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

By: Pat Swords BE CEng FIChemE CEnv MIEMA

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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.

Acknowledgement: I was assisted by Joseph Dalby, Barrister-at-Law, (of the Law Library, Dublin, and 4 -5 Gray's Inn Square, London) particularly relating to the liability of the EU for breaches of the Aarhus Convention in Ireland and Access to Justice provisions in Ireland.

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. EXPLANATORY NOTE

1.1 General

This document is submitted in support of my Communication to the United Nations Economic Commission for Europe's (UNECE) Aarhus Convention.

My complaint is that the European Union has breached the Convention in relation to enforcement in Ireland of the three pillars of Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

This document 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 **systemically 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, through enforcement by the EU and this Committee, the principles of the Convention and the Rights bestowed on the Irish Citizen by ratification of the Convention, will remain simply as text of an international agreement.

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, this Reply to UNECE documents how the system was tested and found wanting. The efforts to test the system were neither random nor sporadic.

1.2 Main Themes and Reference Points

The Committee will find herein reports and references to a number of administrative actions have been taken to enforce rights conferred by the Convention. These largely relate to one of three main areas of complaint.

1.2.1 Ireland's Plan and Programme of Renewable Energy

The Irish government and public authorities promoted and rolled out the use of wind technologies as the main solution to achieving renewable energy targets. This document demonstrates how an emphasis on wind energy is flawed. Furthermore it goes on to show how a failure on the part of the Irish authorities to provide access to information and participation in development of these plans contributed to the folly of over-reliance on wind energy. Furthermore, waste to energy, which is also a renewable technology, was clearly obstructed by the Irish administration based on political 'considerations'.

1.2.2 The Corrib Planning Permission Process

The extraction of gas from the Corrib Gas Field, sited in the North East Atlantic Ocean, on to land is Ireland's largest ever infrastructure project. Permission over the route of the 9.2km onshore pipeline from landfall to terminal was hugely controversial. Ultimately permission was granted when the developer agreed to lay the pipe through an underground tunnel due to a risk of a full-bore rupture in the event of major ground movement (earthquake).

This document demonstrates the flaws in how that decision was reached, the significant lack of disclosure by the planning authority with regard to environmental information, and how ineffective Irish authorities are in holding, collecting and disseminating environmental information, ensuring participation in relation to same and enforcing those obligations.

1.2.3 Lack of Compliance and Enforcement

Overall this document demonstrates that despite a concerted, sincere, and consistent attempt to obtain information relevant to decisions and plans affecting the environment in relation to the above two themes (and others), the system in Ireland has been found wanting. This document contends that that is related to a systemic failure in the application of the Aarhus principles in Ireland, which in turn arises from a failure by the European Union to enforce the same principles.

This document demonstrates the EU has failed to take effective and proper enforcement measures against Ireland to establish and maintain a clear, transparent and consistent framework to implement provisions of this Convention.

In the absence of ratification by Ireland of the Convention, it falls to the EU to ensure compliance. Each instance or example set out herein demonstrates non-compliance by Ireland with the purpose, intention and effect of the Convention. And therefore proves the failure of the EU to enforce same.

1.3 Document Structure

This Reply to UNECE is so constructed such that in a separate document, there is a **Non-Technical Summary**, which contains:

- An explanation of the Aarhus Convention.
- An explanation of the context and importance of the Convention in the Irish Situation.
- A summary of the contents and conclusions of the reply to the questions presented by the UNECE Aarhus Convention Compliance Committee.

Within this document, which contains the detailed technical content of the Reply to UNECE of the questions presented on the 28th January 2011 on Communication ACCC/C/2010/54[1], there is:

- An Executive Summary.
- An Introduction to the Aarhus Convention and its context and importance in the Irish Situation.
- Sections 4 to 11, which answer the six detailed questions presented by the Compliance Committee to me, Pat Swords, the Communicant.
- A further four questions were presented to the Party concerned, the EU, by the Compliance Committee, to which I was made welcome to respond to. These then form Sections 12 to 15 of this Reply to UNECE.

The situation in Ireland is very unique, it that there has been a failure to ratify the Aarhus Convention and implement the necessary reforms, even though Ireland is a Member State of the EU. However, the EU is the Party to Aarhus Convention and it is therefore important to clarify the legal position with regard to the liability of the European Union for breaches of the Convention by Ireland. This is a complex matter and I am grateful to Joseph Dalby, Barrister-at-Law for his contribution to the Section 4.2, which explores the legal interrelationship between the responsibilities adopted by the EU on ratification of the Convention and the current situation with regard to the Irish State, in order to aid the members of the Aarhus Convention Compliance Committee in their decision making.

[1] See Letter to the Party concerned and Letter to the Communicant on the Communication webpage: http://www.unece.org/env/pp/compliance/Compliance%20Committee/54TableEU.htm

2. EXECUTIVE SUMMARY

2.1 Admissibility

2.1.1 Public Authorities

The following entities referred to herein, from whom environmental information (within the definition of Article 2(3)) was sought, are "public authorities" within the meaning of Article 2(2), in that they are either:

- (a) An institution of Government at national, regional and other level or;
- (b) They are natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment.

Letter	Public Authority	Brief Description
A	An Bord Pleanala	Planning Appeals Board, Ireland
B	Danish Embassy, Dublin	Foreign Affairs, Denmark
C	Department of Communications, Energy and Natural Resources	Government Department, Ireland
D	Department of the Environment, Heritage and Local Government	Government Department, Ireland
E	Dun Laoghaire Rathdown County Council	Local Authority, Ireland
F	Eirgrid	State-owned company for operation of grid infrastructure, Ireland
G	European Commission	Directorate General Climate Action
H	European Commission	Directorate General Energy
I	European Commission	Directorate General Environment
J	Commission for Energy Regulation	State Agency, Ireland
K	Industrial Development Authority (IDA)	State Agency, Ireland
L	RTE	State Broadcaster, Ireland
M	Sustainable Energy Authority of Ireland (SEAI)	State Agency, Ireland
N	TG4	State Broadcaster, Ireland
O	University College Dublin (UCD)	State University, Ireland

2.1.2 Environmental Information

The following information referred to herein, which was sought from public authorities (within the definition in Article 2(2)) is “environmental information” within the meaning of Article 2(3) in that it is information on the state of elements of the environment or factors and activities or measures (including administrative measures and policies etc.) affecting or likely to affect the elements of the environment.

I. Access to actual performance data on renewable energy systems, such as energy output, carbon dioxide emissions avoided from the Department of Communications Energy and Natural Resources and EU Commission.

II. Access to data and methodology used for assessing economic analysis of renewable energy from the Department of Communications, Energy and Natural Resources and Eirgrid.

III. Access to procedures and documentation related to administration of foreshore licensing from the Department of Environment, Heritage and Local Government.

IV. Access to compliance documentation on Directive 2003/4/EC, which should have been submitted to the EU Commission, from the Department of Environment, Heritage and Local Government.

V. Access to documentation on how the economic and environmental assessment of the REFIT tariffs on renewable energy, plus associated public participation procedures were assessed and approved by the EU Commission.

VI. Access to documentation generated by the EU on case CHAP (2010)00645 from the EU Commission.

VII. Administrative measures in relation to compliance with the Environmental Acquis from the Department of Environment, Heritage and Local Government.

VIII. Clarifications and supporting documentation in relation to media statements with regard to renewable energy and its economic analysis and justification from the Department of Communications, Energy and Natural Resources, Commissioner for Energy Regulation, EU Commission, Industrial Development Authority, University College Dublin and Danish Embassy.

IX. Clarifications and supporting documentation with regard to media statements on industrial risk / human safety from University College Dublin.

X. Clarifications related to administrative measures for environmental awareness exhibition from Dun Laoghaire Rathdown County Council.

XI. Clarifications in relation to implementation of the Aahus Convention by the State Broadcasters (RTE) and through the Broadcasting Act from the Department of Communications, Energy and Natural Resources.

XII. Clarifications related to administrative procedures for completing public participation exercises according to Article 7 of the Convention, access to same procedures. Access to public submissions to public participation exercises and documentation related to 'taking account of the public participation exercise in the final decision' from the Department of the Environment.

XIII. Clarification in relation to funding arrangements for dissemination of environmental information and arrangements for ensuring the transparency of the information on the environment from DG Energy, EU Commission.

XIV. Criteria for assessment of environmental impact, policies for implementation of the Aarhus Convention from RTE.

XV. Criteria used for assessment of risk and environmental impact in planning decisions subject to Article 6 of the Convention from An Bord Pleanala.

XVI. Environmental assessments required under Directive 2001/42/EC and equivalent information for policies related to renewable energy, waste, and climate change legislation from the Department of Communications, Energy and Natural Resources and Department of Environment, Heritage and Local Government.

2.1.3 The Communicant

The Communicant is a natural person and is likely to be affected by or has an interest in the environmental decision-making by the public authorities listed above in respect of the information listed above.

2.2 Infringements in relation to the Environmental Information referred to herein by Public Authorities in Ireland.

- Note, where reference is made to a "failure" by the EU in respect to public authorities in Ireland, this means or includes a failure to take proper enforcement measures to ensure that Ireland complies (either generally or particularly) with the Convention or Directives adopted thereunder.

Relevant Provision of the Convention	Relevant Section of this Reply to UNECE
	Letter refers to authority from which information was sought and the numeral the type of information
Article 1: The EU failed to guarantee to every person in Ireland the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the Convention.	Sections 3 to 14 of this Reply support this assertion.

Relevant Provision of the Convention	Relevant Section of this Reply to UNECE Letter refers to authority from which information was sought and the numeral the type of information
Article 3(1): The EU failed to take the necessary legislative, regulatory and other measures, including measures to achieve compatibility and proper enforcement measures to establish and maintain a clear transparent and consistent framework to implement the provisions of this Convention in Ireland.	While this is demonstrated throughout this Reply, specific details are in Sections 4.1, 4.3.4, 4.5.2, 4.6, 8.3, and 8.4. (I, VI)
Article 3(2): The EU failed to guarantee or ensure that official and authorities in Ireland provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice (in accordance with the Convention).	See in particular Sections 4.3.1, 4.33 and 7.3.2. (E, X), (D, XII)
Article 4(1): The EU failed to guarantee or ensure that public authorities in Ireland make information available to the public. The EU has failed to ensure its institutions make information available to the public.	See in particular Sections 4.3.1, 4.3.3, 4.3.4, 7.3.1, 7.3.2 and 7.3.5 (N, XIV), (C, XIV), (A, XV), (D, III), (D, XII), (F, II) See in particular Sections 8.4, 11.1 and 11.2 (I, VI), (H/I, I)
Article 5(1): The EU failed to guarantee or ensure that public authorities in Ireland possessed and updated environmental information which is relevant to their functions and failed to ensure that mandatory systems are established so that there is an adequate flow of information to public authorities about proposed and existing activities referred to herein. The EU has failed to ensure its institutions posses and updated environmental information which is relevant to their functions.	See in particular Sections 4.3.2, 4.3.4, 4.4.2, 5.2, 7.1, 7.3.3, 7.3.6 and 7.5. (L, XIV), (A, XV), (C, XVI) (D, XVI), (C, II), (D, IV) See in particular Section 7.5.
Article 5(2): The EU failed to guarantee or ensure that the way in public authorities in Ireland make	See in particular Sections 4.3.3, 5, 7.3.3, 7.3.4 and 7.3.5. (K, VIII), (O, VIII, IX), (E, X), (B, VIII),

Relevant Provision of the Convention	Relevant Section of this Reply to UNECE Letter refers to authority from which information was sought and the numeral the type of information
environmental information available to the public is transparent and that the environmental information is effectively accessible. The EU failed to ensure its institutions disseminated transparent information on the environment.	(L, XI), (C, XI), (J, VIII), (F, II), (D, VII) See in particular Section 11. (G, VIII), (H, XIII)
Article 5 (7a): The EU failed to guarantee that public authorities publish the facts which they consider relevant and important in framing major environmental policy proposals.	See in particular Sections 4.4.2 and 5.8. (D, XVI)
Article 6(4): The EU failed to guarantee or ensure that the public in Ireland was informed in relation to early public participation, when all options are open and effective public participation can take place.	See in particular Section 7.5.
Article 7: The EU failed to guarantee or ensure that the provisions made in Ireland for participation by the public during the preparation of plans and programmes were appropriate and practical such as to achieve the objectives and rights set out in the Convention.	See in particular Sections 4.4.2, 5.2, 5.3, 5.6, 5.8, 7.3.2 and 7.5. (D, XVI), (C, XVI), (D, XVI), (D, XII)
Article 9 (1): The EU failed to guarantee Access to Justice in relation to requests for information, which is timely.	See in particular Sections 4.5.1, 7.3.1, 7.3.2, 7.3.3 (D, III), (D, XII), (C, VIII)
Article 9 (2): The EU failed to guarantee in Ireland Access to Justice such that citizens in order that citizens can challenge decisions, acts and omissions of public authorities under the provisions of the Convention. These procedures shall provide adequate and effective remedies and be fair, equitable, timely and not prohibitively expensive.	See in particular Section 4.5.2.

2.3 Question 1 to the Communicant

Question 1 to the Communicant asked: "How is it considered that the EU Commission failed to monitor the implementation of the Aarhus Convention in Ireland and indicate how your allegations relate to the issues raised in the sub-questions listed under 2". Where question 2 related predominately to matters related to renewable energy. As the information and evidence available to the Communicant in relation to non-compliances with the Aarhus Convention in Ireland was so broad, it was decided that in answering Question 1, predominately general issues excluding renewable energy would be addressed.

The following tables reflect the summary of the main non-compliances documented with regard to question 1.

2.3.1 Implementation of Pillar I

Requirement of the Convention	Actual situation
Article 3 paragraph 1: Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access to justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.	The EU has implemented the main provisions relating to the Aarhus Convention through: (i) Directive 2003/4/EC on public access to environmental information. (ii) Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes to the environment and amending with regard to public participation and access to justice Directives 85/337/EC and 96/61/EC[2]. Both may have been implemented to a limited extent into Irish law, but as the next sections will demonstrate there are major problems with regard to Pillars I, II and III of the Convention in Ireland. The evidence to date is that enforcement action by the EU in relation to the provisions of the Convention has been limited. However, as this document demonstrates the EU has failed to take effective and proper enforcement measures against Ireland to establish and maintain a clear, transparent and consistent framework to implement provisions of this Convention.

[2] Directive 85/337/EC on Environmental Impact Assessment and 96/61/EC on Integrated Pollution Prevention and Control.

Requirement of the Convention	Actual situation
	In the absence of ratification by Ireland, it falls to the EU to ensure compliance. Each instance or example set out herein demonstrates non-compliance by Ireland with the purpose, intention and effect of the Convention. And therefore proves the failure of the EU to enforce same.

Requirement of the Convention	Actual situation
Article 3 paragraph 3. Each party shall promote environmental education and environmental awareness among the public, especially on how to obtain access to information, to participate in decision making and to obtain access to justice in environmental matters.	Directive 2003/4/EC is clear in Article 3 paragraph 5 that Member States shall ensure that officials are required to support the public in seeking access to information. While this statement is transposed into Article 5 (a) of S.I. No. 133 of 2007, the reality of the situation is that Public Authorities have not actively informed the public of their rights relating to access to information on the environment and have frequently been obstructive. The norm is that information is not systematically published. Routinely, anyone with an interest has to ask especially for information. Even this is proof of a breach of the Convention. A request is of no guarantee that support is forthcoming. One has to wait and see what answer the public authority gives for not automatically and immediately publishing the information. Excuses range from not having the information, to taking legal advice on disclosure, to withholding disclosure on the grounds of an exception. The low take-up of applications to the Commissioner for Environmental Information is a testament to weariness on the part of the consumer and interested party to pursue matters beyond a direct request.

Requirement of the Convention	Actual situation
Article 5, paragraph 1(a) requires that public authorities possess and update environmental information which is relevant to their functions.	Numerous Access to Information on the Environment requests have shown that Irish Public Authorities fail to possess and update environmental information, even when it is legally incumbent on them to produce the relevant documentation. For examples, see Sections 4.3.2 and 4.3.3, the section on Corrib debacle, the section on Renewable Energy.

Requirement of the Convention	Actual situation
Article 5 paragraph 2 requires that within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent.	National legislation is S.I. No. 133 of 2007, which implements Directive 2003/4/EC. This is clear in that as a matter of course, 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. 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. There is systematic disregard with regard to compliance with this legislation in Ireland. Even in the rarer times when Public authorities have the information they rely far too readily on exceptions (e.g. judicial capacity), or are inattentive to their obligations. Indeed as far as the State Broadcasters, the Broadcasting Authority of Ireland and the Department of Communications are concerned, the legislation simply doesn't apply to them.

2.3.2 Implementation of Pillar II

In relation to the Corrib Development

Requirement of the Convention	Actual situation
Environmental impact assessment is a fundamental requirement of Article 6 paragraph 6 of the Aarhus Convention and Article 6 paragraph 8 requires that this documentation be taken into account in the decision reached by the competent authority.	Case C-50/09 of the European Court of Justice demonstrated that arbitrary decision making that has characterised Irish planning, due to the concept of 'in the interest of proper planning and sustainable development' referred to in Irish planning legislation, was incompatible with the obligation under Article 3 of Directive 85/337/EEC, to assess the project's direct and indirect effects in an appropriate manner. A key aspect in completing proper structured public participation. The fact that 26 years after it was introduced, this key Directive dating back to 1985 is not yet transposed into Irish Law, is a clear indication of how ineffective the EU's enforcement procedures in relation to environmental legislation are.

Requirement of the Convention	Actual situation
Article 4 of the Convention requires public authorities to provide access to information on the environment on request. Article 5 of the Convention requires that public authorities; possess and update environmental information which is relevant to their function; this environmental information is the made available to the public in a transparent manner. Article 6 paragraph 6 (f) requires that in accordance with national legislation, the main reports and advice issued to the public authority is made accessible to the public concerned. Article 6 paragraph 8 requires that in the decision due account is taken of the outcome of the public	Articles 4 and 5 of the Convention are implemented into European Law by Directive 2003/4/EC. Ireland has failed to give practical effect to the requirements of Directive 2003/35/EC, which gives effect to Article 6 of the Convention. Clearly Section 4.3.4 demonstrates An Bord Pleanala acted outside Articles 4, 5 and 6 of the Convention in the Corrib planning case. It maintains generally that information is not accessible to the public, even when it is necessary for proper participation in the planning process. It reserves the right to withhold material information about vital aspects of major projects with a singular impact on the environment. However, the Corrib situation is by no means unique, it is the norm.

Requirement of the Convention	Actual situation
participation. Article 6 paragraph 9 required that the reasons and considerations on which the decision is based be made accessible to the public.	

In relation to Climate Change

Requirement of the Convention	Actual situation
Article 5 paragraph 7 (a) requires that each party shall publish the facts and analyses of facts which it considers relevant and important in framing major environmental policy proposals. Article 7 requires 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.	Under national legislation the Climate Change Response Bill, the scope of which would have had massive environmental and economic impacts on the country, should have been subject to a Strategic Environmental Assessment as part of the national implementation of Directive 2001/42/EC. Indeed the failure to ensure an Environmental Report was completed in compliance with Directive 2001/42/EC is a failure of the EU to comply with its responsibilities under the UNECE Kyiv Protocol on Strategic Environmental Assessment. Clearly the EU Commission is 'standing back' with regard to compliance with proper environmental assessments and is also complicit in failing to complete such assessments itself in the development of environmental targets. As regards the Irish public, instead of a structured Environmental Report being made available, what was produced was an appalling Regulatory Impact Assessment, which did not fulfil the requirements of Article 5 paragraph 7 (a) and Article 7 of the Convention .

