would not have occurred without the approval of the EU of the REFIT tariff programme to finance 1,450 MW of renewable energy, almost exclusively wind. A programme of financial aid which will have to be paid for on consumer prices for the 15 year period of the contracts issued. Indeed there is every indication that it has increased generation costs in Ireland by 15%. In my meeting on 3rd December 2010 with representatives from DG Environment and DG Energy of the EU Commission, I asked as to what basis, in the approval of the REFIT tariffs, the environmental and cost effectiveness of this programme was assessed. I was told it had nothing to do with them and that DG Competition had approved it.

Following the meeting, I sent in an Aarhus Access to Information Request under Regulation 1367 of 2006 in relation to the EU's approval process for such tariffs, such as the role of public participation, Strategic Environmental Assessment, Community Guidelines on how the amount of aid should be the minimum to achieve the environmental protection sought, etc. Instead of the statutory 15 working days it took four months to get a reply, which then demonstrated that the only document, which fell within the scope of my request, was a 'Note to File 0645' in relation to my meeting on the 3rd December. To repeat, unless the EU Commission in their Reply to this Communication can demonstrate otherwise, there was **NO** consideration given to the Aarhus Convention in approval of the REFIT programme.

Neither was there any consideration of the Aarhus Convention given in funding of €110 million for the East-West-Interconnector to the UK. The sole purpose of this €600 million project, the balance paid entirely by the Irish electricity consumer, is to facilitate the expansion of wind energy. There is no environmental, technical or economic justification. It may well be part of the EU's 'Priority Interconnection Plan' of January 2007, but that plan, involving an investment of €30 billion, has never been through a process of strategic environmental assessment or proper public participation in decision-making. Indeed the document itself is very critical of 'time consuming public consultation procedures'.

Furthermore the Environmental Impact Assessment for the interconnector was not transparent, to the point of being inaccurate, while the competent authority for planning failed to fulfil its legal obligations to conduct its own environmental assessment in its decision making. Instead the project was 'rubber stamped' in the 'reasons and considerations', which amounted to less than a page, by reference to policies and plans, which at no stage had been through the proper public participation in decision-making procedures required by the Aarhus Convention. To repeat, unless the EU Commission in their Reply to this Communication can demonstrate otherwise, there was **NO** consideration given to the Aarhus Convention in relation to the decision making for allocating €110 million in funding for the interconnector.

This is not an isolated example, in which policies are developed completely outside the principles of the Aarhus Convention and then used to ‘rubber stamp’ specific developments, in which the planning procedure also operates outside the principles of the Convention and there is no effective Access to Justice to contest the process. If we consider the National Renewable Energy Plan developed under Directive 2009/28/EC to comply with the EU’s target of 16% of Ireland’s energy to be obtained from renewable sources by 2020, this sets out the targets for renewable energy at National level and how they are to be achieved. Not only was there no environmental assessment and associated public participation exercise conducted with regard to the content in the Irish plan, it being in essence an expansion on the content prepared in previous energy related documentation, but the plan completely fails to quantify any environmental impacts, such as the quantity of greenhouse gas emissions saved. In this regard, it didn’t have to, the template under Directive 2009/28/EC didn’t require any quantification of environmental issues, it was optional. Note: The National Renewable Action Plans from a number of other Member States, such as the Netherlands, Denmark, Sweden and France, also have a blank table with regard to greenhouse gas savings and job creation; even though these are the core justifications for the policy and Directive, see below:

5.3 Assessment of the impacts (optional)

Table 13: Estimated costs and benefits of the renewable energy policy support measures:

Measure	Expected renewable Energy (ktoe)	Expected costs (EUR) - please time frame	Estimated GHG reduction by gas (tonnes / year)	Expected growth jobs
No Clean and Efficient policy	2005	n/a.	n/a.	n/a.
Established policy	3748	n/a.	n/a.	n/a.
Announced policy	7340	n/a.	n/a.	n/a.

The National Renewable Energy Action Plan of the Netherlands

5.3. Assessment of the impacts (Optional)

Table 13: Estimated costs and benefits of the renewable energy policy support measures

Measure	Expected renewable energy use (ktoe)	Expected cost (in EUR) - indicate time frame	Expected GHG reduction by gas (t/year)	Expected job creations

Danish and Swedish National Renewable Energy Action Plans

5.3. Impact assessment

This optional aspect will be completed on the occasion of the presentation to the Commission of one of the biennial reports provided for in Article 22 of Directive 2009/28/EC.

French National Renewable Energy Action Plan

Yet the Irish Renewable Energy Action Plan is now being used by the competent authority for planning in Ireland as a justification to approve wind farms, subject to Directive 85/337/EC on Environmental Impact Assessment, including those in sensitive and scenic locations. In this regard the position of the EU Commission was made clear following the meeting of the 3rd December 2010 in the Note to File 0645, in that:

- “So far as Directive 2001/42/EC was concerned, the Commission considered that any National Renewable Energy Action Plan that did not create a framework for specific projects for purposes of Directive 85/337/EEC did not need to undergo a Strategic Environmental Assessment, but that subsequent more detailed plans might need to do so”.

They simply didn't want to know about it. Is there any wonder that there is a growing anger in Europe about the democratic deficit? With regard to the renewable energy programme, which is clearly ill conceived and dysfunctional, it is clear that mandatory targets have been set by diktat, that policies have also been set by diktat and the planning process is then a 'rubber stamp', in which the citizen has no access to justice to contest the decision. Furthermore, the general citizen is completely unaware of his / her Rights under the Aarhus Convention, because the authorities never complied with the Convention in promoting awareness among the public of those Rights. It is therefore with interest I await to see, what documentation the EU Commission can provide to the Compliance Committee, with regard to how they ascertained that the Renewable Energy Action Plan submitted by Ireland was developed in compliance with the Convention.