Requirement of the Convention	Actual situation
Article 7 / 8 of the Convention requires appropriate taking account of the outcome of the public participation.	The Climate Change Response Bill consultation, as has also been demonstrated in this Reply with reference to other consultation exercises, was merely the conducting of

Article 3 of the Convention requires a clear, transparent and consistent framework to implement the provisions of the Convention.	a public participation exercise rather than the 'taking account' of the public participation exercise. The EU ratified the Convention in February 2005. In April 2011, following a public participation exercise which was conducted clearly outside the principles of the Convention, we have a situation where a principal officer in the Irish Department of the Environment is responding to a legal request and stating that the Convention has no direct effect. The failure to carry out a Strategic Environmental Assessment and ensure access to information and public participation, had allowed government and officials to already sanction a massive bias (and spend) in favour of wind energy on little more than loose and untested assumptions.

2.3.3 Implementation of Pillar III

Requirement of the Convention	Actual situation
Article 9 of the Convention requires that in relation to access to information, the citizen shall have access to a review procedure, which shall be fair, equitable, timely and not prohibitively expensive.	S.I. No. 133 of 2007 established the Office of the Commissioner for Environmental Information and implemented Directive 2003/4/EC, which is a schedule to the S.I. Article 6 paragraph 1 of Directive 2003/4/EC states that: "Any such procedure shall be expeditious and either free of charge or inexpensive". The current situation is that appeals to the Commissioner for Environmental Information are not resolved in a timely / expeditious manner.

Requirement of the Convention	Actual situation
Article 9 paragraphs 2, 3 and 4 define that each party shall ensure the rights to access to justice of the citizen to challenge the substantive and procedural legality of any	These Rights do not exist in Ireland. The EU as a Party to the Convention has failed to ensure these Rights. There is no equality of arms between

Requirement of the Convention	Actual situation
decision, act or omission of Article 6 and other relevant provisions of this Directive. Any such procedure shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.	parties. Public authorities use public money to engage a full legal team. Whereas the applicant must decide between representing himself or engaging a legal team that is still very expensive. The system is in effect still prohibitively expensive because, whilst Ireland has implemented a "no costs" rule, the "substantial interest" test and the right of a public authority to question the admissibility of review application (after the court has given leave) simply adds to the costs that an applicant will incur.

2.3.4 Aarhus Convention compliance measures by the EU in Ireland

Requirement of the Convention	Actual situation
Article 3 paragraph 3 of the Convention requires that each Party shall promote environmental education and environmental awareness among the public, especially on how to obtain access to information, to participate in decision-making and to obtain access to justice in environmental matters. Article 3 paragraph 1: Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access to justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.	The EU Commission has never promoted an awareness of the Convention and its importance among the Irish Public. If one puts Aarhus into the search engine on the EU Commission's representation in Dublin website[3], one draws a blank. As the situation to date has demonstrated, such as with the Environmental Impact Assessment Directive, and as is highlighted in several Sections of this Reply to UNECE, the EU Commission simply does not have 'proper enforcement measures' at its disposal to deal with breaches of the terms of the Aarhus Convention or indeed environmental legislation in general.

[3] http://ec.europa.eu/ireland/press_office/index_en.htm

Requirement of the Convention	Actual situation
Article 5 paragraph 1 requires that each Party shall possess and update environmental information which is relevant to their function.	Directive 2003/4/EC required the EU Commission to have a report related to the experience gained in the application of the Directive in Ireland by 14th August 2009. This report was not received until several months later. Note: This report is not disseminated on the Europa website, neither is there any comment or reference to it.

Requirement of the Convention	Actual situation
Article 3 paragraph 1: Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access to justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.	Outside of the European Court of Justice case C-427/07, there is no evidence of enforcement measures by the European Commission in relation to Aarhus Convention compliance in Ireland. As regards enforcement measures generally, the Commission knows from previous experience of Ireland that it is only through infringement proceedings that Ireland will take measures to give effect to European legislation, particularly in the environmental field. It is for this reason that the paucity of action on the part of the EU has had a significant (if not substantial) effect on non-compliance by Ireland with regard to the Aarhus Convention.

2.4 Question 2 to the Communicant

2.4.1 Question 2 (a) and (b)

In question 2 (a) of their letter of January 2011 the Compliance Committee highlighted: To what plan, programme or policy do the allegations of non-compliance with the Convention relate? We found the following possibly relevant documents / decisions:

- Energy Policy Green Paper, 1 October 2006.
- Energy Policy White Paper, March 2007, basis for Government Renewable Energy Policy.
- Government's policy decision to accelerate the development of Ocean Energy (Wave and Tidal) in Ireland.

- Offshore Renewable Energy Development Plan.
- Sustainable Energy Authority of Ireland's (SEAI) Strategic Energy Plan 2010 – 2015.

In part (b) it was asked if the allegations of non-compliance relate to any of the above documents / decisions, all of the above or if the allegations relate to other documents please indicate in each case which provisions of the Convention in your view are at stake and why.

Requirement of the Convention	Actual situation
Article 5 of the Convention requires that the way in which public authorities make environmental information available to the public is transparent and they publish the facts and analysis of the facts which they consider relevant and important in framing major environmental proposals. Article 7 requires 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. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.	The EU has set ambitious targets for renewable energy in Ireland through mandatory Directives, 2001/77/EC and 2009/28/EC. There has never been a proper assessment of the environmental and economic impacts of those targets on Ireland. Certainly the website of the EU Commission's representation in Dublin does not show that any public participation exercise was carried out as to how these measures would affect Irish citizens. While the Aarhus Convention would clearly have applied to the development of the targets for Directive 2009/28/EC.

Requirement of the Convention	Actual situation
Article 5 of the Convention requires that the way in which public authorities make environmental information available to the public is transparent and publish the facts and analysis of the facts which it considers relevant and important in framing major environmental proposals. Article 7 requires 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	As the EU had ratified the Aarhus Convention in 2005, it applied to Community Legal order and the conduct of the Energy Green Paper consultation, which lead to the finalised Energy White Paper. The documentation for the Green Paper was neither transparent nor adequate in terms of environmental considerations and neither was any account taken of the technical content of the Submission made by the Irish Academy of Engineering.

Requirement of the Convention	Actual situation
the environment, within a transparent and fair framework, having provided the necessary information to the public. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.	

Requirement of the Convention	Actual situation
Article 5 of the Convention requires that the way in which public authorities make environmental information available to the public is transparent and publish the facts and analysis of the facts which it considers relevant and important in framing major environmental proposals. Article 7 requires 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. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.	As the EU had ratified the Aarhus Convention in 2005, it applied to Community Legal order and the conduct of the All Island Grid Study and Government decision to increase the level of renewable sources in electricity generation from 33% to 40%. The documentation was neither transparent nor adequate in terms of environmental considerations. Neither was any proper public participation exercise conducted in the development of the renewable energy portfolios or in the decision to increase the percentage of renewables from 33 to 40%.

Requirement of the Convention	Actual situation
Articles 4 and 5 of the Convention require that public authorities provide access to information on the environment and that such information progressively becomes available in electronic databases. Article 7 requires 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	As the EU had ratified the Aarhus Convention in 2005, it applied to Community Legal order and the conduct of the Joint Oireachtas Committee's consultation on "Meeting Ireland's electricity needs post 2020". There was deliberate obstruction with regard to ensuring access to the Submissions to the consultation. Furthermore there was a failure to take account of the technical content of the Submissions, the final report by the

Requirement of the Convention	Actual situation
transparent and fair framework. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.	Committee being nothing more than the results of a straw poll.

Requirement of the Convention	Actual situation
Article 5 of the Convention requires that the way in which public authorities make environmental information available to the public is transparent and publish the facts and analysis of the facts which it considers relevant and important in framing major environmental proposals.	As the EU had ratified the Aarhus Convention in 2005, it applied to Community Legal order and the conduct of Ocean Energy development in Ireland. Wave and tidal energy are most certainly not technically proven with regard to the situations which apply in Irish marine waters. Furthermore the cost basis for this energy is about five times that of standard generating costs. This was never explained in a transparent manner to the public in the relevant documentation. Any references to job potentials, etc, must be placed in the perspective that investment by taxpayers in this sector is extremely speculative, with a very high risk of failure.

Requirement of the Convention	Actual situation
Article 5 of the 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. Article 7 requires 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. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.	As the EU had ratified the Aarhus Convention in 2005, it applied to Community Legal order and the conduct of the consultation on the “Offshore renewable energy plan”. As the EU had become a Party to the UNECE (Kyiv) Protocol on Strategic Environmental Assessment in November 2008, this protocol, although not yet legally binding, should also have been applied to the conduct of this consultation. The consultation was not transparent. The public were simply presented with a massively expensive programme costing billions and told it was “a wonderful economic opportunity”. There was no data provided on; what environmental benefits would ensue, what alternatives were considered to achieve those

Requirement of the Convention	Actual situation
	environmental benefits, what would be the state of the environment if the programme did not proceed, the technical limitations, etc. The sole justification was on political considerations.

Requirement of the Convention	Actual situation
Article 5 paragraph 2 requires that within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent.	National legislation is S.I. No. 133 of 2007, which implements Directive 2003/4/EC. This is clear in that as a matter of course, 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. 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. The documentation produced by SEAI is frequently not transparent.

Requirement of the Convention	Actual situation
Article 5 paragraph 7 (a) requires that each party shall publish the facts and analyses of facts which it considers relevant and important in framing major environmental policy proposals. Article 7 requires 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. Furthermore Article 7 references Article 6 paragraph 3 which states that each party shall provide for early	The requirements for Strategic Environmental Assessment are defined both in Directive 2001/42/EC and the UNECE (Kyiv) Protocol on Strategic Environmental Assessment. The EU became a Party to this protocol in November 2008 and although not yet legally binding, it should have been applied to the conduct of the Waste Policy consultation. The documentation produced for the Waste Policy consultation was a false reflection of technical facts and EU environmental policy. There was also a complete failure to produce an environmental assessment for two of the components of the policy, the Department clarifying that they would

Requirement of the Convention	Actual situation
public participation, when all options are open and effective public participation can take place.	complete this requirement after adoption by the Government. The consultation was not conducted in a transparent and fair framework. There was a refusal to make available the Submissions received and they were clearly ignored in the preparation of the resulting legislation.

2.4.2 Question 2 (c)

Question 2 (c) related to in what way does the decision of the Commissioner for Environmental Information in Case CEI/09/0016 of the 27th September 2010 amount to non-compliance with the Convention.

Requirement of the Convention	Actual situation
Article 5 paragraph 2 is clear in that the manner in which public authorities make environmental information available to the public is transparent. Article 5 paragraph 7 (a) requires that each party shall publish the facts and analyses of facts which it considers relevant and important in framing major environmental policy proposals. Article 7 requires 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.	The section on nuclear energy in the Green Paper was false and could not be verified by the Department when questioned under appeal CEI/09/0016 The requirements for Strategic Environmental Assessment are defined both in Directive 2001/42/EC and the UNECE (Kyiv) Protocol on Strategic Environmental Assessment. The EU became a Party to this protocol in November 2008 and although not yet legally binding, it should have been applied to the preparation of the National Renewable Energy Action Plan. The fact that there has never been the most basic consideration of the environmental aspects of the renewable energy programme in Ireland is a clear breach of Article 5 paragraph 7(a) and Article 7 of the Convention.

2.4.3 Question 2 (d)

Question 2 (d) related to whether use had been made of the possibility to appeal decision of the Commissioner in Case CEI/09/0016 to the High Court.

Requirement of the Convention	Actual situation
Article 4 paragraph 4 states that the grounds for refusal shall be interpreted in a restrictive way,	Directive 2003/4/EC implements Pillar I of the Convention in the EU. This Directive is clear in Article 4 that

taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.	Member States may not provide for a request to be refused where the request relates to information on emissions into the environment. This is being breached in relation to appeal CEI/07/0005 and is now subject to proceedings at the Supreme Court.

2.4.4 Question 2 (e)

In Question 2 (e) it states that in the Communication mention is made of several requests for environmental information, in addition to the request at stake in Case CEI/09/0016. The communication also mentions that these requests have been submitted to the Irish Authorities and to the Commissioner for Environmental Information. An explanation was therefore requested as to how in my view decision-making with regard to these request amount to non-compliance with the Convention.

Requirement of the Convention	Actual situation
Article 4 of the Convention provides Access to Environmental Information, although there are limited exemptions in which environmental information may be refused if the disclosure could adversely affect, for instance the course of justice. Article 9 of the Convention requires that in relation to access to information, the citizen shall have access to a review procedure, which shall be fair, equitable, timely and not prohibitively expensive.	As the EU is a Party to the Convention, it applies to Community Legal Order in Ireland, in particular Directive 2003/4/EC. In Case CEI/10/0016 in relation to the Poolbeg Waste to Energy Plant, the Department of Environment, Heritage and Local Government were supporting the political ambitions of their Minister. Not only had they no right to refuse access to information in claiming that they were a public authority acting in a judicial capacity, but clearly Article 3 (2) of S.I. No 133 of 2007 is an incorrect transposition of Article 4 of Directive 2003/4/EC and Article 4 paragraph 4 (c) of the Aarhus Convention. The fact that the appeal to the Commissioner for Environmental Information was made on the 30th August 2010 and there is still no decision nine months later demonstrates that the review procedure is not timely.

Requirement of the Convention	Actual situation
Article 4 of the Convention provides Access to Environmental Information, although there are limited exemptions in which environmental information may be refused if the disclosure could adversely affect, for instance the course of justice, 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". Article 5 requires that the way in which public authorities make environmental information available is transparent and that environmental information is effectively accessible. Article 7 provides for public participation in decision-making in polices, plans and programmes relating to the environment, within a transparent and fair framework. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.	The EU is a Party to the Convention and has implemented public participation in decision-making through Directive 2003/35/EC. Case CEI/11/002 in relation to the waste policy public participation, established how it was conducted in anything but a transparent and fair framework. When requests for access to information and its dissemination were made, they were obstructed. Furthermore the outcome of those requests for information clearly demonstrate that at no point in time was it the intent of the Department of the Environment, Heritage and Local Government to conduct a public participation in decision-making exercise within a transparent and fair framework.

Requirement of the Convention	Actual situation
Article 5 of the Convention states that public authorities must ensure that they possess and update environmental information which is relevant to their function. Furthermore, they must ensure the way in which they make environmental information available	The EU is a Party to the Convention and has implemented the access to information pillar through Directive 2003/4/EC and was therefore binding on Ireland, a Member State. CEI/11/003 established that the Minister for Energy was making statements to

Requirement of the Convention	Actual situation
to the public is transparent. Article 6 paragraph 8 is clear in that: "Each Party shall ensure that in the decision due account is taken of the outcome of the public participation".	the public which were not transparent, i.e. false information on the environment. This was confirmed by the inability of his Department to providing transparent supporting documentation for his claims. Furthermore the results of the public participation, in which the Irish Academy of Engineering and Industry were pointing out the devastating impact of the rising electricity prices, were simply being ignored.

Requirement of the Convention	Actual situation
Article 5 paragraph 2, states: "Each Party shall ensure that, within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible". 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 of 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 body established by law. The procedure shall provide adequate and effective remedies and be fair, equitable, timely and not prohibitively expensive.	CEI/10/0020 also established that there is constant dissemination of false information by senior officials in Ireland. When requests for information are made and demonstrate the inadequacies of the information held within their departments to support these statements, the Commissioner for Environmental Information refuses to comment on the content or the usefulness of such records. The EU is a Party to the Convention and it applies to Community Legal order in Ireland. Directive 2003/4/EC implements the measures associated with Articles 4, 5 and paragraph 1 of Article 9 of the Aarhus Convention. Even though the EU is a Party to the Convention there are clearly no measures in place to ensure the transparency of environmental information made available to the public in Ireland, in particular measures related to access to justice which are fair, equitable, timely and not prohibitively expensive.

Requirement of the Convention	Actual situation
Article 5 paragraph 2, states: "Each Party shall ensure that, within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible". "The Aarhus Convention: An Implementation Guide" states: "Transparency means that the public can clearly follow the path of environmental information, understanding its origin, the criteria that govern its collection, holding and dissemination, and how it can be obtained. Article 5, paragraph 2, thus builds on Article 3, paragraph 1, requiring Parties to establish and maintain a clear and transparent framework to implementing the Convention, and Article 3, paragraph 2, requiring officials to assist the public in seeking access to information".	The request for information to Eirgrid / SEAI in relation to their report on electricity costs also highlighted the clear problem with the transparency of environmental information in Ireland. The EU as a Party to the Convention may have brought in legislation in the form of Directive 2003/4/EC, but in reality in Ireland there are no effective measures to ensure that the way in which public authorities make environmental information available is transparent.

Requirement of the Convention	Actual situation
Article 5 paragraph 2, states: "Each Party shall ensure that, within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible".	The EU is a Party to the Convention and Article 8 paragraph 1 of Directive 2003/4/EC is clear on the duty of the Member State to ensure the quality of information on the environment. As has been highlighted previously there is a clear problem with the transparency of environmental information in Ireland. AEI/2009/039 demonstrated that the Administration in Ireland has no measures in place to deal with officials making claims to the media that are not transparent or otherwise producing documentation that is not transparent.

2.4.5 Question 2 (f)

This related as to how in my view the decision-making process regarding the interconnector between Ireland and the United Kingdom amounted to non-compliance with the Convention.

Requirement of the Convention	Actual situation
Article 7 requires 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. With this regard the following Sections of Article 6 apply: "Each party shall provide for early public participation, when all options are open and effective public participation can take place". "The public concerned shall be informed, either by public notice or individually as appropriate, early in the environmental decision-making procedures, and in an adequate, timely and effective manner". Environmental impact assessment is a fundamental requirement of Article 6 paragraph 6 of the Aarhus Convention and Article 6 paragraph 8 requires that this documentation be taken into account in the decision reached by the competent authority. Article 5 requires Public Authorities to ensure that the way they make environmental information available to the public is transparent.	Even though the Aarhus Convention was in force following its ratification by the EU in February 2005, there simply was no proper public participation completed on the EU Priority Interconnection Plan or the Irish White Paper Energy Policy of 2007. These were then used to 'rubber stamp' the approval of the Environmental Impact Assessment and planning decision for the interconnector. In the 'Reasons and Considerations' for the planning approval, which amounted to less than a page, it is clear in that An Bord Pleanala did not fulfil its legal obligations to conduct an environmental assessment, an issue that was the subject of the European Court of Justice March 2011 Decision C-50/09. A failure therefore to comply with the structured public participation in decision making under Article 6 of the Convention. Indeed the decision had absolutely no consideration of alternatives. Furthermore the environmental impact assessment, completed by EirGrid, a public authority, was not transparent.

2.4.6 Question 2 (g)

This related as to how in my view the Renewable Energy Action Plan submitted by Ireland to the European Commission amounted to non-compliance with the Convention.

Requirement of the Convention	Actual situation
Article 5 paragraph 7 (a) requires that each party shall publish the facts and analyses of facts which it considers relevant and important in framing major environmental policy	There was a complete failure to comply with these measures both at EU and Member State level. No documentation has been prepared that provides as a minimum; (i) an environmental assessment of the mandatory targets

Requirement of the Convention	Actual situation
proposals. Article 7 requires 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. With this regard the following Sections of Article 6 apply: "Each party shall provide for early public participation, when all options are open and effective public participation can take place". "The public concerned shall be informed, either by public notice or individually as appropriate, early in the environmental decision-making procedures, and in an adequate, timely and effective manner".	set, (ii) a consideration of the alternatives to meet the relevant environmental objectives and (iii) the current state of the environment and the likely evolution thereof without implementation of the plan or programme. The fact that there has never been the most basic consideration of the environmental aspects of the renewable energy programme in Ireland is a clear breach of Article 5 paragraph 7(a) and Article 7 of the Convention. Furthermore the general Irish Public were simply not given an opportunity to participate during preparation of this plan when all options are open and effective public participation can take place. Indeed they were never properly informed or provided with a real and effective opportunity to engage, in a transparent and fair public participation exercise, at any stage of the development and implementation of this renewable energy programme.

2.5 Question 3 to the Communicant

Question 3 related to pending remedies, both those of a judicial and of an administrative nature and both those at national and European level:

- With regard to the investigation by the EU Ombudsman (2587/2009/JF), this is on-going since October 2009. On the 25th May I received a letter from the EU Ombudsman P. Nikiforos Diamandouros. While it had not proved possible for him to complete the examination of his case, he stated: "I will inform you of the next steps relating to the above inquiry as soon as possible and, in any event, before the end of August 2011".

Requirement of the Convention	Actual situation
Article 3 paragraph 1: Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access to justice provisions in this Convention, as well	While the EU ratified the Convention in February 2005, the situation is that the necessary legislation is not in place in Ireland. Furthermore the CHAP (2010)00645 complaint process, which the EU Commission has now closed, demonstrated that the EU has no proper enforcement measures in relation to the

Requirement of the Convention	Actual situation
as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.	Convention and clearly does not ensure that the necessary provisions are adhered to.

2.6 Question 4 to the Communicant

This related as to how in my view the September 2007 decision of the European Commission, by which it approved the REFIT I programme for state aid amounted to non-compliance with the Convention.

Requirement of the Convention	Actual situation
Article 3 paragraph 1: Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access to justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.	The EU ratified the Convention in February 2005 and approved the REFIT programme in September 2007. Without this approval for State Aid, the resulting 1,384 MW of wind farm construction in Ireland would not have occurred. Not only did this wind energy programme by-pass the provisions of the Convention, which applied to its implementation at National level, but the EU failed to take any considerations of environmental aspects or obligations under the Aarhus Convention in its approval process for the State Aid.

2.7 Question 5 to the Communicant

This question related as to how the March 2010 decision of the European Commission to allocate €110 million to the interconnector between Ireland and the UK amounted to non-compliance with the Convention.

Requirement of the Convention	Actual situation
Article 7 of the Convention relates to public participation concerning plans, programmes and policies relating to the environment. Article 6 relates to public participation in decisions on specified activities.	The EU ratified the Convention in February 2005 and allocated €110 million to the interconnector in March 2010. This project and the policies to which it related were subject to Articles 6 and 7 of the Convention. However, at both EU and National level these articles were not complied with.

2.8 Question 6 to the Communicant

This question related as to how in the Communication various allegations were made as to how the European Union was in non-compliance with having failed to provide access to environmental information and / or having failed to disseminate environmental information.

Requirement of the Convention	Actual situation
Article 4 of the Convention relates to Access to environmental information. Information should be made available at the latest within a month. Article 5 requires that each Party shall ensure that the way public authorities make environmental information available to the public is transparent.	While the EU ratified the Convention in February 2005, the example provided in Section 11.2 with regard to availability and dissemination of data on offshore wind highlighted the limitations with regard to access to information and the transparency of information. Furthermore the absence of any proper data on offshore wind clearly demonstrated that EU officials had not completed the most rudimentary assessments of the policies and programmes they are promoting.

Requirement of the Convention	Actual situation
Article 4 of the Convention relates to Access to environmental information. Information should be made available at the latest within a month. Article 5 paragraph 2 requires that each Party shall ensure that the way public authorities make environmental information available to the public is transparent.	Regulation 1367 of 2006 implements Articles 4 and 5 of the Aarhus Convention as they apply to institutions of the EU. While the EU ratified the Convention in February 2005, the example provided in Section 11.2 in relation to the EU Commission funding the European Wind Energy Associations dissemination programme to the tune of several hundred thousand Euro, further highlights the limitations with regard to access to information and the transparency of information. Indeed the very fact that there is an absence of independent transparent analysis on the wind energy programme, instead of industry association funded programmes, is a clear example of a lack of intent to comply with Article 5 paragraph 2.

3. INTRODUCTION

3.1 The Aarhus Convention

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 environmental rights. 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".

3.2 The Aarhus Convention in Ireland

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 clarified[4], i.e. in theory it applies to Ireland through Community legal order. Note: Community legal order includes the 300 of so Directives in the Environmental Sphere, commonly called the Environmental Acquis[5].

[4] 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 comminautaire", 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.

3.3 Reason for EU as a Party

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. This Document and the Technical Annexes attached to it are the response to those questions.

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[5] 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.

3.4 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 States[6], 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 Bank[7] 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".

3.4.1 Ireland's Record of Implementation

Unfortunately Ireland is by far the Member Sate 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 Justice[8], 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 2011[9]:

- "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.

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6 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.

7 http://siteresources.worldbank.org/INTECAREGTOPENVIRONMENT/Resources/511168-1191448157765/Chapter1.pdf

8 http://ec.europa.eu/environment/legal/law/statistics.htm

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

3.4.2 Policy Vacuum

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 damming 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 decades[10]. 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, then 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.

[10] 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".

3.4.3 Lack of an Effective Regulatory Oversight

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 Rights[11], boasts of how it has never been fined by the European Court for an infringement of environmental legislation[12].

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) 773[13], on the role the Aarhus Convention plays in the better and more consistent enforcement of Community environmental law. It 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 this Reply to UNECE documents, the Irish State has not only failed to ratify the Aarhus Convention, but the administration is out rightly 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, 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.

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[11] 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.

[12] 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

[13] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0773:FIN:EN:PDF

4. COMMC54 QUESTION 1 – HOW IS IT CONSIDERED THAT THE EU COMMISSION FAILED TO MONITOR THE IMPLEMENTATION OF THE AARHUS CONVENTION IN IRELAND

4.1 General

Question 1 to the Communicant on ACCC/C/2010/54 asked: "How is it considered that the EU Commission failed to monitor the implementation of the Aarhus Convention in Ireland and indicate how your allegations relate to the issues raised in the sub-questions listed under 2". Where question 2 related predominately to matters related to renewable energy. As the information and evidence available to the Communicant in relation to non-compliances with the Aarhus Convention in Ireland was so broad, it was decided that in answering Question 1, predominately general issues excluding renewable energy would be addressed, while in Question 2 and the following Questions, the renewable energy issues and related non-compliances with the Convention would be the main focus of the reply.

To reiterate the position of the Aarhus Convention in Ireland, while the ratification of the Aarhus Convention rests with the National Government, the terms of the Convention have applied to Community Legal Order in Ireland since its ratification by the EU in February 2005. However, the reality of the actual situation in relation to the operation of the Convention in Ireland is radically different. Essentially EU Citizens resident in Ireland are nearly completely disenfranchised, with regard to the benefits legally entitled to them under the terms of the Convention, following its ratification by the EU. If we consider the three pillars of the Convention, it is not just that there have been blatant warning signs in relation to how the Irish Administration has conducted its activities, but that the level of irregularities has long since demonstrated a culture of systematic non-compliance. Clearly this has been tolerated by the EU, as the level of enforcement action has been minimal:

- European Court of Justice Case C-427/07, Commission v Ireland[14], related to two different pre-litigation procedures. First, the Commission complained that the EIA Directive (Directive 85/337 as amended by Directive 97/11) had not been transposed by Ireland in relation to private roads. In the second pre-litigation procedure, the Commission alleged that Ireland had not transposed (fully) the Aarhus Directive (Directive 2003/35/EC). The Commission argued that that no measure had been taken by Ireland to ensure transposition of the requirement of timeliness. The Commission also argued there was no applicable ceiling as regards the amount that an unsuccessful applicant would have to pay, as there was no legal provision which referred to the fact that the procedure would not be prohibitively expensive. Lastly, the Commission criticised Ireland for not having made available to the public practical information on access to administrative and judicial review procedures.

- With regard to the requirement that the procedures must not be prohibitively expensive, the European Court of Justice found that mere judicial discretion to decline to order the unsuccessful party to pay the

[14] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:220:0003:0004:EN:PDF

costs of the procedure cannot be regarded as valid implementation of the directive. Finally, the Court found that Ireland had not fulfilled its obligation to inform the public about access to judicial review procedures as the mere availability on the internet of rules and decisions cannot be regarded as ensuring, in a sufficiently clear and precise manner, that the public concerned is in a position to be aware of its rights on access to justice in environmental matters.

- Compliance by Ireland with EU law in the environmental field, and Court of Justice cases in particular are piecemeal. Ireland declares that it has never been fined by the EU for a breach of Community law. This is because it takes action only at the last minute. For instance, there are four other cases in respect of which the Commission has sent final warnings to Ireland[15].

Requirement of the Convention	Actual situation
Article 3 paragraph 1: Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access to justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.	The EU has implemented the main provisions relating to the Aarhus Convention through: (i) Directive 2003/4/EC on public access to environmental information. (ii) Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes to the environment and amending with regard to public participation and access to justice Directives 85/337/EC and 96/61/EC[16]. Both may have been implemented to a limited extent into Irish law, but as the next sections will demonstrate there are major problems with regard to Pillars I, II and III of the Convention in Ireland. The evidence to date is that enforcement action by the EU in relation to the provisions of the Convention has been limited. However, as this document demonstrates the EU has failed to take effective and proper enforcement measures against Ireland to establish and maintain a clear, transparent and consistent framework to implement provisions of this Convention.

15 http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/313&format=HTML&aged=1&language=EN&guiLanguage=en

16 Directive 85/337/EC on Environmental Impact Assessment and 96/61/EC on Integrated Pollution Prevention and Control.

Requirement of the Convention	Actual situation
	In the absence of ratification by Ireland, it falls to the EU to ensure compliance. Each instance or example set out herein demonstrates non-compliance by Ireland with the purpose, intention and effect of the Convention. And therefore proves the failure of the EU to enforce same.

4.2 Liability of the European Union for Breaches of the Convention by Ireland

The EU is the Party to Aarhus Convention and it is therefore important to clarify the legal position with regard to the liability of the European Union for breaches of the Convention by Ireland, the only Member State which has failed to ratify the Convention.

The substantive matters complained of concern provisions of Irish law and procedure that are at variance to the Convention. Ireland is a party to the Convention but has not ratified it by way of implementation of same into national law in accordance with its constitution.

However, the Committee may and should take cognisance of the constitutional and international framework in which the Convention applies in and as between Ireland and the European Union.

4.2.1 The Transfer of Competence

Ireland has, by virtue of its Constitution and the European Communities Act 1972 and being a Member State of the EU, conferred on the European Union, the right and obligation to legislate and take other measures in order to give effect to European Union law.

Ireland has transferred or conferred competence on the Union to conclude international agreements.

- The Community, in accordance with the Treaty on the Functioning of the European Union, and in particular Article 3 thereof, is competent, together with its Member States, for entering into international agreements, and for implementing the obligations resulting therefrom, which contribute to the pursuit of the objectives listed in Article 191 of the Treaty.

- Further, Article 216(2) TFEU provides that '[a]greements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States'.

4.2.2 The EU as a Party to the Convention

Notwithstanding the absence of ratification by Ireland, the European Union is a Party to the Convention.

- Article 1 of Decision 2005/370 provides: ‘The UNECE Convention on access to information, public participation in decision-making and access to justice in environmental matters, (Aarhus Convention) is hereby approved on behalf of the Community.

- Recital 7 of Decision 2005/370 states: 'The objective of the Aarhus Convention, as set forth in its Article 1 thereof, is consistent with the objectives of the Community's environmental policy, listed in Article 174 of the Treaty, pursuant to which the Community, which shares competence with its Member States, has already adopted a comprehensive set of legislation which is evolving and contributes to the achievement of the objective of the Convention, not only by its own institutions, but also by public authorities in its Member States'.

Article 19 of the Convention provides that any [regional economic integration] organisation ... which becomes a Party to this Convention without any of its Member States being a Party shall be bound by all the obligations under this Convention. If one or more of such an organisation’s Member States is a Party to this Convention, the organisation and its Member States shall decide on their respective responsibilities for the performance of their obligations under this Convention. In such cases, the organisation and the Member States shall not be entitled to exercise rights under this Convention concurrently.

The European Union has not declined to assume responsibility for any provision relevant to this Communication.

- Under the terms of the Aarhus Convention, a regional economic integration organisation must declare in its instrument of ratification, acceptance, approval or accession, the extent of its competence in respect of the matters governed by the Convention. The only limitation reserved by the European Union to Member States is in relation to Article 9(3) of the Convention:

- In its declaration of competence made pursuant to Article 19(5) of the Aarhus Convention and annexed to Decision 2005/370, the Commission stated, in particular, ‘that the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by Article 2(2)(d) of the Convention, and that, consequently, its Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless and until the Community, in the exercise of its powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations’.

4.2.3 The Convention is Part of the Acquis Communataire

The European Union accepts and maintains that the Convention is integrated into European Union law and that it is only respect of Article 9(3) of the Convention that it is agreed that Member States have reserved sole responsibility[17]. This matter has been definitively ruled upon by the European Court of Justice, which ruling should be sufficient for the Committee.

- The Court of Justice of the European Union has confirmed that the Convention is integrated into EU law. And the European Union has further ratified and given effect to the Convention by means of Directive in accordance with the Treaty on the Functioning of the European Union.

- In Case Case C-240/09, Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky[18], the Court of Justice of the European Union ("the ECJ") ruled:

  30 The Aarhus Convention was signed by the Community and subsequently approved by Decision 2005/370. Therefore, according to settled case-law, the provisions of that convention now form an integral part of the legal order of the European Union (see, by analogy, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 36, and Case C-459/03 *Commission* v *Ireland* [2006] ECR I-4635, paragraph 82).

  31 Since the Aarhus Convention was concluded by the Community and all the Member States on the basis of joint competence, it follows that where a case is brought before the Court in accordance with the provisions of the EC Treaty, in particular Article 234 EC thereof, the Court has jurisdiction to define the obligations which the Community has assumed and those which remain the sole responsibility of the Member States in order to interpret the Aarhus Convention (see, by analogy, Joined Cases C-300/98 and C-392/98 *Dior and Others* [2000] ECR I-11307, paragraph 33, and Case C-431/05 *Merck Genéricos – Produtos Farmacêuticos* [2007] ECR I-7001, paragraph 33).

The European Court of Justice went to indicate the situation in which the European Union had not assumed certain obligations but left it to the Member States to interpret the Convention. In this particular case it was concerned with Article 9(3) Aarhus:

[17] Article 9(3) relates to members of the public having access to administrative or judicial procedures to challenge acts or omissions by private persons and public authorities which contravene provisions of national law relating to the environment.

[18] 8 March 2011, not yet reported

> 32 Next, it must be determined whether, in the field covered by Article 9(3) of the Aarhus Convention, the European Union has exercised its powers and adopted provisions to implement the obligations which derive from it. If that were not the case, the obligations deriving from Article 9(3) of the Aarhus Convention would continue to be covered by the national law of the Member States. In those circumstances, it would be for the courts of those Member States to determine, on the basis of national law, whether individuals could rely directly on the rules of that international agreement relevant to that field or whether the courts must apply those rules of their own motion. In that case, EU law does not require or forbid the legal order of a Member State to accord to individuals the right to rely directly on a rule laid down in the Aarhus Convention or to oblige the courts to apply that rule of their own motion (see, by analogy, *Dior and Others*, paragraph 48 and *Merck Genéricos – Produtos Farmacêuticos*, paragraph 34).

However, this ruling is relevant to Member States in respect of the provision in question (Article 9(3)) at the point in time that the ruling is made. It does not apply to provisions adopted by the Community, nor to the EU's obligation to ensure compliance with international agreements. As the Court added:

> 36 Furthermore, the Court has held that a specific issue which has not yet been the subject of EU legislation is part of EU law, where that issue is regulated in agreements concluded by the European Union and the Member State and it concerns a field in large measure covered by it (see, by analogy, Case C-239/03 *Commission* v *France* [2004] ECR I-9325, paragraphs 29 to 31).

> 44 .... a provision in an agreement concluded by the European Union with a non-member country must be regarded as being directly applicable when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure (see, in particular, Case C-265/03 *Simutenkov* [2005] ECR I-2579, paragraph 21, and Case C-372/06 *Asda Stores* [2007] ECR I-11223, paragraph 82)

> 49 Therefore, if the effective protection of EU environmental law is not to be undermined, it is inconceivable that Article 9(3) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law.

> 51 Therefore, it is for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of the Aarhus Convention and the objective of effective judicial protection of the rights conferred by EU law, so as to enable an environmental protection organisation, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law (see, to that effect, Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 44, and *Impact*, paragraph 54).

4.2.4 Duty of Member States

Ireland is bound by, must give effect to and not act in any way contrary to EU law. The general obligation on Member States is Article 4 TEU:

> "to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EC Treaty or resulting from action taken by the institutions of the Community."

Additionally, they must abstain from any measure which could jeopardise the attainment of the objectives of the Treaty.

The Court of Justice has elaborated on the significance of Article 4, although it is sufficient just to note that Article 4 is one of the provisions relied upon by the ECJ in concluding that EU law take priority over national law (the principal of supremacy).

The obligation on Member States with regard to implementation of directives is elaborated in the Treaty of European Union and the Treaty on the Functioning of the European Union (formerly the EC Treaty) In respect of the duty to implement directives then, bearing in mind the obligation in Article 4 TEU a directive is (as per Article 288 TFEU):

"binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. "

Again, this is a duty to implement and thus give effect to the directive adopted.

Therefore a breach by Ireland of the Convention and or the Directives that seek to give effect to the Convention is, by virtue of the EU's adherence to the Convention, and the integration of the Convention into EU law, a breach by the EU of the Convention.

To the extent that Ireland is in breach of the Convention, the European Union has failed to take the necessary legislative, regulatory and other measures to establish in Ireland a clear, transparent and consistent framework to implement the provisions of the Convention.

In particular the EU has not used the mechanisms available (under Article 258 TFEU) to ensure compliance with the Convention by Ireland[19].

4.2.5 The EU's Duty to Enforce

The EU maintains that, ordinarily, the Commission alone is competent to decide whether it is appropriate to bring proceedings against a Member State for failure to fulfil its obligations.

This applies for breaches of Community law. Any discretion the Commission has in relation to the breaches of the Convention must be qualified by the terms of the Convention.

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[19] With the exception of one case C-427/07 related to Directive 2003/35/EC.

Under Article 3.1 of the Convention, "Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.

Therefore the Commission has no discretion not to undertake proper enforcement measures to implement the provisions of the Aarhus Convention in Ireland.

4.3 Implementation of Pillar I of the Convention in Ireland

4.3.1 Failure to support the public in seeking access to information

Directive 2003/4/EC is implemented into Irish legislation by the Access to Information on the Environment Regulations, S.I. No. 133 of 2007[20], However, as the Commissioner for Environmental Information concluded in her 2009 Annual Report[21]:

- "The Commissioner points to the relatively low level of activity in this area and the lack of awareness generally about the right of access to environmental information under the Access to Information on the Environment Regulations and Directive EC/2003/4".

In her speech in 2008 the Commissioner for Environmental Information made it clear in that[22]:

- "Implementation of Directive 2003/4/EC in Ireland is at a fairly minimalist level. The technical, legal arrangements have been made but the wider operational arrangements have not been made".

In her 2010 Annual Report published in May 2011, the Commissioner was again pointing out that the level of activity in appeals and in applications under the Regulations had been low. Again she identified the level of fee (normally €150) as being a discouragement to appellants and the lack of awareness generally regarding the rights of members of the public under the Regulations.

Indeed, outside of a very limited number of specialists in environmental legislation and protection, there is essentially no awareness in the Irish public of the Rights they are entitled to under this legislation. Furthermore as was recorded in the 'book' entitled 'Bringing the Irish Administration to Heel', submitted already to UNECE[23], Public Authorities were; (a) often not aware of the regulations themselves and / or (b) out rightly hostile to fulfilling the access to information duties incumbent on them.