Finally with regard to renewable energy, 20% of the EU's energy supply, a value in excess of a €100 billion per year, is to be removed from the normal 'checks and balances' of the regulated market place and instead assigned to an administrative structure, which is clearly non-compliant with the procedures which are legally binding on it. The system is completely open to abuse and corrupt practices. Indeed the Reply to UNECE on this Communication documents:

- How the Danish authorities are using false claims in the Irish media to promote sales of wind energy infrastructure.
- How the Danish EU Commissioner for Climate Action made statements on the National broadcaster promoting offshore wind, based on it being sound economics and actually paying off. When documentation was requested from the EU Commission under Aarhus to support such claims, it had to be stated by her officials that the Commissioner's statements were based on publicly available information, her general experience, knowledge and political views. Indeed, despite six months passing since it was requested, DG Energy has been unable to provide any performance data for wind energy farms installed in European waters to date.
- What little documentation produced by the EU commission on the wind energy programme, relies extensively on the European Wind Energy Association (EWEA) for technical justification. A lobby group instead of an independent technical review. Despite failing to complete the necessary environmental assessment themselves; the EU Commission has funded the dissemination programme of the EWEA, for instance their website <http://www.wind-energy-the-facts.org/>, which contains inaccurate information on the environmental impacts. Funding amounted to over €350,000 in 2007, at which time the Aarhus requirement for transparency of environmental information applied. Note: Regulation 1367 of 2006 which states: "Community institutions and bodies shall, insofar as is within their power, ensure that any information compiled by them, or on their behalf, is up-to-date, accurate and comparable." When queried on this matter, the EU commission could only draw attention to the disclaimer on the website.
- There are eleven different sources of renewable energy, the most effective, from a position of cost and environmental performance, being energy from waste. To comply with the political objectives of the Irish Green Party, the Irish Administration has acted to actively obstruct waste to energy projects, to the point of bringing in legislation to impose punitive levies on them, in order to make the market place available for the preferred, less environmentally effective, technology approach of the Green Party. In doing so both the principles of the Aarhus Convention and legally binding National requirements were bypassed by officials in the administration. One can also point out that contracts worth billions of Euros were handed to wind energy developers without any environmental assessment or consideration of alternatives. Unfortunately, while the Garda Bureau of Fraud Investigation has acknowledged receipt of information in this regard, they have failed to take any action.

2.3 Conclusion

The Aarhus Convention is not just the text of a simple international agreement. It is about the environmental and human rights of the citizen. As the UNECE website states:

- “The subject of the Convention goes to the heart of the relationship between people and governments. The Convention is not only an environmental agreement, it is also a Convention about government accountability, transparency and responsiveness”.
- “The Aarhus Convention grants the public rights and imposes on Parties and public authorities obligations regarding access to information and public participation and access to justice”.

The systematic maladministration, which has been documented in the Reply to UNECE on this Communication, has a major impact on the quality of the citizen's life. Many in Ireland, ranging from those employed in industrial development to inshore fisheries and aquaculture, have seen major losses in employment as a result. Communities in rural areas have seen the imposition of over a thousand wind turbines, with several thousand more to come, into the landscape around them. Effectively they have been denied their Right to challenge the legality of these decisions, decisions which are based on pure diktat, having bypassed procedures related to environmental assessment and public participation. A complete affront to Principle 10 of the UN Rio Declaration, that; “Environmental issues are best handled with participation of all concerned citizens, at the relevant level”.

While the EU has ratified the Aarhus Convention in February 2005, it has failed to honour those Rights. In the case of Citizens in Ireland, some of those Rights are still absent from the Statute Book, while to a large extent the principles of the Convention are ignored by the public authorities in their conduct with the citizens. Furthermore, as the Reply to UNECE on this Communication demonstrates, the Institutions of the EU clearly operate outside the principles of the Convention, which are legally binding on them.

It is not as if the EU is unaware of these issues. They are. Correspondence with the EU Commission has been on-going for almost two years. According to Jean Francois Brakeland, Head of Unit 2A, DG Environment, which is responsible Aarhus Convention issues, they are not in a position to clearly establish any infringement of EU law and see no grounds for pursuing the CHAP (2010) 0645 Compliant File, which they have now closed. As far as the EU Ombudsman is concerned, for which a compliant case was opened in October 2009, the necessary analysis is still on-going, with a decision due by the end of August 2011.

Clearly the EU Commission considers itself compliant with its responsibilities under the terms of the Aarhus Convention and that the renewable energy programme will continue as existing. I beg to differ; the Reply to UNECE on this Communication has demonstrated, among others, systemic flaws resulting in a paucity of information, misinformation, unreasoned or questionable decision making, biased reporting, a culture of resistance in disclosure, an ineffectual review system bypassing public participation procedures and a costly judicial review system. While the Compliance Committee are entitled to make their own recommendations, I would respectfully point out that the EU should not be allowed to claim that it is a compliant Party with the Convention, until as such time as it can **demonstrate** that the necessary procedures to do so are in place and functioning. In this regard, I would like to point out some of the many current limitations:

- The EU has no proper enforcement measures. Clearly the mechanisms available (under Article 258 TFEU) are ineffective, taking not only several years, but often decades to have effect.
- There are no mechanisms to ensure that public authorities possess and update environmental information which is relevant to their functions.
- There are no mechanisms to ensure that the way public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible.
- There are no effective mechanisms to ensure a transparent and fair framework for public participation in decision making.
- With regard to Access to Justice, not only are there limitations at national level, but the internal review procedure, under Regulation 1367 of 2006, of legislative acts taken at a Community level, effectively disenfranchises a very significant percentage of the European Public.