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20 http://www.irishstatutebook.ie/2007/en/si/0133.html

21 http://www.ocei.gov.ie/en/MediaandSpeeches/PressReleases/2010/Name,12072,en.htm

22 http://www.ocei.gov.ie/en/MediaandSpeeches/Speeches/2008/File,7822,en.pdf

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

- In Appeal CEI/10/0016, see also Section 7.3.1, I asked the Department of the Environment 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. The reply I received said that since the "foreshore licensing function is exempt from the terms of the Access to Information on the Environment (AIE) regulations", the records that I had requested would not be released. The Department justified its decision on the grounds that the statutory regulations and published guidance notes on Access to Information on the Environment excludes decisions made in a "judicial…capacity," which refers, for example, to processes of determination (normally statutory in nature), which are open to the hearing of submissions from different parties, and where the authority concerned is required to act in a judicial manner. This is quite amazing that information about the administrative function in processing a licence application (and not a particular decision) can now be considered as acting in a judicial or legislative function. Note: Article 4 paragraph 4 (c) of the Aarhus Convention does provide grounds for refusal if the disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature.

Requirement of the Convention	Actual situation
Article 3 paragraph 3. Each party shall promote environmental education and environmental awareness among the public, especially on how to obtain access to information, to participate in decision making and to obtain access to justice in environmental matters.	Directive 2003/4/EC is clear in Article 3 paragraph 5 that Member States shall ensure that officials are required to support the public in seeking access to information. While this statement is transposed into Article 5 (a) of S.I. No. 133 of 2007, the reality of the situation is that Public Authorities have not actively informed the public of their rights relating to access to information on the environment and have frequently been obstructive. The norm is that information is not systematically published. Routinely, anyone with an interest has to ask especially for information. Even this is proof of a breach of the Convention. A request is of no guarantee that support is forthcoming. One has to wait and see what answer the public authority gives for not automatically and immediately publishing the information. Excuses range from not having the information, to taking legal advice on disclosure, to withholding disclosure on the grounds of an exception. The low take-up of applications to the

Requirement of the Convention	Actual situation
	Commissioner for Environmental Information is a testament to weariness on the part of the consumer and interested party to pursue matters beyond a direct request.

4.3.2 Failure to possess and update environmental information in general

One of the most frustrating aspects of dealing with Public Authorities in Ireland through the Access to Information on the Environment Regulations is that they frequently fail to have the necessary information, even though it is legally incumbent on them to do so. Such an example is the appeal to the Commissioner for Environmental Information CEI/09/0016, which determined that not only had there been no Strategic Environmental Assessment completed for the renewable energy programme, a breach of Directive 2001/42/EC[24], but neither did the Department of Communications, Energy and Natural Resources hold any additional information on; (a) a ranking system for technology alternatives in terms of their ability to meet the criteria in the Renewable Energy Directive and (b) options to reach the objectives in legislation. **This is dealt with further under Pillar II below.** While the Commissioner for Environmental Information in her Decision made the statement below; this is as far as her legislative powers go, an issue which will be discussed further in Section 8.1:

- "The Aarhus Convention: an Implementation Guide[25]" [ECE/CEP/72] says that if the public authority does not hold the information requested, it is under no obligation to secure it. It goes on to suggest that failure to possess environmental information relevant to a public authority's responsibilities might be a violation of Article 5, paragraph 1(a) of the Convention which relates to the requirement that public authorities collect, possess and disseminate environmental information.

Additional examples of the same occurrence are numerous, some examples are provided below and in later sections of this Reply to UNECE:

- Appeal to the Commissioner for Environmental Information CEI/09/0015[26] in relation to the State Broadcaster RTE, determined that RTE had; (a) no criteria with regard to assessment of environment impact, environmental pollution, acceptable risk, unacceptable risk, unacceptable hazard and (b) no policy for its obligation under the Aarhus Convention for dissemination of environmental information. The general public rely on the State Broadcasters for the bulk of their information on the environment. However, the State Broadcasters are characterised by sensationalist and inaccurate reporting. Not only did

[24] Directive on Strategic Environmental Assessment, which had been implemented in Irish law in 2004: http://www.environ.ie/en/DevelopmentandHousing/PlanningDevelopment/EnvironmentalAssessment/

[25] http://www.unece.org/env/pp/acig.pdf

[26] http://www.ocei.gov.ie/en/DecisionsoftheCommissioner/Name,13514,en.htm

RTE have no benchmarks to differentiate between what are actual environmental impacts and sensationalist claims of environmental impacts, but even though they were a public authority, they also claimed that neither Directive 2003/4/EC nor the Aarhus Convention applied to them and specifically to their journalistic function.

- Appeal to Commissioner for Environmental Information CEI/10/0002[27] in relation to the Planning Appeals Board (An Bord Pleanala). An Bord Pleanala is one of the competent authorities for the implementation of the Environmental Impact Assessment Directive, 85/337/EC, which was amended by Directive 2003/35/EC (Pillar II of Aarhus Convention). This requires that as part of the public participation and in accordance with national legislation, the main reports and advice issued to the competent authority is made available to the public. With regard to the highly controversial Corrib gas pipeline project, see Chapter 7 of 'Bringing the Irish Administration to Heel', a request was made in relation to; the parameters the Board applies to assessing risk and determining acceptance criteria in the context of its decision to refuse permission for the pipeline. An Bord Pleanala were queried by the Commissioner for Environmental Information as to whether they had produced or held any guidelines in this regard. They replied in the negative. In advance of the resumed Oral Hearing in September 2010 they were again requested on the 17th July the same information in relation to risk, along with information in relation to the management plans relevant to the Natura sites in the vicinity of the proposed development. The reply to both of these was in the negative, even though under the Natura Directive[28] it was mandatory after six years to have the necessary conservation measures established. Furthermore the relevant Natura sites in relation to the Corrib development had been designated more than six years previously.

Requirement of the Convention	Actual situation
Article 5, paragraph 1(a) requires that public authorities possess and update environmental information which is relevant to their functions.	Numerous Access to Information on the Environment requests have shown that Irish Public Authorities fail to possess and update environmental information, even when it is legally incumbent on them to produce the relevant documentation. For examples, See Sections 4.3.2 and 4.3.3, the section on Corrib debacle, the section on Renewable Energy.

27 http://www.ocei.gov.ie/en/DecisionsoftheCommissioner/Name,12502,en.htm

28 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31992L0043:EN:NOT

4.3.3 Failure to disseminate environmental information which is transparent

With regard to the requirements of Article 5 of the Aarhus Convention in relation to dissemination of environmental information which is transparent, the situation in Ireland is even worse. S.I. No. 133 of 2007 contains Directive 2003/4/EC as a schedule, so thereby it gives legal effect to the Directive and in particular Article 7 on dissemination of environmental information and Article 8 on the quality of environmental information. Indeed Article 8 of Directive 2003/4/EC is clear in that any information has to be up to date, accurate and comparable. The "Aarhus Convention: an Implementation Guide" is also clear with regard to the purpose of the Access to Information Pillar:

- "Under the Convention, access to environmental information ensures that members of the public can understand what is happening in the environment around them. It also ensures that the public is able to participate in an informed manner".

Unfortunately the above has never been observed in Ireland and a constant stream of inaccurate information on the environment is fed to the general Irish public. This is by no means an idle statement, documentation produced by the Administration is frequently inaccurate or in many cases there is a complete failure to produce the necessary documentation required by law, such as strategic environmental assessments. Senior elected and non-elected officials frequently appear on the media and make statements that are manifestly inaccurate. The State Broadcasters consider themselves completely exempt from the requirements of the Aarhus Convention with regard to dissemination of environmental information, which is held by or for them.

Examples

There are many examples related to the public being deliberately misinformed, which will be discussed in the latter sections of this Reply to UNECE, but some examples are also provided here.

- (a) Appeal to the Commissioner for Environmental Information CEI/10/0003[29] in relation to the Industrial Development Authority (IDA). On 5th December 2009 in the Irish Times, Ireland's second largest paper: *With some of the best wind and wave resources in the world, Ireland is ideally placed for the development of green and clean technology, according to Barry O'Leary, chief executive of IDA Ireland. "Onshore wind turbines could account for 35 per cent of our energy needs and Ireland has the highest wave energy resource in Europe," O'Leary writes in the current issue of Heritage Outlook, the Heritage Council magazine. In the article, he cites local and international businesses that are currently developing and testing wave energy prototypes, suggesting that, in the long term, Ireland could become a net exporter of green energy.* The outcome of the appeal was that despite having access to extensive Government documentation, the IDA could supply zero information with regard to: "the economic impacts of the wind energy programme, its costs, subsidies required for job creation and industrial grants, resulting electricity prices, loss of competitiveness in other manufacturing sectors and resulting job losses". Clearly what was being promoted to the public, and the article was never changed or amended, had never been subject to any

[29] http://www.ocei.gov.ie/en/DecisionsoftheCommissioner/Name,12267,en.htm

assessment and no facts or figures were available to substantiate the claims made.

- (b) Appeal to the Commissioner for Environmental Information CEI/10/0008[30] against University College Dublin (UCD). This case related to inaccurate statements made in the media. The first part of appeal CEI/10/0008 related to a letter from Aonghus Shortt of the Electricity Research Centre, University College Dublin, which was published on the 24th December 2010 in the Irish Times. The letter was fulsome in its praise for wind energy and scathing of those who questioned its merits. It clearly stated that: "The impact of wind generation on the future electricity price is uncertain". Countless studies have shown that wind energy will raise significantly the price of electricity. Indeed the Electricity Research Centre, as will be discussed later, prepared the generation portfolios as part of the All Island Grid Study, which then formed justification for the target of 40% of Ireland's electricity to be renewable (37% from wind) and the basis for the Renewable Energy Action Plan submitted to the EU Commission. This Study clear demonstrated the significant cost increases with the programme. However, when I request the technical files to support the statements in relation to electricity prices made by University College Dublin in their statement to the Irish Times, I was officially informed that no records existed.

- (c) The second part of the CEI/10/0008 appeal related a letter of Andy Storey of University College Dublin to the Irish Times on the 19th March 2010, relating to the 'dangerous, onshore pipeline' on the Corrib project. Andy Storey is a lecturer in political science at University College Dublin Under S.I. No. 133 of 2007, I requested the full technical file developed by University College Dublin, which clearly outlined while the pipeline concerned was dangerous. No such technical file was provided or any other action, such as issuing a correction to the public.

- (d) A similar situation of dissemination of inaccurate environmental information was the 'environmental awareness' exhibition run each year at my local municipality, Dun Laoghaire County Council. Not only were 'Environmental Awareness Officers' unaware of their obligations under the access to information requirements under the Aarhus Convention, which they most certainly not informing the public of, but they were in effect using public money and premises to run political rallies for the Green Party. Their response to my Access to Information on the Environment Request, when they finally replied, was that; (a) the exhibition was not linked to any particular legislation; (b) the selection criteria for the guest speakers was individuals who have a background or interest in environmental issues; (c) the funding was provided for in the Council budget for the year.

- (e) On the 4th September 2009 an article appeared in the Irish Times, in which a reporter had been to Denmark on a trip organised by Climate Consortium Denmark[31] to review their wind industry. As a result he was

30 http://www.ocei.gov.ie/en/DecisionsoftheCommissioner/Name,12418,en.htm

31 A Danish public / private partnership: http://www.klimakonsortiet.dk/Home.aspx

lamenting Ireland's failures to become such 'world leaders'. Two points in this article were important; (a) how Denmark exported cheap wind generated electricity and imported more expensive hydro or nuclear generated power when the wind wasn't blowing and (b) 5,500 wind turbines in Denmark are supplying more than 20% of Denmark's electricity. The reality of the situation is very different, as numerous studies have shown[32], in that approximately half the highly subsidised wind energy generated in Denmark is dumped into the grids of the surrounding countries for little or no revenue. Furthermore wind energy could simply not compete with hydro or nuclear energy unless it was highly subsidised and was given preferential access to the grid, i.e. other plants have to come off line when the wind blows. The net result is that Danish electricity costs are the highest in Europe[33]. It was on this basis I contacted the Danish Embassy in Dublin and made it very clear to them that under the Aarhus Convention, they should either supply me with the facts to support the statements made in the Irish Times or ensure that the Irish Public is correctly informed of the true costs, benefits and alternatives in relation to Danish wind energy products. See Annex 1 and 2. Note this information was forwarded to the EU Commission in October 2009, who while they replied to the correspondence, did absolutely nothing about it. An issue which was raised during the investigation process by the EU Ombudsman[34].

While technical reports are important and indeed can play a major role in policy development and planning decisions, the general public do not read such documentation and instead rely on the media for their information on the environment. This fact is clearly recognised in the preamble to the Aarhus Convention, which states:

- "Noting, in this context, the importance of making use of the media and of electronic or other, future forms of communication".

Appeal CEI/09/0015 in relation to RTE's benchmarks and policy on the Aarhus Convention revealed that RTE had no training or standards in relation to environmental issues. Note TG4 simply broke the law and refused to reply to the same request. Indeed RTE's sole 'environment' correspondent is an English language graduate, who is characterised by uncritical reporting of 'Green' issues[35], a common trait in RTE.

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32 http://www.cepos.dk/fileadmin/user_upload/Arkiv/PDF/Wind_energy_-_the_case_of_Denmark.pdf , http://www.ref.org.uk/attachments/article/148/spot.price.leaflet.05.09.pdf

33 http://www.energy.eu/

34 http://www.unece.org/env/pp/compliance/C2010-54/Communication/Annex%203%20(a-c)%20file%20on%20EU%20Ombudsman/OmbudsmanRequestToCommission29.10.10.pdf

35 http://www.buy4now.ie/rte/aspx/productdetail.aspx?pid=1228&loc=P&catid=10.5

For example on the 1st July 2010 on the RTE prime time radio 'Pat Kenny Morning Show', the Shell to Sea group were given free reign to make false and abusive claims against the project, even though the information which was held in the project regulatory files demonstrated that the statements they were making were false. The resulting complaint which was taken by me with the Broadcasting Authority of Ireland raised some interesting legal issues; see Annex 3, 4 and 5. Firstly RTE's position on the appeal to the Commissioner of Environmental Information CEI/09/0015 is highly revealing:

- "The Information Commission having examined the request and RTE's response found that RTE had acted correctly and dismissed Mr Swords' appeal. RTE is supplying this background and it might appear from Mr Swords' email that the Commission had found against RTE, whereas in fact it found in favour of RTE".

Secondly the position of the Broadcasting Authority of Ireland in their conclusion on rejecting the complaint is equally revealing, they ignored, i.e. edited out all reference to legal requirements relating to dissemination of environmental information under Directive 2003/4/EC and the Aarhus Convention in general.

- (f) Access to Information request to the Department of Communications, Energy and Natural Resources on broadcasting standards and compliance with the Aarhus Convention. The Department failed to answer this request within the statutory one month as they claimed 'they were seeking legal advice'. I then requested an Internal Review, which they failed to answer within the statutory one month as they claimed the same reasons. I then went to appeal to the Commissioner for Environmental Information (CEI/10/0014), a month later the Department came back to me with a reply, see Annex 6. As the relevant questions had been answered and the Commissioner for Environmental Information offered to refund me my €150 fee, I accepted the refund and closed the case. However, the reply did reveal that the Department; (a) had had no interaction with the State broadcasters in relation to their dissemination requirements under Article 7 of Directive 2003/4/EC, nor intended to; (b) was of the opinion that the Aarhus Convention had no domestic legal effect and (c) had no compliance role in respect of the broadcasting agencies and the Access to Information on the Environment Regulations.

In summary, there is a major conflict going on in Ireland with regard to the way in which public authorities make environmental information available to the public. Clearly what is being made available is not transparent. In particular the State Broadcasters and their relevant State Department are strongly resisting the fact that they should be held accountable for the dissemination of transparent environmental information. As far as they are concerned they have 'journalistic licence' with regard to personal and political agendas. There are no relevant benchmarks and certainly no accountability with regard to the accuracy of the information. In many respects the public is being 'duped' with a constant stream of inaccurate information and unfortunately there are too many 'opportunists' lining up to take advantage of the resulting dysfunctional policies.

Requirement of the Convention	Actual situation
Article 5 paragraph 2 requires that within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent.	National legislation is S.I. No. 133 of 2007, which implements Directive 2003/4/EC. This is clear in that as a matter of course, 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. 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. There is systematic disregard with regard to compliance with this legislation in Ireland. Even in the rarer times when Public authorities have the information they rely far too readily on exceptions (e.g. judicial capacity), or are inattentive to their obligations. Indeed as far as the State Broadcasters, the Broadcasting Authority of Ireland and the Department of Communications are concerned, the legislation simply doesn't apply to them.

4.3.4 Failure to Update and Make Available Environmental Information About Proposed and Existing Activities To Enable Public Participation in the Planning Process – the Corrib debacle

Introduction to the Planning Process in Ireland

There are major problems with Ireland's planning system, already highlighted previously. However, from a legal perspective how did these arise when in theory our legislative system for planning is based around the Environmental Acquis, the 300 or so Directives in the environmental sphere?

Certainly light can be thrown on this by the 3rd March 2011 decision in the European Court of Justice, C-50/09[36]. Essentially the whole of Ireland's planning system revolves around the phrase "In the interests of Proper Planning and Sustainable Development", which is de facto interpreted 'to suit the occasion' by the ten members of the Board of An Bord Pleanala[37], the planning appeals board. Note: These are political appointees.

36 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009J0050:EN:HTML

37 http://www.pleanala.ie/about/members.htm

In contrast the European approach is based on specifying the key criteria in the hard law, such as a Directive. An example is requirement for the administration to implement a planning consent or an environmental permitting process, in conjunction with the assessment of environmental impacts and the participation of the public in the decision making process. The actual criteria on which the decisions are made are generally based on soft law. These comprise guidelines on environmental, technical or economic circumstances; soft, non-binding targets and goals regarding the minimisation of the negative impacts of certain activities; etc.

In some cases National Legislation and Regulations specify mandatory targets; in other cases the administrative structure or the relevant professional or industry bodies prepare guidelines and standards. All of these contribute to the criteria for effective decision making. The regulators then have to apply them, with their inherent flexibility, to determine precise permitting requirements for individual facilities based on local economic, environmental and technological circumstances.

Previous Criticism of the Planning System

However, in Ireland, both hard and soft law are frequently ignored. Case C-50/09 demonstrated this with regard to the fundamental requirement to complete an Environmental Impact Assessment. This requirement is part of EU legislation, Directive 85/337/EEC as amended. However, environmental impact assessment is also a fundamental requirement of Article 6 paragraph 6 of the Aarhus Convention and Article 6 paragraph 8 requires that this documentation be taken into account in the decision reached by the competent authority. It is worth pointing out that this European Court of Justice Decision of 3rd March 2011, had its origins in November 1988, which demonstrates how long and quite ineffective the EU Commission's enforcement measures are. Essentially the Court found that Ireland had failed to transpose Article 3 of Directive 85/337/EC, in that

- "The competent environmental authority may not confine itself to identifying and describing a project's direct and indirect effects on certain factors, but must also assess them in an appropriate manner, in the light of each individual case".

- "Indeed, that assessment, which must be carried out before the decision-making process, involves an examination of the substance of the information gathered as well as a consideration of the expediency of supplementing it, if appropriate, with additional data. That competent environmental authority must thus undertake both an investigation and an analysis to reach as complete an assessment as possible of the direct and indirect effects of the project concerned on the factors set out in the first three indents of Article 3 and the interaction between those factors[38]".

[38] (a) Human beings, fauna and flora; (b) soil, water, air climate and the landscape and (c) material assets and cultural heritage.

The Court clearly rejected Ireland's argument that the concept of 'in the interest of proper planning and sustainable development' referred to in Irish planning legislation, which is the principal criterion which must be taken into consideration by any planning authority when deciding on an application for planning permission, sufficed with regard to Directive 85/337/EEC. It further found that there was inadequate co-ordination between An Bord Pleanala and the Environmental Protection Agency where both had decision making powers in ensuring that an environmental impact assessment is carried out fully and in good time. Unfortunately An Bord Pleanala just continues to ignore this ruling, such as in June 2011 the basis for its decision to refuse permission to the Indaver incineration project in Cork, case PA0010[39].

Requirement of the Convention	Actual situation
Environmental impact assessment is a fundamental requirement of Article 6 paragraph 6 of the Aarhus Convention and Article 6 paragraph 8 requires that this documentation be taken into account in the decision reached by the competent authority.	Case C-50/09 demonstrated that arbitrary decision making that has characterised Irish planning, due to the concept of 'in the interest of proper planning and sustainable development' referred to in Irish planning legislation, was incompatible with the obligation under Article 3 of Directive 85/337/EEC, to assess the projects direct and indirect effects in an appropriate manner. A key aspect in completing proper structured public participation. The fact that 26 years after it was introduced, this key Directive dating back to 1985 is not yet transposed into Irish Law, is a clear indication of how ineffective the EU's enforcement procedures in relation to environmental legislation are.

Introduction to the Corrib Debacle

The Corrib project was the both largest, most critical infrastructural development and most controversial project in Ireland in decades. Yet 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. Most critically of all, a decision that a the risk of a 'full bore rupture' in a 27 mm thick pipe was a material risk to be considered had no basis in either legislation or the body of technical knowledge provided; it was not justified by a single fact or figure. Sadly this decision was kept from the public record and not even recorded on the competent authority's schedule of correspondence, until after the decision was finally made.

39 http://www.pleanala.ie/

This significance of how Corrib was handled is of manifest concern. The Irish Academy of Engineering in their Review of Ireland's Energy Policy in June 2009, which formed a Submission to the Joint Oireachtas Committee on Climate Change and Energy Security, stated:

- **"Following what can only be described as a debacle in relation to the Corrib field, Ireland is viewed as a high risk location for such large scale international investment precisely because of the unpredictability of its permitting processes".**

However, the Corrib pipeline decision was not finalised until January 2011. Its tale is very much a narrative of how dysfunctional and non-compliant the Irish planning process has become. Note: While, the saga of the controversial Corrib development is already addressed in the 'book', "Bringing the Irish Administration to Heel", which is part of this Communication to the Compliance Committee; it is instructive to highlight a few key issues here. Not only is the Corrib project the largest infrastructure development to be completed in Ireland in several decades, but five men were jailed for contempt of court, while others were imprisoned on several occasions for violent public order offences. With regard to the implementation of the project, not only have delays added more than seven years to the project, but the costs have soared by more than €1 billion, many of which can be attributed to the direct failures of Ireland's political, regulatory and media structures.

The Pipeline Issue

With regard to the rerouting of the 9.2 km onshore pipeline connecting the on-shore terminal to the landfall of the 80 km offshore gas pipeline, the planning oral hearing in May 2009 conducted by An Bord Pleanala lasted 19 days.

It is important to stress that the Environmental Acquis has a highly developed regulatory framework concerning industrial risk and indeed the subject of land use planning. This is naturally enough concentrated within the legislative framework for Control of Major Industrial Accident Hazards, although the principles and technical knowledge are directly comparable to a whole range of industrial sectors. As gas pipelines are not considered a significant industrial risk, they do not fall under the scope of activities regulated by the Directive on Control of Major Industrial Accident Hazards (96/82/EC commonly called Seveso II). **Therefore An Bord Pleanala chose to exclude the input from the competent authority for industrial risk, the Health and Safety Authority, and ignore the extensive body of hard and soft law developed in this area in relation to industrial risk.**

However, at the same time, endless discussions occurred with An Bord Pleanala's 'expert' gas engineer Nigel Wright, including five days on the consequences of gas explosions and the methodology of Quantified Risk Assessment.

In effect there was a major debate about the risk and consequences of full bore rupture and its effect on the environment, yet incomplete disclosure of vital information material to it.

This had a material effect on the ultimate decision, which was that the theoretical risk of a full bore rupture was justification enough to have the pipepline laid underground, at a cost of approximately €200 million taking more than 2 years to execute.

Yet, as Nigel Wright's own report had to concede, thick walled pipelines of greater than 15 mm simply do not fail unless there is major ground movement and the Corrib pipeline was 27 mm in thickness. Where was this major ground movement going to occur? There were simply no earthquake scenarios present which could in the extreme event result in a pipeline rupture.

To understand the significance of the planning authorities reasoning and approach, one only needs to consider the thousands of kilometres of surface laid pipelines around the world carrying gas and oil, through places that have an equal, higher or lower risk of rupture - in all these instances less protective measures are put in place.

Or put it another way not discussed at the hearing, if there was ever a major ground movement in or around the North-West Coast of Ireland large enough to create a risk of full bore rupture, then it is the consequences of the earthquake, and not the consequences of full bore rupture which will have the most devastating impact on the locality. In other words it is just as likely that County Mayo would fall off into the sea as a result of an earthquake, than a 27mm thick pipe will suffer a full bore rupture.

Action Taken With Regard to Pillar I and Pillar II

It was clear to me that the process had been conducted in a disjointed and unsatisfactory manner. In August 2009, as a decision on the approval of the pipeline had not been made, the Chairman of StatoilHydro, a 20% partner in the Corrib development, made a press release about the unfortunate political risks to project completion occurring in Ireland[40]. On a personal basis I decided to do something about it, as this was only one of the many examples of appalling maladministration in Ireland and I was becoming aware of the legal implementation of Aarhus Pillar I through S.I. No. 133 of 2007.

With regard to the Access to Information on the Environment request to An Bord Pleanala originally made on 22nd September 2009, the first two sections related to:

- The legislative basis for the recent Oral Hearing of circa 19 days on the Corrib pipeline rerouting.
- The procedures for conducting an Oral Hearing to this legislative basis, such as choice of staff, training of staff, specific areas of legislation to be addressed, areas outside of the legislation that should not be addressed, recommended time frame for Oral Hearings, relationship to competent authorities for Environmental, Safety, etc.

An Bord Pleanala refused to answer this.

[40] As the Irish Academy of Engineering in their March 2010 presentation to the Joint Oireachtas committee pointed out (page 11), such comments are usually reserved for such countries as Nigeria or Angola: http://www.iae.ie/site_media/pressroom/documents/2010/Mar/04/Joint_Oireachtas_Climate_Change_Report_-_March_2010.pdf

On the 13 December the Request was restarted in which additional information was requested with regard to **the parameters the Board applies to accessing risk and determining acceptance criteria**. This led to Appeal to the Commissioner for Environmental Information CEI/10/0002, referred to earlier, in which An Bord Pleanala were queried by the Commissioner for Environmental Information as to whether they had produced or held any guidelines in this regard. **They replied in the negative.**

In respect to the conducting of Oral Hearings their reply was their guidelines of 2007, which have since been updated[41]. Not only was there no proper training and selection requirements for inspectors demonstrated in these guidelines, but there was no mention of the requirement of the Authorities to actively and systematically disseminate the specific environmental information, such as is specified in Article 2 of Directive 2003/4/EC and includes administrative measures, policies, legislation, plans, programmes, environmental agreements, measures or activities designed to protect environmental elements. In addition there was no mention of the requirement under Directive 2003/35/EC that the main reports and advice issued to the competent authority have to be made available to the public, rather an arbitrary statement about documentation submitted to the Board in which there was no clarification as to what are the main reports and advice under which the decision would be made. Indeed at no stage in the Oral Hearing on the Corrib pipeline in May 2009 was any attempt made by the inspector to clarify or even adhere to the legislative basis concerning hazard and risk. Indeed it wasn't even mention in his Report to the Board.

Observations Arising

From a professional engineering perspective, see more details in Annex 8, 9 and 10, the whole oral hearing and resulting decision making was a farce, designed deliberately to confuse the issue. Engineering systems are designed not to fail, so there simply is a complete absence of reliable data related to failure rates. Risk, upon which the regulatory framework is based, is a combination of frequency (likelihood) and consequence. That one can complete quantified risk assessments that are accurate in the absence of such failure data, and use the conclusions to justify a regulatory decision is a complete distortion of fact. Risk is not and never will be a precision calculation, hence the reliance on engineering assessment and judgement. Yet clearly the manner in which An Bord Pleanala were operating was based on the fact that an accurate risk calculation would be made available on which they could base a decision. Given that at no stage they made any effort to evaluate the whole concept of risk or publish any guidance on the subject in advance of this Oral Hearing, is it little wonder that they got so much wrong.

Refusal to Disclosure Information Held – Misleading Answers

In the course of the appeal to the Commissioner for Environmental Information CEI/10/0002, referred to previously in Section 4.3.2, **An Bord Pleanala responded that they had no documentation on risk**, even when this Access to Information on the Environment request was repeated in advance of the resumed Corrib Oral Hearing in July 2010. However, even **this reply was false.**

41 http://www.pleanala.ie/publications/2008/oralhearings.htm

Firstly **a report** had been prepared by Nigel Wright for An Bord Pleanala on his assessment of the pipeline risk following the **May 2009** Oral Hearing, which was **only published as part of the decision on the final pipeline on their website in January 2011**. This was never provided to me despite the multiple requests.

In the Appeal to the Commissioner for Environmental Information, she clearly stated in her Decision:

- "**My Office asked the Board to confirm whether it held any information to the effect that its assessment of proposed development is regulated according to the Environmental Acquis**. I**t also requested any information held setting out parameters the Board applies to assessing risk and determining acceptance criteria in the context of the Corrib case. It queried whether the Board had produced or held any advice or guidelines on this".**

Yet An Bord Pleanala replied in the negative, as they did in relation to records relating to compliance with the Environmental Acquis.

What is even more galling is that even though I was being refused information about what risk guidelines were being applied, a colleague had obtained a copy of the correspondence of the 29th January 2010 from An Bord Pleanala to the developer. By way of background, when An Bord Pleanala refused permission for the 5.6 km section of the pipeline in November 2009, on the basis of that the design documentation did not present a complete, transparent and adequate demonstration that the pipeline does not pose an unacceptable risk to the public[42], a request for further information was made.

The letter of January 29 contained the critical statement that revealed that the standard applied for assessing the route for the pipeline was:

- "The intent of the Board is to ensure that persons standing beside the dwellings will not receive a dangerous dose of thermal radiation in the worst case scenario of a **"full bore rupture"** of the pipeline at maximum pressure".

Clearly this *was* the acceptance criteria in relation to risk. In effect several centuries of engineering experience in designing high pressure systems, such as guns or boilers, was completely irrelevant – it was going to completely split in two regardless. **The first thing to note is this document was never presented to me, despite my requests under the Aarhus legislation. Furthermore the schedule of correspondence for the planning case on An Bord Pleanala's website, see Annex 11 does not list it, neither is it on the website. So I was denied information that was being revealed elsewhere. Furthermore An Bord Pleanala had informed the Commissioner for Environmental Information as late as mid-2010, that it had no information with regard to the parameters the Board applies to accessing risk and determining acceptance criteria.**

It is extremely noteworthy that in disclosing the letter to my colleague, An Bord Pleanala wrote:

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[42] It is important to point out that this was the personal opinion of the Board. At no point did they demonstrate this by reference to any accepted standards or documentation. Indeed as has already been demonstrated they had no criteria, main reports or advice on which to assess risk for the pipeline.

"Dear Sir,

I refer to your e-mail in relation to the above-mentioned case.
Please be advised that *the Board does not make available submissions or correspondence received by it in relation to any application*.

The Board is obliged to keep a list of such material only.

Notwithstanding the above, a copy of the correspondence you refer to is attached for information.

Yours faithfully,"

Follow-Up Action In relation to non-disclosure

When I lodged a complaint with the Commissioner for Environmental Information in January 2011 with regard to having being denied access to (a) Nigel Wright's Report of the 2009 Oral Hearing and (b) the letter of clarification from the Board on the 29th January 2010, I was informed:

- "Decisions issued by the Commissioner for Environmental Information under Article 12 of Statutory Instrument No. 133 of 2007 are final and binding and can only be appealed as set out in Article 13 of the S.I. to the High Court on a point of law within one month of the Commissioner's decision issuing. Unfortunately there is no provision under the legislation for the Commissioner to reopen or revisit a case once a legally binding decision has been issued. Therefore we are unable to re-examine this case or to review the issue of whether or not An Bord Pleanala failed to comply with the Access to Information on the Environment Regulations in relation to these two records in the context of this case".

- "However, the Commissioner would be disappointed to learn that material relevant to an Access to Information on the Environment request was not identified by the relevant public authority at the time and she will take your correspondence into account in any future appeals to this Office in relation to An Bord Pleanala".

Conclusion

With regard to the requirement of An Bord Pleanala in relation to a full bore rupture, the whole legislative basis in law is based on the Principle of Proportionality and the concept of risk (to reiterate, risk is a combination of likelihood and consequence).

An Bord Pleanala were acting Ultra Vires by applying a condition, which was based solely on consideration of consequence, without any consideration of likelihood, the existing technical basis for design and approval of such piping systems and the experiences to date. Even the reports by Nigel Wright and the Inspector at the May 2009 Oral hearing never raised any consideration or justification for a full bore rupture of a pipeline of that thickness, i.e. that it would split in two. At no stage did An Bord Pleanala make any attempt to provide the reasons or considerations as to why a full bore rupture had to be considered, instead it was pure diktat. The developer was left with no option after that letter of the 29th January but to either bore a tunnel underground or bring An Bord Pleanala into the High Court. He chose to carry the cost of a tunnel, at an estimated cost of €200 million, of which 25% represents lost revenue to the State. In January 2011 An Bord Pleanala approved this tunnel.

Requirement of the Convention	Actual situation
Article 4 of the Convention requires public authorities to provide access to information on the environment on request. Article 5 of the Convention requires that public authorities; possess and update environmental information which is relevant to their function; this environmental information is the made available to the public in a transparent manner. Article 6 paragraph 6 (f) requires that in accordance with national legislation, the main reports and advice issued to the public authority is made accessible to the public concerned. Article 6 paragraph 8 requires that in the decision due account is taken of the outcome of the public participation. Article 6 paragraph 9 required that the reasons and considerations on which the decision is based be made accessible to the public.	Articles 4 and 5 of the Convention are implemented into European Law by Directive 2003/4/EC. Ireland has failed to give practical effect to the requirements of Directive 2003/35/EC, which gives effect to Article 6 of the Convention. Clearly Section 4.3.4 demonstrates An Bord Pleanala acted outside Articles 4, 5 and 6 of the Convention in the Corrib planning case. It maintains generally that information is not accessible to the public, even when it is necessary for proper participation in the planning process. It reserves the right to withhold material information about vital aspects of major projects with a singular impact on the environment. However, the Corrib situation is by no means unique, it is the norm.

4.4 Implementation of Pillar II of the Convention in Ireland

4.4.1 General

As the "Aarhus Convention: an Implementation Guide" states about public participation:

- "Public participation cannot be effective without access to information, as provided under the first pillar, nor without the possibility of enforcement, through access to justice under the third pillar. In its ideal form, public participation involves the activity of members of the public in partnership with public authorities to reach an optimal result in decision-making and policy-making. There is no set formula for public participation, but at a minimum it requires effective notice, adequate information, proper procedures, and appropriate taking account of public participation".

Essentially under the Aarhus Convention, public participation can be divided into two groups:

- Article 6 of the Convention, which relates to public participation in decisions in specific activities, listed in Annex I of the Convention. In practical terms this relates to planning decisions, which fall under the Environmental Impact Assessment Directive 85/337/EEC, as amended and environmental permits, which fall under the Integrated Pollution Prevention and Control Directive 96/61/EC, as amended. In practical terms, the first relates to planning decisions for larger developments in which An Bord Pleanala is usually the competent authority and the second to the licensing procedures of the Environmental Protection Agency.

- Articles 7 of the Convention, which relates to public participation concerning plans, programmes and policies and relating to the environment. Article 8 of the Convention, which relates to public participation during the preparation of executive regulations and / or generally applicable legally binding normative instruments.

However, there is a practical interaction between the two. Planning decisions made by An Bord Pleanala and to a lesser extent licensing arrangements made by the Environmental Protection Agency, will reflect the plans, programmes and policies prepared by Government Departments. Unfortunately many of these policies in Ireland have by-passed proper public participation procedures, such as the renewable energy programme, and are highly questionable in substance. Furthermore, the planning process is in an even direr situation, as the Irish Academy of Engineering stated in their Submission to the Joint Oireachtas Committee on Climate Change and Energy Security in June 2009:

- "Large infrastructural projects in Ireland cannot be planned and completed in a predictable economic timeframe. The risk return calculations for such projects are currently little better than a lottery".

Unfortunately as the situation had not improved by February 2010, they clarified in their report on: "Energy Policy and Economic Recovery 2010 – 2015[43]:

- "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".

One can also add to the above, as has been demonstrated in the Section 4.3.4, the planning system is illegal, in that it does not comply with the minimum standards set by EU Directives and the principles of the Aarhus Convention.

4.4.2 Failure to Provide For Adequate Public Participation in Policy Development – the Climate Change Response Bill

The development of policies in relation to energy and waste will be discussed in the coming Sections in this Reply to the UNECE. Note, as waste is an important source of renewable energy, there is an interaction between the two. However, the Climate Change Response Bill is a damming indictment of how policies are developed and public participation conducted in Ireland. This Bill, driven in the main by the junior partner in the coalition Government, the Green Party, was published on the 23rd December 2010 with a consultation period until 28th January 2011[44]. As I stated in my Submission to the consultation:

- The Climate Change Response Bill is a National Policy to provide for plan or programmes for reductions in greenhouse gases. The Bill clearly prescribes mandatory targets for these plans or programmes and as is stated in the Regulatory Impact Assessment "it sets a statutory basis for key national policies and principles to underpin a progressive course of transition to a low-carbon future".

The Bill therefore falls under the Definition set in Section 2 (a) of Directive 2001/42/EC for a 'plan or programme'. **As these mandatory targets for greenhouse gas reductions will have a major impact on agriculture, forestry, energy, industry, transport, tourism, town and country planning and land use, a Strategic Environmental Assessment is required according to Article 2 (2) of the Directive.**

43 http://www.iae.ie/site_media/pressroom/documents/2011/Feb/28/IAE_Energy_Report_Web_17.02.2011.pdf

44 http://www.environ.ie/en/Environment/Atmosphere/ClimateChange/ClimateChangeResponseBill2010Consultation/

A. Action Taken In Relation to Pillar I

On the 26th December, **as no Environmental Report in accordance with Directive 2001/42/EC was posted on the website of the Department of the Environment, Heritage and Local Government**, I submitted an Access to Information on the Environment Request (AIE) under S.I. No. 133 of 2007, which implements Directive 2003/4/EC (Pillar I of Aarhus Convention), requesting a copy of this Environmental Report. This AIE request was received and acknowledged by the Department of the Environment, Heritage and Local Government as AIE/2011/002. A reply was received on the 24th January 2011, which demonstrated that no Strategic Environmental Assessment had been completed.

Other Observations

Furthermore not only was there non-compliances with Directive 2001/42/EC, but the EU is since November 2008 a Party to the UNECE (Kyiv) Protocol on Strategic Environmental Assessment[45], which entered into force on the 11thJuly 2010. One could come to the conclusion that the first formal preparatory act for this Climate Change Bill occurred after the Kyiv Protocol entered into force, so a failure to comply with Directive 2001/42/EC is also a failure to comply with the Kyiv Protocol. Indeed the EU it its declaration on approval to the Kyiv Protocol stated:

- "The European Community declares that it has already adopted legal instruments, including Directive 2001/42/EC of the European Parliament and the Council concerning the assessment of the effects of certain plans and programmes on the environment, binding on its Member States, covering matters governed by this Protocol, and will submit and update, as appropriate, a list of those legal instruments to the Depositary in accordance with Article 23(5) of the Protocol. The European Community is responsible for the performance of those obligations resulting from the Protocol which are covered by Community law".

Breach of the Convention

The Aarhus Convention: An Implementation Guide[46] 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**

45 http://www.unece.org/env/eia/sea_protocol.htm

46 http://www.unece.org/env/pp/acig.pdf

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 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".

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".

Available Consultation Documentation

If we consider the documentation prepared for the consultation, **then the only one addressing the above requirements is the Regulatory Impact Assessment**, which states that the:

- "Objective of the Climate Change Response Bill 2010 is to provide a robust and transparent legislative context and underpinning for a new national medium and longer term vision on transition to a low-carbon, climate resilient and environmentally sustainable society".

To put it mildly the quality of information in this document was derisory. It simply did not provide the necessary information to the public with regard to the requirements of the Aarhus Convention above. There were no facts or figures, the 'qualitative assessments' were based around 'buzz words', such as; "Social benefit – better quality of life and well being". Nothing was referenced to technical reports or published assessments.

Context

The reality of the situation is that the Republic of Ireland has banned the generation of electricity from nuclear power under Section 18 (6) of the 1999 Electricity Regulation Act. As regards the Climate Change Response Bill, this Regulatory measure will see reductions in the use of fossil fuel starting at 2.5% per year and rising to a staggering 80% by 2050. Let us not forget that the EU target for Ireland for 2020 is only 16% of our energy supply to be sourced from renewable sources. This is going to be a major challenge to achieve. As regards Government Policy to generate 40% of electricity from renewable sources (37% from wind energy), there are huge technical and economic constraints related to this programme, which will be discussed in the coming Sections in this Reply to UNECE.

One can only conclude: What on earth are the Irish population going to use to heat their homes, drive their transport, fuel their industry, etc? Certainly the documentation provided on the consultation process doesn't even acknowledge that this might be an issue. Effects such as these on the population, who will freeze in winter, have little or no transportation, no effective manufacturing industry to provide employment, are 'relatively important' with regard to the environment they will find around them and need to be addressed in the environmental assessment. Furthermore the Regulatory Impact Assessment for the Climate Change Response Bill certainly did not provide any practical information on how society would adapt to these new restrictions.

The spring of 2011 saw a new Government in Ireland and extracts from the Department of Finance's briefing notes for the new Minister became available on the website of the Department[47]. These stated:

- "The policy agenda on climate change has been driven recently more by ideology and target-setting rather than being informed by a rational assessment of what is possible and what is in Ireland's interest, given the costs and benefits involved"

- "Climate Change Response Bill: The draft Climate Change Response Bill was at Second stage in the Seanad last month (January 2011). This bill fell with the fall of the Government. In the context of preparations of this Bill, the Department expressed grave reservations about its content, particularly targets that appeared to be well in excess of EU targets".

[47] See page 147 and 148 of: http://www.finance.gov.ie/documents/foi/2011/Incoming_Minister_Brief_2011_(partially_redacted).pdf

While the word 'ideology' is contentious, given that politics are part of the human condition and are often characterised by different ideological viewpoints, it is important to clarify some issues, particular within the context of environmental matters. Ideology can be defined as a theory, or a set of beliefs or principles, especially one on which a political system, party or organisation is based. Ideologies, like fashions, come and go; often driven by certain trends and popularities.

Environmental matters, particularly within the context of the Aarhus Convention, are very different. They can be quantified, i.e. assessed. That information has to be made available in a transparent manner to the public, so that the public can understand what is happening in the environment around them and is able to participate in an informed manner. Furthermore there has to be active involvement with the public in the development of plans, programmes and policies. It is a factual process, which is in many respects above politics and most certainly is not ideological driven based on a set of beliefs.

Conclusion

With regard to climate change, there is an appalling absence of proper quantification of the impacts of climate change, which is in shocking contrast to the enormous financial burden and restrictions, which are to be imposed on the citizen. The most critical aspect in this regard is what exactly is the damage cost of carbon dioxide, this has to be assessed in order for a rational decision making process to be implemented with regard to applying measures to reduce those emissions. Furthermore, for the implementation of a policy, plan or programme on the environment, the evolution of the environment without implementation of the measure has to be assessed. We cannot answer this if we do not know the damage mechanisms and costs of carbon dioxide.

Neither is it adequate to insist as a justification for the Climate Change Response Bill that these targets derived from the EU. **The EU has an obligation to provide such assessments when it is setting such environmental targets.** Unfortunately if one considers the publications produced by DG Clima at the European Commission[48], they can be charitably described as 'journalistic' in nature, such as pictures of children on skis playing on green pastures, with comments that "without action now skiing holidays could be a thing of the past for future generations"[49]. If one is more technical and examines the EU's ExternE project, which is based on quantification of the external costs of energy, such as that of damage to human health, the environment, etc, then one finds that there has been to a greater extent a failure to properly assess the impact of carbon dioxide. Indeed in the "ExternE: Externalities of Energy – Methodology 2005 Update[50]", Chapter 8 on Global Warming, there is a failure to derive a reliable monetary value, with a reliance on politically agreed 'shadow prices', such as €20 per tonne, which are consider what the population could readily accept. This is in contrast to the only damage cost documented of €9 per tonne.

48 http://ec.europa.eu/clima/publications/index_en.htm

49 http://ec.europa.eu/publications/booklets/move/70/en.pdf

50 http://www.externe.info/

Clearly therefore we don't know what the environmental impacts are, as these haven't been quantified in the decision making process, which led to the targets in the environmental programme. Unfortunately neither do we seem to know the costs of implementing the programme. For instance on the 28th January 2008 we had the EU Commissioner for the Environment stating that climate change measures will cost 0.04 to 0.06% of GDP, while on the same day the President of the Commission was stating that they would cost 0.5% of GDP[51].

In essence the Department of Finance was calling it right: There was no rational assessment of what was possible and what would be in the public interest, given that nobody knew what the costs of the programme would be and in the absence of a quantification of the damage that carbon dioxide was causing, what the benefits of the programme would be from reducing emissions by the prescribed targets.

Requirement of the Convention	Actual situation
Article 5 paragraph 7 (a) requires that each party shall publish the facts and analyses of facts which it considers relevant and important in framing major environmental policy proposals. Article 7 requires 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.	Under national legislation the Climate Change Response Bill, the scope of which would have had massive environmental and economic impacts on the country, should have been subject to a Strategic Environmental Assessment as part of the national implementation of Directive 2001/42/EC. Indeed the failure to ensure an Environmental Report was completed in compliance with Directive 2001/42/EC is a failure of the EU to comply with its responsibilities under the UNECE Kyiv Protocol on Strategic Environmental Assessment. Clearly the EU Commission is 'standing back' with regard to compliance with proper environmental assessments and is also complicit in failing to complete such assessments itself in the development of environmental targets. As regards the Irish public, instead of a structured Environmental Report being made available, what was produced was an appalling Regulatory Impact Assessment, which did not fulfil the requirements of Article 5 paragraph 7 (a) and Article 7 of the Convention .

[51] http://www.europa-eu-un.org/articles/en/article_7673_en.htm http://www.europa-eu-un.org/articles/en/article_7670_en.htm

B. Action Taken In Relation to Pillar II

After the Climate Change Consultation closed a further Access to Information on the Environment request was submitted to the Department of Environment, Heritage and Local Government. This comprised:

- The procedures and details related to exactly how the Irish Administration will comply with Pillar II of the Aarhus Convention in the preparation of this climate change legislation, i.e. "appropriate taking account of the public participation".

- That in accordance with the dissemination requirements of Directive 2003/4/EC, the Submissions received should be posted on the website. In other words so that the public could check on how due account of the public participation exercise was completed.

On the 1st March 2011 I received a reply (AIE 2011/006[52]). With regard to the first component, the reply was: "Article 8 of the Aarhus Convention requires that in the making of executive regulations and / or generally binding applicable legally binding normative instruments that effective participation must be promoted and that a number of steps should be taken in this regard. The Department initiated compliance with these requirements by:

1. Opening a public consultation for a period of five weeks.

2. Placing a notice of public consultation advertisement in thee national newspapers and publishing said notice on the Department's website. This notice informed interested parties of the procedures for making responses.

3. Allowing all interested parties to respond by post or by e-mail, either individually or through representative organisations".

As regards the second part of the request the reply was: "The Department is not putting the submissions received on its website. As it was never the intention to do so, clearance from respondents was not sought or obtained. A summary note of the submissions received in response to the public consultation is available on this Department's website (www.environ.ie) and a copy is included with this letter. Copies of individual responses to the consultation are available, free of charge, upon request from the Department. As part of the regulatory impact analysis the Department will be updating the existing Regulatory Impact Assessment to take account of the responses received and this will be available on the website in due course".

[52] Given that in two months the Department had only processed six such requests, two of which were from myself, is clear indication of the appalling poor awareness among the citizens of their rights under these regulations.

An Internal Review of the above was requested given that points 1 to 3 in the attached response did not address the issue raised in the first question, namely; "appropriate taking account of the public participation". As regards the second question relating to the posting of the Submissions on the website, I highlighted the position of the UNECE on electronic communication[53]. Note: With regard to posting of the Submissions on the website, this is something I would consider proactive and desirable from the viewpoint of transparency. However, I do concede that the availability of the Submissions on request, while more restrictive, does satisfy the minimal legal requirement.

However, the reply to this Internal Review and its justification was most revealing, see Annex 7. In summary the reviewer confirmed the position of the initial decision maker and in doing so raised several interesting points. Firstly the only record relating to Pillar II of the Convention and this public participation was the summary note available on the public consultation, see above, i.e. no other records had been developed with respect to taking account of the public participation. Secondly, with regard to the main factors taken into account in reaching the decision on the internal review, it was clearly stated in the first paragraph that:

- "**Ireland has not ratified the Aarhus Convention and it is understood that the Convention does not have direct effect in Ireland.** It is understood that the access to information elements dealt with in the Convention are implemented in Ireland by the Access to Information on the Environment (AIE) Regulations 2007. Therefore, while this was not specified in the original decision, **references to the provisions of the Convention *per se* in the original application and review request would not appear relevant in deciding the case which must, accordingly, be decided purely in the context of the specific provisions of the AIE Regulations".**

Furthermore it was the Internal Reviewer's interpretation that the matters address in my Request, in relation to taking account of the public participation, did not fall within the definition of "environmental information". If we consider Article 2 of the Aarhus Convention, then the climate change measures proposed would clearly have an impact on the state of the elements of the environment. Furthermore the public participation process in relation to the development of this legislation, clearly belonged to an environmental policy, which would affect or likely to affect the elements of the environment.

One could also point out that Article 3 paragraph 1 of the Convention requires that each Party shall take the necessary measures to maintain a clear, transparent and consistent framework to implement the provisions of the Convention. **That a Principal Officer in the Department of Environment, Heritage and Local Government would be writing this form of documentation, clearly demonstrates that there has been a complete systems failure with regard to the legally binding requirements under the Convention.**

[53] http://www.unece.org/env/documents/2005/pp/ece/ece.mp.pp.2005.2.add.4.e.pdf

Finally the Aarhus Convention – An Implementation Guide is clear in that the requirement that Parties ensure that "due account is taken of the outcome of public participation" implies that there must be a legal basis to take environmental considerations into account in plans, programmes and policies. The Guide further states "the requirement to take the outcome of public participation into account further points to the need to establish a system for evaluation of comments, which may be satisfied through the establishment of national Strategic Environmental Assessment procedures". **If we consider the Summary of Responses to the Public Consultation[54] on the Climate Change Response Bill, it stated:**

- **"In general, all respondents were very positive about the need to act on climate change mitigation and adaptation".**

All I can point out is, that viewpoint wasn't in my Submission, as I know it wasn't in other Submissions and as we now know, it certainly wasn't the position of the Department of Finance, who expressed grave reservations about its content.

Clearly with regard to the Climate Change Response Bill, as will be demonstrated again in this Reply to UNECE, instead of proper public participation within the context of the Aarhus Convention, we have in Ireland a system where there is a failure to complete the necessary information requirements for the public participation exercise, which is then reduced to the collection of submissions, which are then essentially ignored in the final decision making process. As others, notably the European Environmental Bureau, have pointed out, public participation in Ireland is like a charade[55].

Requirement of the Convention	Actual situation
Article 7 / 8 of the Convention requires appropriate taking account of the outcome of the public participation. Article 3 of the Convention requires a clear, transparent and consistent framework to implement the provisions of the Convention.	The Climate Change Response Bill consultation, as has also been demonstrated in this Reply with reference to other consultation exercises, was merely the conducting of a public participation exercise rather than the 'taking account' of the public participation exercise. The EU ratified the Convention in February 2005. In April 2011, following a public participation exercise which was conducted clearly outside the principles of the Convention, we have a situation where a principal officer in the Irish Department of the Environment is responding to a legal request and stating that the Convention has no direct effect.

54 http://www.environ.ie/en/Publications/Environment/Atmosphere/FileDownLoad,25524,en.pdf

55 See page 24 of "How far has the EU applied the Aarhus Convention" / Publications / Books: http://www.participate.org/index.php?option=com_jdownloads&Itemid=62

Requirement of the Convention	Actual situation
	The failure to carry out a Strategic Environmental Assessment and ensure access to information and public participation, had allowed government and officials to already sanction a massive bias (and spend) in favour of wind energy on little more than loose and untested assumptions.

4.5 Implementation of Pillar III of the Convention in Ireland

4.5.1 Access to Justice in relation to Pillar I

In relation to Article 9 paragraph 1 of the Convention, citizens who consider their request for information under Article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered or otherwise not dealt with in accordance with the provisions of that article, shall have access to a review procedure before a court of law or other independent and impartial body established by law. Furthermore in accordance with Article 9 paragraph 4, the above measure shall be fair, equitable, timely and not prohibitively expensive.

The situation in Ireland is that access to information on the environment is regulated by S.I. no. 133 of 2007. This established the Office of the Commissioner for Environmental Information[56] as the independent and impartial body for appeals related to access to information in the environment. The cost of an appeal to the Commissioner is €150. **While she has expressed reservations in her public statements[57] that this may be a disincentive for people to commence an appeal through her office, I am not of the opinion that it is excessive. However, having taken a number of appeals through her office, the time frame for me, from requesting information from a public authority to an actual Decision by the Commissioner, has ranged from five to twelve months. This therefore is clearly not timely and most probably reflects the fact that her office is under resourced.**

Requirement of the Convention	Actual situation
Article 9 of the Convention requires that in relation to access to information, the citizen shall have access to a review procedure, which shall be fair, equitable, timely and not prohibitively expensive.	S.I. No. 133 of 2007 established the Office of the Commissioner for Environmental Information and implemented Directive 2003/4/EC, which is a schedule to the S.I. Article 6 paragraph 1 of Directive 2003/4/EC states that: “Any such procedure shall be expeditious and either free of charge

56 http://www.ocei.gov.ie/en/

57 http://www.ocei.gov.ie/en/MediaandSpeeches/Speeches/2008/File,7822,en.pdf

Requirement of the Convention	Actual situation
	or inexpensive". The current situation is that appeals to the Commissioner for Environmental Information are not resolved in a timely / expeditious manner.

4.5.2 Access to Justice in relation to Pillar II

Judicial Review implications of the Corrib case

On the 18th January 2011, An Bord Pleanala issued its long awaited decision on the Corrib pipeline project, Case GA0004. As discussed elsewhere this enquiry was extremely long running. However, I had participated in the process by advising one of the non-governmental organisations, Pro Gas Mayo, which was an unpaid voluntary organisation of ordinary citizens, acting totally independently of Shell, Government or other statutory body. **Pro Gas Mayo had emerged to support the project for the benefit of the area, the county and country at large. It was critical of the excessive delays in the regulatory process and the failure to accept internationally developed standards for such developments.**

When the decision was issued, I sought advice on the merits of bringing a Judicial Review of the decision and was ultimately only deterred by; (a) cost and (b) the uncertainty of which test applied with respect to my interest. Ultimately, according to my legal advisers, there was no certainty as to whether:

- I would not be liable for the costs of the State and;
- I could show to the court that I had a "substantial interest" in the planning decision.

In this regard, it would require me to incur substantial costs for simply engaging my own team of solicitors, and one barrister, and possibly a second more senior barrister. I was advised that preparing the application for leave was one obstacle I would have to face, but that it would be open to the court to allow the State to cast doubt on my interest and force me to defend it. I was further advised that the entire hearing alone would probably consume many days.

My case in point is being demonstrated by the Judicial Review on the case, which since has been brought by Peter Sweetman, who is representing himself. I am advised that the case was entered into the Commercial List of the High Court, which is likely to cause higher costs to be incurred that would otherwise be the case.

The advice I was given stands as a testament to how difficult and ineffective the remedies offered by Ireland are. I provide an overview of same as follows:

Planning Judicial Review Proceedings

In Ireland, challenges to planning decisions are by way of Judicial Review, but for many years special procedures have applied to Judicial Review of planning matters compared to the review of other administrative decisions.

Presently Planning Judicial Reviews are governed by Sections 50 and 50A of the Planning and Development Act, 2000 (as amended). These provisions were commenced on 28th September, 2010 by Ministerial Order.

(i) Conditional Right to Review

The right of review of planning decisions is subject to the High Court being satisfied that leave should be granted to apply for Judicial Review. Leave can be granted, within eight-weeks of a “decision” or “act,” only if the Court is satisfied that there are “substantial grounds” for contending that it is invalid, and that the applicant has a “substantial interest” in the matter.

At the *ex parte* hearing, it is open to the Court to decide that that the application for leave should be conducted on an *inter partes* basis. The test is “the likely impact of the proceedings on the respondent or another party, or for other good and sufficient reason”. The fact that a Judicial Review casts doubt over the legality of the planning permission will result in uncertainty for the developer. Therefore a Court may be tempted to remit the leave application to a full hearing in order to allow the developer have his say. In fact it is likely that the main hearing will deal with both the leave application and the substantive application. In effect, the applicant even at this stage still has to satisfy the Court, in the face of opposition from another party with a vested interest in the outcome of the case, that he has an interest.

This adversely affected me, because I felt that the fact that I had a substantive objection to an identifiable decision that had been taken with regard to a major aspect of the project, but that this would count for nothing because I had not directly made any representation in the planning procedure. In fact I made an indirect submission, through a Non-Governmental Organisation, and was not concerned with all aspects of An Bord Pleanala's decision, just the one that was based upon having to consider “a full bore rupture”, which forced an extremely expensive underground tunnel to be implemented. Whilst the interest to me was that this was going to deter investment in Ireland, I was at the same time very clear in my view that this was wrong evaluation and conclusion.

(ii) Any “decision” or “act”

The special judicial review procedure for planning governs all challenges to the validity of any “decision” or “act” of a planning authority or An Bord Pleanála; the latter is the statutory administrative tribunal, which decides on appeals from planning decisions made by local authorities in the Republic of Ireland.

The inclusion of “acts,” in conjunction with the eight-week limitation period that applies, means that waiting for a formal “decision” could result in the Judicial Review proceedings being commenced out time in respect of the “act” which occurred more than eight weeks earlier.

So the uncertainty for me was that I was relying upon what I considered to be a defective evaluation of the risk of a full bore rupture, which appeared in the clarification letter of the 29th January 2010 from An Bord Pleanala to the developer. I was therefore at risk that the date of the act was not the date of An Bord Pleanala's decision (18th January 2011), but the earlier date, which would render my application out of time. Since the eight-week time limit may be enforced by the Court at the instance of the Respondent authority, I knew that there was a risk that I would have to consume more resources simply dealing with this point.

(iii) Eight week time-limit

The eight week time-limit commences from the date of the act or decision being challenged. And it is necessary to obtain leave to apply for a review from a High Court judge in order to commence proceedings. The application for leave is done ex parte.

Therefore, an applicant will not be statute barred if he actually presents his application for leave before a judge within the eight weeks. However, the merits of an application for leave may be reviewed at the substantive hearing. Accordingly the applicant must show at the leave stage, and sustain thereafter, sufficient evidence to show, and record by way of affidavit, that substantial grounds and substantial interest exist on or before the application is made. These constitute two distinct pre-conditions to a review, and therefore in default of either an application may fail.

Thus the eight-week time limit can apply adversely against an applicant in two ways. Firstly it is open to the Respondent planning authority, to challenge the decision to grant leave to apply, in addition to defending its act or decision. Thus even after leave has been granted by a High Court Judge the right to review may eventually be refused on the grounds that there was insufficient grounds for review. Secondly, it is not certain that the applicant can rely on any additional grounds or evidence raised after the eight-week limit (but within the same proceedings) even to further justify the right to review.

The High Court does have discretion to extend time for "good and sufficient reason", but this may only be exercised where the delay is outside the control of the applicant for Judicial Review. The risk of a court finding against the applicant is too discouraging. For example: An Bord Pleanála might decide at an early stage of an appeal that a proposed development is not likely to have significant effects on the environment and therefore does not embark on a full environmental impact assessment ("EIA"). If that decision is published at the time, then the applicant risks failing to bring a challenge with eight-weeks of that date, and that an objector is not entitled to await the final decision on the appeal.

In Linehan v. Cork County Council [2008] I.E.H.C. 76 the judge observed that it may no longer be safe for an applicant to await a final planning decision before making an application for Judicial Review, where the grounds of challenge involve questioning the validity of an earlier procedural decision or act. Note: By implication an act includes an omission. So if an apparent error occurs during the course of a planning application / appeal, it may be necessary to move to challenge that "act" or "omission" within the eight week time-limit.

For me this was just another area of uncertainty that strongly discouraged me from bringing judicial review proceedings against the Corrib decision. To reiterate once again, I would have to spend a substantial amount, just to have my application fail potentially without the substance of my complaint being heard.

(iii) "Substantial grounds"

Irish Planning Judicial Reviews differ from other forms of administrative action in that the "Substantial Grounds test" is a higher standard than applies to non-Judicial Review applications, which is whether the applicant has an arguable case (See G v Director of Public Prosecutions [1994] 1 IR 374).

I think this speaks for itself, but it is important to note that a person who has not participated fully in the planning process will not have a "substantial interest". See, for example, Treacy v. An Bord Pleanála [2010] I.E.H.C. 13 in which the Court said that the "substantial interest" requirement copper-fastened the rule that an applicant for Judicial Review cannot rely on a ground, which could have been, but was not raised during the course of the proceedings before the decision-maker.

(iv) "Substantial interest" requirement

The Public Participation Directive provides that access to the "review procedure" is to be available to members of the public concerned, who either (i) have a sufficient interest, or (ii) maintain the impairment of a right, where administrative procedural law of a Member State requires this as a precondition. The Directive goes on to provide that what constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice.

Whilst the test for conventional Judicial Review in Ireland is "sufficient interest", the test for statutory Judicial Review under Sections 50 and 50A of the Planning and Development Act, 2000 (as amended) is "substantial interest".

The discrepancy between the two is obvious and for me it was a major deterrent for me to bring proceedings for review. I do not think it is necessary or appropriate for an applicant to argue whether he has a sufficient or a substantial interest or to have to risk losing a case, because he does not have the latter.

Admittedly the European Commission is of the view that the test of "sufficient interest" is not in compliance with the Directive. In Case C–427/07 Commission v. Ireland it argued that the imposition of a requirement, which was more restrictive than that applicable to conventional Judicial Review, was both inconsistent with the obligation to ensure "wide access to justice" and discriminatory. Unfortunately, the European Court ruled that it was unnecessary for it to decide this issue in the context of Case C–427/07 in that those proceedings were concerned with an alleged failure to transpose a directive, and were not therefore concerned with the quality of any transposition measures.

In this regard, the EU is not in compliance with the Aarhus Convention, because it has failed to bring proceedings against Ireland to correct this known infringement.

Whilst the EU does have a clear view, but has done little to correct the infringement, the position within Ireland is incomprehensible and a further reason why taking proceedings in Ireland is beyond the ordinary citizen.

In Sweetman v. An Bord Pleanála [2007] I.E.H.C. 153, the Court said that if it should prove to be necessary, on the facts of any individual case, to give a more generous interpretation of the requirement of "substantial interest", so as to meet the "wide access to justice" criteria set out in Article 10a, then there would be no difficulty in construing the term "substantial interest" in an appropriate manner.

I say it is impossible to determine whether to bring an action on this basis, not least because that view is not shared by other judges. In Harding v. Cork County Council [2008] I.E.S.C. 27, the Irish Supreme Court considered "substantial interest" in the context of the legislation prior to the 2006 amendments. Ireland's most senior judge, Murray C.J, described the "substantial interest" requirement as "vague and lacking in precision".

I was further discouraged in taking proceedings by the decision that was reached in Harding. In that case, Mr Harding sought to challenge a decision to grant planning permission for a golf and leisure resort at Kinsale. Mr Harding lived some two to three kilometres from the site of the proposed development, and said he had maintained a constant and continuous interest in the area over the years, and that he visited the area frequently both by land and sea.

It was held by the High Court and the Supreme Court that he did not have a substantial interest in the decision.

The Supreme Court ruled that in changing the standing requirement from a "sufficient interest" (as it used to be) to a "substantial interest", the legislature intended to "raise the threshold" and to "limit the range of persons" who would have the *locus standi* to challenge planning decisions. It held that a substantial interest has to be one "peculiar or personal" to the applicant, albeit the interest does not have to be unique to the applicant.

It was also noted by the Court that it was emphasised that the "substantial grounds" and "substantial interest" requirements create two fences, not one; and that an applicant who fails to establish the latter has no entitlement to obtain leave merely because he has grounds which are substantial.

It went on to say that in order to demonstrate a "substantial interest", it is necessary for an applicant to establish the following criteria: (a) that he has an interest in the development the subject of the proceedings, which is "peculiar and personal" to him; (b) that the nature and level of his interest is significant or weighty; and (c) that his interest is affected by or connected with the proposed development.

Harding, whilst being a significant and binding decision, is not an isolated case. In Treacy v. Cork County Council [2009] I.E.H.C. 136 the Court ruled that the owner of a holiday home a short distance from the permitted development also did not have a substantial interest.

However, as a matter of law and certainty, it is necessary for Irish legislation to clearly set out what the test is. I was deterred from commencing a Judicial Review in respect of the Corrib decision, because of the lack of clarity about the test for sufficient interest.

Costs

Article 9 paragraph 2 of the Aarhus Convention is clear in that citizens should have Access to Justice to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6 and, where so provided for under national law and without prejudice to paragraph 3, of other relevant provisions of the Convention. Article 9 paragraph 3 of the Convention requires that in addition, where they meet the criteria, if any, laid down in national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities, which contravene provisions of its national law relating to the environment. Furthermore 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.

Article 9 has been transposed by the EU in Article 10a of the Environmental Impact Assessment Directive, that the review procedure not be "prohibitively expensive". **In the meantime, the European Court in Case C–427/07 Commission v. Ireland had criticised Ireland for failing to put in place legislative measures to give effect to this aspect of Art.10a.** The European Court reiterated its established case law to the effect that the provisions of a Directive must be implemented with "unquestionable binding force" and with the specificity, precision and clarity required in order to satisfy the need for legal certainty. It was not sufficient that the Irish courts enjoy discretion under the Rules of the Superior Courts in making costs orders, in which discretion might be exercised so as to avoid imposing prohibitive costs on an unsuccessful applicant. In the case of a Directive intended to confer rights on individuals, the persons concerned must be enabled to ascertain the full extent of their rights.

A special costs regime has been introduced for Environmental Impact Assessment, Strategic Environmental Assessment and Integrated Pollution Prevention and Control cases under the Planning and Development (Amendment) Act, 2010. A new Section, 50B, has been enacted which provides as follows:

- "(2) Notwithstanding anything contained in Order 99 [which deals generally with costs] of the Rules of the Superior Courts and subject to subsections (3) and (4), in proceedings to which this section applies, *each party* (including any notice party) *shall bear its own costs*."

There are a number of exceptions to this position. Section 50B (3) provides as follows.

- "(3) The Court may award costs *against* a party in proceedings to which this section applies if the Court considers it appropriate to do so—

  (i) because the Court considers that a claim or counterclaim by the party is *frivolous or vexatious*,

  (ii) because of the *manner* in which the party has conducted the proceedings, or

  (iii) where the party is in *contempt* of the Court."

Meanwhile Subsection 50B (4) sets out the circumstances in which costs might be awarded in favour of a party, as follows:

- "(4) Subsection (2) does not affect the Court's entitlement to award costs in favour of a party in a matter of exceptional public importance and where in the special circumstances of the case it is in the interests of justice to do so."

It should be noted that subsections (2), (3) and (4) are out of alignment with each other. An applicant who brings a case of "exceptional public importance" may be denied the costs the Court is entitled to award in his favour because, on a literal reading of subsection 50B (3), none of the three criteria permit costs to be awarded against a party on account of the importance of proceedings; unless of course the Respondent has, additionally, acted improperly or in contempt.

I say that in the final analysis, the foregoing state of affairs is far too complicated a basis to say that Irish law complies with either the Directives or in turn with the Aarhus Convention, and that a clear statement from the Committee is necessary to direct that the EU ensures that the Ireland gives proper effect to EU law.

With regard to the situation in Ireland, the excessive costs and barriers to Access to Justice were also clearly outlined in the report prepared for the Environmental Protection Agency[58]. The same conclusions were reached in the Report prepared by Milieu Ltd on behalf on the EU Commission in relation to Measures on Access to Justice in Environmental Matters (Article 9 (3)): Country Report for Ireland[59]. Furthermore there is the on-going case at the European Court in relation to implementation of Directive 2003/35/EC and the provisions for Access to Justice; C-427/07[60].

In their decision on Communication ACCC/C/2008/27[61], the Aarhus Compliance Committee with regard to a dismissal of a right to a Judicial Review in relation to a planning case in Belfast, found that the quantum of costs awarded in this case, £39,454, rendered the proceedings prohibitively expensive and that the manner of allocating costs was unfair, within the meaning of Article 9 paragraph 4 of the Aarhus Convention and thus amounted to non-compliance by the UK. Similarly in their decision on Communication ACCC/C.2008/33[62], the Aarhus Compliance Committee with regard to the Port of Tyne case, where the environmental group could not afford to take a judicial review, found that by failing to ensure that the costs for all court procedures subject to article 9 were not prohibitively expensive, and in particular by the absence of any clear legally binding directions from the legislature or judiciary to this effect, that the UK had failed to comply with Article 9, paragraph 4 of the Aarhus Convention.

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58 http://www.environmentaldemocracy.ie/pdf/finalreport.pdf

59 http://ec.europa.eu/environment/aarhus/study_access.htm

60 http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/313&format=HTML&aged=1&language=EN&guiLanguage=en

61 http://www.unece.org/env/pp/compliance/C2008-27/Findings/ece.mp.pp.c.1.2010.6.add.2.edited.ae.clean.pdf

62 http://www.unece.org/env/pp/compliance/C2008-33/Findings/ece.mp.pp.c.1.2010.6.add.3.edited.ae.clean.pdf

In my opinion, and the advice that I have received, a similar level of costs would be incurred by applicants in Ireland. **Generally, the process from initial advice to full hearing of an application could costs "tens of thousands" on average if a full legal team is engaged.** Certainly some cases, will be much less than the average, but not usually in planning cases, where the amount of documentation is often voluminous, particularly in infrastructure projects which will have an impact on the environment.

This represents either an excessive cost or at least high-risk cost; the risk being that you may not reach a full hearing on account of not having a "substantial interest". The only alternative is to represent oneself. **Either way, there is an inequality of arms between the state and the applicant.** The state will invariably be represented, which means that the unrepresented applicant is at a disadvantage. If the applicant does obtain representation, then he is still at a disadvantage because there is no limit to the State's financial resources. There are no rules limiting the state to one solicitor or barrister. There are no rules requiring the State to assist the Court or the applicant in the review of the issues. It is an adversarial procedure, at the end of which the State can add to the pressure and uncertainty on the part of the applicant by asking for costs to be paid in any event by the Applicant. This is unfair and inequitable.

Requirement of the Convention	Actual situation
Article 9 paragraphs 2, 3 and 4 define that each party shall ensure the rights to access to justice of the citizen to challenge the substantive and procedural legality of any decision, act or omission of Article 6 and other relevant provisions of this Directive. Any such procedure shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.	These Rights do not exist in Ireland. The EU as a Party to the Convention has failed to ensure these Rights. There is no equality of arms between parties. Public authorities use public money to engage a full legal team. Whereas the applicant must decide between representing himself or engaging a legal team that is still very expensive. The system is in effect still prohibitively expensive because, whilst Ireland has implemented a "no costs" rule, the "substantial interest" test and the right of a public authority to question the admissibility of review application (after the court has given leave) simply adds to the costs that an applicant will incur.

4.6 Enforcement measures by the EU Commission

It is not as if the EU Commission were unaware of the problems with the implementation of the Aarhus Convention in Ireland, the issue is that they choose to distance themselves from it and do very little about it. The simple fact is that while the EU ratified the Convention in 2005, Ireland has still to ratify the Convention. Indeed one can point out that the situation in early 2011 is that the Convention is simply neither on the 'radar' of the public, who have never been properly informed about it, nor on that of the political system. If one was to sum up the progress made in six years with regard to Ireland's ratification of the Convention, it could effectively be described as 'zero'. Furthermore, the most critical issue, in relation to access to justice, has not been addressed in any effective manner. Indeed to reiterate the situation with regard to the Environmental Impact Assessment Directive 85/337/EEC, which as has been discussed already in Section 4.3.4 of this Reply to UNECE, it takes not only several years, but sometimes several decades for enforcement measures by the EU Commission to have effect.

Requirement of the Convention	Actual situation
Article 3 paragraph 3 of the Convention requires that each Party shall promote environmental education and environmental awareness among the public, especially on how to obtain access to information, to participate in decision-making and to obtain access to justice in environmental matters. Article 3 paragraph 1: Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access to justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.	The EU Commission has never promoted an awareness of the Convention and its importance among the Irish Public. If one puts Aarhus into the search engine on the EU Commission's representation in Dublin website[63], one draws a blank. As the situation to date has demonstrated, such as with the Environmental Impact Assessment Directive, and as will be highlighted in further Sections of this Reply to UNECE, the EU Commission simply does not have 'proper enforcement measures' at its disposal to deal with breaches of the terms of the Aarhus Convention or indeed environmental legislation in general.

63 http://ec.europa.eu/ireland/press_office/index_en.htm

It is clear then that of the 27 Member States and Accession States that Ireland continues to be the 'problem child' in relation to the Convention, unlike the others it simply hasn't ratified it. One would expect that the EU Commission would therefore be monitoring the situation closely. However, all the indications are to the contrary. An Access to Information on the Environment request of mine to the Department of the Environment, Heritage and Local Government AIE/2009/039, see Section 7.3.6 of this Reply to UNECE, was finally answered in mid December 2009. One of the queries related to a copy of the submission to the EU Commission under Article 9 of 2003/4/EC, which was due to be communicated to the EU Commission on the 14th August 2009.

- "I regret that the submission to the Commission under Article 9 of 2003/4/EC, which you have requested, has not yet been finalised. I am therefore refusing your request in accordance with Section 10(6) of the above mentioned Regulations. However, I expect that the report will be finalised as soon as possible in the coming weeks, at which time I will provide you with a copy".

I never did receive my copy, although the report was at some stage finally posted on the Department of the Environment's website[64]. This clearly demonstrates that there was absolutely no urgency, either by the EU Commission or the Irish Administration, over this report on the experiences with Pillar I of the Convention in Ireland. One can only assume that neither was there any attention paid to the main conclusion of the report, i.e. the relatively low volume of requests received to date. Certainly there was no effort made to correct this deficiency, indeed the Environmental Information Office in the Centre of Dublin, ENFO, was shut down and replaced by a more limited website[65].

Requirement of the Convention	Actual situation
Article 5 paragraph 1 requires that each Party shall possess and update environmental information which is relevant to their function.	Directive 2003/4/EC required the EU Commission to have a report related to the experience gained in the application of the Directive in Ireland by 14th August 2009. This report was not received until several months later. Note: This report is not disseminated on the Europa website, neither is there any comment or reference to it.

64 http://www.environ.ie/en/Publications/Environment/Miscellaneous/FileDownLoad,22174,en.doc

65 http://www.environ.ie/en/Environment/ENFO/ The previous library at the ENFO centre had among others, a collection of every Environmental Impact Assessment produced in Ireland. This resource is now gone.

If we consider the European Community's first Aarhus Convention Implementation Report in May 2008[66], it simply doesn't mention Ireland once. Furthermore with regard to the section on the implementation of Article 3 of the Convention, it simply fails to mention anything to do with 'proper enforcement measures', which is a requirement under Article 3 paragraph 1. With regard to the second Implementation Report of November 2010, which is a consultation document[67], in a similar vein there is no mention of enforcement in relation to Article 3 paragraph 1 or of Ireland at all in the document. Indeed with regard to: "Obstacles encountered in the implementation of Article 3", the answer is: "No information was provided under this heading".

My own experience with the EU Commission was that I was obstructed on every occasion, in which I raised the issues of maladministration in Ireland and the failures with regard to the Aarhus Convention. Some of this is already documented on Annex 3 and Annex 4 of the webpage of this Communication[68].

It therefore should not have been a surprise to me, that when I went to Brussels on the 3rd December 2010 and met with the representatives of DG Environment and DG Energy, that they were simply not interested. Indeed they had not prepared for the meeting in advance and choose to be unaware of the contents of the CHAP (2010)00645 investigation, further discussed in Section 8.4 of this Reply to UNECE. Despite having spent over an hour explaining the major breaches of EU Environmental Legislation and the principles of the Aarhus Convention in particular, I was told at the end of the meeting by Liam Cashman, deputy head of Unit Env A.2 on Compliance Promotion, Governance and Legal issues that the Convention applied to Community Legal Order in Ireland despite Ireland's failure to ratify it.

While the EU Commission is the 'Guardian of the Treaties' it has discretionary powers in relation to enforcement. As Liam clearly put it, the Commission may well take a compliance action with respect to a wind farm and a peat slide on the side of a mountain[69], but they are not going to take issue with an energy policy, which was developed outside the proper legislative principles, see next Section, and resulted in the wind farm being built in the first case. None of the representatives of the EU Commission at that meeting wanted any follow up actions, for examples those raised in the Agenda for the meeting, and none have occurred since. However, an examination of the EU Ombudsman's website for March 2011 reveals I am not the only person dissatisfied with the EU Commission's handling of the situation with regard to infringements of environmental legislation by Ireland[70]. **An Irish environmental consultancy had lodged a compliant over the refusal of the Commission to release copies of its correspondence with the Irish Authorities in regard to the status of official complaints in relation to environmental legislation.**

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66 http://ec.europa.eu/environment/aarhus/pdf/sec_2008_556_en.pdf

67 http://ec.europa.eu/environment/consultations/pdf/aarhus.pdf

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

69 http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/313&format=HTML&aged=1&language=EN&guiLanguage=en

70 http://www.ombudsman.europa.eu/en/cases/caseopened.faces/en/10139/html.bookmark

Requirement of the Convention	Actual situation
Article 3 paragraph 1: Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access to justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.	Outside of the European Court of Justice case C-427/07, mentioned previously in Section 4.1, there is no evidence of enforcement measures by the European Commission in relation to Aarhus Convention compliance in Ireland. As regards enforcement measures generally, the Commission knows from previous experience of Ireland that it is only through infringement proceedings that Ireland will take measures to give effect to European legislation, particularly in the environmental field. It is for this reason that the paucity of action on the part of the EU has had a significant (if not substantial) effect on non-compliance by Ireland with regard to the Aarhus Convention.

5. COMMC54 QUESTION 2 – INFORMATION WITH REGARD TO SPECIFIC PLANS, PROGRAMMES AND POLICIES (PART A)

5.1 Specific policies and plans related to Energy

Question 1 to the Communicant on ACCC/C/2010/54 asked: "How is it considered that the EU Commission failed to monitor the implementation of the Aarhus Convention in Ireland and indicate how your allegations relate to the issues raised in the sub-questions listed under 2". Where question 2 related predominately to matters related to renewable energy. As the information and evidence available to the Communicant in relation to non-compliances with the Aarhus Convention in Ireland was so broad, it was decided that in answering Question 1, predominately general issues excluding renewable energy would be addressed, while in Question 2 and the following Questions, the renewable energy issues and related non-compliances with the Convention would be the main focus of the reply.

5.1.1 Question presented by UNECE

In question 2 (a) of their letter of January 2011 the Compliance Committee highlighted: To what plan, programme or policy do the allegations of non-compliance with the Convention relate? We found the following possibly relevant documents / decisions:

- Energy Policy Green Paper, 1 October 2006.
- Energy Policy White Paper, March 2007, basis for Government Renewable Energy Policy.
- Government's policy decision to accelerate the development of Ocean Energy (Wave and Tidal) in Ireland.
- Offshore Renewable Energy Development Plan.
- SEAI's Strategic Energy Plan 2010 – 2015.

5.1.2 Background to the Development of Irish Energy Policy

It is important to at this point to provide some background to energy policy and its development in Ireland in particular. Energy is the 'currency' of the modern lifestyle we enjoy. The costs of energy not only impacts on the quality of life of the citizens, but are crucial to the success of the industrial sector, which underpins the financial success of the economy. Furthermore investments in energy are large long term financial commitments, such as the forty year lifespan of a thermal power plant. If these investments are not planned in a rational objective manner, the consequences will be dire.

With regard to the Irish Energy Policy there are three main aspects of the policy in the context of the Aarhus Convention which are highly relevant. Firstly the treatment of nuclear energy, secondly the massive support structures given to investment in renewable energy, particularly wind and thirdly the obstruction of waste related energy production.

In Ireland, Section 18(6) of the Electricity Regulation Act 1999 states:

- "An order under this section shall not provide for the use of nuclear fission for the generation of electricity."

In effect Ireland has a legal act banning the use of nuclear generation. However, what is the background and justification for this? **In April 2010, Jerry Waugh BE CEng MIEI MIEE made an Access to Information on the Environment request to the Department of Communications, Energy and Natural Resources related to provision of the environmental information, which formed the basis for the above mentioned ban on nuclear energy in Ireland.** The reply was:

- "In practical terms, **the only background material that we have been able to locate (after extensive searches of files including the updating of old electronic files) which could constitute environmental information for your purposes, are transcripts of various Oireachtas debates and Ministerial briefing and speaking notes for these debates**, as well as published lists of the relevant amendments. Whether or not these comprise environmental information, our approach has been to provide you with material relevant to your request".

In essence, as can be seen from Annex 12 and 13, the decision was made 'behind closed doors' by a handful of politicians, acting in the 'best interests of the Irish people', justified by such statements as; "the public is keen to establish its right to nuclear-free electricity". There was no consideration of any technical, economic or environmental aspects. Furthermore it was also clear in that there was scant regard to the legal aspects with regard what the European Court of Justice might decide. Indeed Ireland ratified the Euroatom Treaty[71] on accession to the EEC in 1972, the primary objective of which is the promotion of nuclear energy. When the amendment to the Electricity Regulation Act was put forward to the Dail (Irish Parliament) in 1999, the Attorney General clearly recommended that the amendment not be accepted. This recommendation was ignored by the politicians.

Moving forward to 2006 and the further development of energy policy through the Energy Policy Green Paper, it is important to point out a number of key issues. Firstly the increasing promotion of renewable energy by the EU, initially through Directive 2001/77/EC relating to electricity produced from renewable energy sources, for which Ireland was given a target of 13.2% to be obtained by 2010. Note: There was never any assessment completed for this target, for instance as to how many wind turbines should be built, where they should be built, what the impact on the landscape or population would be, what actual environmental benefits would incur, such as in Greenhouse gas reductions. **Indeed it is sad to say that there is not a single document ever produced, which can state with any accuracy, what Ireland's greenhouse gas emissions would be, with versus without, the massive capital investment of several billion Euros which has gone into meeting this 13.2% target.**

71 http://esarda2.jrc.it/references/Technical_sheets/ts-Euratom-040304.pdf

The fundamental principle of the Aarhus Convention in relation to development of policies, in particular Article 5 paragraph 7 and Article 7, is that some form of documentation is completed in advance of the public participation to justify the measures which are proposed and provide a consideration of the environmental aspects of the policy. However, at the time Directive 2001/77/EC was developed the Aarhus Convention was not in force in the EU.

Indeed as has been pointed out in previous documentation in this Communication, the 20% of Europe's energy market, which has been assigned to renewable sources by 2020 under the more recent Directive on renewable energy, 2009/28/EC, has a value in excess of €100 billion per year. Given that an every increasing share of the energy market is being removed from the normal checks and balances of the free market economy, there is potential for major abuses to occur. One of the consequences is that there are many business initiatives that now have a hugely vested financial interest in this renewable market. In the absence of proper and critical assessment and policy development in the area of renewable energy, they naturally talk up the sector. Indeed many of the submissions to the consultations on renewable energy can best be described as business plans to exploit the market.

Secondly there has also been a failure, particularly in Ireland, for the designated public servants to scrutinise the policies on renewable energy, which are often seen as vote winning by the politicians, who do not stand to benefit from the long term strategies necessary for a correct energy policy. Indeed public servants have, as will be demonstrated, contributed to the failure to complete the minimum assessments required by law. In the case of Ireland, public servants are extremely well paid, nearly a third more than their counterparts in Germany. Unlike those in manufacturing industry, the massive economic costs of the programme are not going to affect them[72]. For instance the additional costs that principally German industry and commerce will have to carry:

- Electricity providers in Germany estimate to have to pay €16.7 billion for renewable electricity in 2011, which otherwise would have had a price of €4.7 billion on the open market. This is leading to a 4.4 cent per kWh rise in electricity costs[73].

[72] It is generally accepted from a number of studies, principally in Germany, Denmark and Spain that the rising cost of electricity is having a significantly detrimental effect on the viability of manufacturing industry: http://dialogue.usaee.org/index.php?option=com_content&view=article&id=85:renewable-subsidies-do-they-create-or-destroy-jobs&catid=35:v17-no3&Itemid=78

[73] http://www.spiegel.de/spiegel/print/d-77299738.html . To put this in context, the cost of generating a kWh of electricity in a modern high efficiency, low emissions, Combined Cycle Gas Turbine is about 4.5 cent per kWh.

Thirdly one has to account for the role of the environmental movement and its very close interactions with the media and as a result the political process. To an overwhelming extent this movement has been ideologically, unscientifically and emotionally driven, with far too often the result that it has been counter productive in achieving balanced environmental protection, in which the costs are justified by the potential benefits (Principle of Proportionality). One can simply ask to which themes remain with these pressure groups, when it turns out the effects of global warming are limited or the consequences manageable. Unfortunately the media also has been guilty of driving relentlessly this Green Agenda, without any scrutiny of its costs and benefits. It is a sad reality that instead of reason prevailing in politics, where media leads, the political process increasingly seems to follow!

Fourthly there are only a limited number of technical specialists experienced with the complexity of delivering energy systems and their economic and environmental impacts. It is too easy to brush the independent technical assessments of this group aside, as they do not conform to the mainstream opinion and are 'getting in the way' of the objectives of the others. There is no doubt this is happening, few if any in Ireland would have my combined training and experience in the areas of industrial development and regulatory compliance. Yet my input, instead of being considered as of value, has been treated at National and EU level as something which has to be obstructed.

In fact it is increasingly easy to 'brush' this independent technical input aside, by failing to complete proper technical assessments for consultations and by failing to evaluate the technical content of the documentation received in the public participation, as part of the resulting decision making. For instance the 2007 EU Commission's "Renewable Energy Road Map: Renewable energies in the 21st century; building a more sustainable future"[74], the first section on the consultation reads like the results of an opinion poll, there was no technical analysis. For example:

- "Two thirds of respondents considered renewable energies the best option to ensure that all Europeans enjoy access to energy at reasonable prices".

In reality electricity prices are rocketing in Member States, which have had ambitious renewable energy programmes, such as Denmark, Germany and Spain. The cost of renewable energy for Germany in 2011 is already highlighted above. The statement above is therefore very much an oxymoron; one can only wonder what happened to the third of respondents who didn't agree with the statement? Without doubt many of them probably submitted technical evidence to support their claims, which clearly didn't account for anything in this 'opinion poll'. Furthermore it is interesting to point out, that the document states with regard to the EU working since 1997 towards a target of a 12% share of renewable energy in gross inland energy consumption by 2010:

- "The target of a 12% share for renewable energy was based on the expectation that 68% of the increase in renewable electricity would come from biomass and 24% from wind power. With the successful

74 http://ec.europa.eu/energy/energy_policy/doc/05_renewable_energy_roadmap_full_impact_assessment_en.pdf

development of wind power, this technology will instead account for at least 50% of the increase in renewables"

As every engineer would point out, biomass combustion gives a steady high quality power input to the grid, i.e. it is dispatchable as it is available on demand, while wind is a highly variable intermittent non-dispatchable source, which has to be full backed up by other thermal plants. Clearly, the ball was set rolling without any proper analysis or control of the programme and as a result a 'pig in the poke' evolved.

5.2 The Irish Energy Policy Green Paper and White Paper

In advance of the Energy Policy Green Paper, the Irish Academy of Engineering submitted in 2006, a detailed report to the Government on "Future Energy Policy in Ireland". It was ignored. As the Academy then pointed out in their Submission to the consultation on the Green Paper[75]:

- "Excluding proposed policy on renewables and the use of market forces to deliver solutions, what substantive new policies emerge from the Green Paper?"

As they further pointed out there was a tendency to ignore economic realities.

- "Irish electricity prices have risen much more rapidly than the EU average since 2000. This rapid upward trend is likely to continue based on the strategies suggested (30% penetration by renewables; investment in networks and inter connectors; cost of creating All Island Energy Market; inducements to new entrants, etc.)".

Furthermore with regard to my appeal to the Commissioner for Environmental Information CEI/09/0016 in relation to the Department of Communications, Energy and Natural Resources, this clearly pointed out the irregularities with regard to the section of the Green Paper dealing with nuclear energy. I wasn't the only one pointed this out, as the Irish Academy of Engineering stated:

- "The comments on Nuclear Energy (pg 56) appear to be factually incorrect in relation to costs and available plant sizes. The Academy has already recommended commissioning a Report on the current state of Nuclear power engineering and economics".

What clearly was being sold in the Green Paper was that nuclear would not work, which clearly is not the case and that renewables, predominately wind, were the way forward. The reality of the situation was that Ireland, with a newly liberalised electricity market, was renewing its thermal plants, primarily replacing them with high efficiency combined cycle gas turbine plants. For the first time in its history, it had a modern and highly efficient portfolio of thermal generating plants. Regardless of how much wind energy one put on the grid, due to the incredibly intermittent characteristics of this renewable energy, one still needed all those thermal plants. Every bit of the massive expenditure in wind generation was additional to the existing thermal plants and grid. Furthermore the cost of generating electricity in the wind turbines was more expensive than doing so in the new high efficiency thermal plants.

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75 http://www.dcenr.gov.ie/NR/rdonlyres/54C78A1E-4E96-4E28-A77A-3226220DF2FC/27136/IAE.pdf

The Green Paper presented the target of 30% penetration by renewables, but it never informed the public of the huge costs involved and the massive intrusions to the landscape, which would result from the installation of several thousand wind turbines and the associated major expansions to the grid. As far as the public were to be concerned, what was proposed was a reliable, cost effective, proven technology approach with a minimal impact. This was false.

The Government then published an Energy White Paper entitled "Delivering a Sustainable Energy Future for Ireland" on 12th March 2007.

- "The White Paper describes the actions and target for the energy policy framework out to 2020, to support economic growth and meet the needs of all consumers. The Paper sets a clear path for meeting the Government's goals of ensuring safe and secure energy supplies, promoting a sustainable energy future, and supporting competitiveness".

The document clearly failed to correct the inaccuracies in the Green Paper in relation to nuclear generation, which was ruled out on reasons of security, safety, economic feasibility and system operation. Indeed one could clearly point out that none of these four points had any technical justification. Renewables were projected to contribute 33% to electricity generation by 2020, with an all island target to be set during 2007 informed by the All-Island Grid Study.

However, **there was simply no assessment of what this would cost, how many turbines would be required, where these would be located, what the environmental benefits would be, etc.** Instead just mention of "considerable challenges inherent in realising these ambitious targets" and "investment costs do remain a key challenge". However, the reader could be assured as "the Government considers that the balance of social costs and benefits must be recognised as positive and that is our starting point".

Finally it is also important to point out with regard to waste, a theme which will be returned to later in this, the clear stance taken by the White Paper:

- "The need for action on waste-to-energy potential was another strong theme in the development of sustainable energy supply".

This was reinforced by the National Bioenergy Action Plan[76] produced by the Department of Communications, Energy and Natural Resources in 2007.

5.3 The All-Island Grid Study

The All-Island Grid Study[77] has had massive implications with regard to energy policy in Ireland and is also a clear example of systematic non-compliances with the Aarhus Convention. The report was published in January 2008 and examined:

- A range of generation portfolios for Ireland.

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[76] http://www.dcenr.gov.ie/NR/rdonlyres/6D4AF07E-874D-4DB5-A2C5-63E10F9753EB/27345/BioenergyActionPlan.pdf

[77] http://www.dcenr.gov.ie/Energy/North-South+Co-operation+in+the+Energy+Sector/All+Island+Electricity+Grid+Study.htm

- The ability of the Irish power system to handle various amounts of electricity from renewable sources.

- The investment levels required, and;

- The climate change and security of supply benefits that would accrue.

As the Irish Academy of Engineering stated in their June 2009 Submission to the Joint Oireachtas Committee on Climate Change and Energy Security[78], which was a Review of Irish Energy Policy:

- "The All Island Grid Study is not a sufficient robust exercise on which to base Ireland's future energy policy".

- "Evidence based research, rather that ideology, should determine public energy policy".

However, even in advance of the publishing of the All Island Grid Study, the October 2008 carbon budget raised Ireland's target of 33% of electricity to be generated by renewables, set in the 2007 White Paper, to 40% electricity generation to be generated from renewable sources by 2020, which seemingly equated to 37% originating from wind energy. **There was simply no public participation exercise related to this change in target:**

- Minister for Environment, John Gormley T.D. has announced a revised ambitious target for renewable penetration in the electricity sector. The new target of 40% is a significant increase from the previous goal of 33% and exceeds considerably both current EU targets of 20% and the UK's current target of 15%.

  The Minister said: "One of the most effective ways of reducing our national greenhouse gas emissions is to generate as much electricity as possible from renewable sources rather than from fossil fuels. The previous Government adopted a target that 33% of electricity consumed would be from renewable sources by 2020. Today I can confirm that the Government has now agreed, on the recommendation of my colleague, the Minister for Communications, Energy and Natural Resources, Eamon Ryan, T.D. to increase this target to 40%. The target is underpinned by analysis conducted in the recent All Island Grid Study which found that a 40% penetration is technically feasible, subject to upgrading our electricity grid and ensuring the development of flexible generating plant on the electricity system."

A lot of this was due to the 2007 general election, which saw the Irish Green Party enter Government, with two key ministries; Environment, Heritage and Local Government with Minister John Gormley and Communications, Energy and Natural Resources with Minister Eamon Ryan. As Wikileaks[79] highlighted in respect to an analyses of Irish Energy policy by the US Embassy in Dublin:

- "With the inclusion of the Green Party in government, environmental and energy issues have become an area of ferment within the Irish

[78] http://www.oireachtas.ie/viewdoc.asp?fn=/documents/Committees30thDail/J-Climate_Change/Submissions/document1.htm

[79] http://www.guardian.co.uk/world/us-embassy-cables-documents/151826

policymaking community. The enthusiastic engagement by Minister Ryan has produced some notable results -- the ocean energy incentives and the ESB investment program, in particular. However, other observers here echo Jim Barry's (CEO of Irish firm NTR) comment that, "the government does not have an energy / climate change policy," and "that it is making decisions on an ad hoc basis rather than engaging in any strategic thinking".

It was not only failing to engage in strategic thinking, but it was also clearly bypassing legal requirements in relation to public participation. One of the key aspects of the All-Island Grid Study was the selection of generation portfolios in a report completed by the Electricity Research Centre in University College Dublin[80]. The same public authority, which had failed to comply with the Access to Information on the Environment request related to the uncertainty in the cost of wind energy, as discussed in Section 4.3.3 of this Reply to UNECE. As their report acknowledges, a set of renewable energy penetration scenarios ranging from 15 – 30% were presented at a public consultation in Dublin. Some of the criticisms received were that there was no basis to how the scenarios were derived and that there were no higher renewable energy scenarios than 30%.

So instead the Electricity Research Centre and a number of stakeholders came up with new generation portfolios. The list of stakeholders is very interesting, a range of academics, government bodies and firms commercially engaged in renewable energy programmes, but nobody who represented the electricity consumers, who were going to pay for the whole programme. The study team "believed that these portfolios suitably represent the range of possible renewable energy penetrations on the All-Island system by 2020". With regard to the interconnector to the UK, discussed in more detail in Section 7.4 of this Reply to UNECE:

- "**It was assumed that there would be a further 500 MW of interconnection to Great Britain by 2020**, making a total of 1,000 MW of interconnection between the two systems[81]".

With regard to portfolio which included 8,000 MW of wind (36% of electrical energy), they stated:

- "This is a very high renewable energy portfolio scenario. The wind energy resource assumed to be exploited here may even exceed the physically realisable resource on the island. This issue will be examined in work-stream 1".

This 8,000 MW wind energy portfolio was later dropped following a more detailed analysis, which showed the grid network would need to be completely redesigned to accommodate it. Instead a 6,000 MW wind energy portfolio was selected as the practical option.

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80 http://www.dcenr.gov.ie/NR/rdonlyres/27E755FE-EFB7-41CE-8828-2BB3A8EF6FE5/0/WS2AReport.pdf

81 N. Ireland already had an existing 500 MW interconnector to Scotland, the 'Moyle' interconnector.

With regard to cost, work stream four defined the additional cost to society as the sum of the operating cost of the power system for each portfolio. These costs are additional to the investment costs of existing conventional generators and existing base case transmission costs. Conveniently the study never did assess what it would cost the electricity consumer, if no new renewable generation had ever been placed on the grid. After all to repeat the point made previously, we had a grid with high efficiency power stations, which would function perfectly well without any of this investment.

As the Irish Academy of Engineering pointed out in their February 2011 report: "Energy Policy and Economic Recovery 2010 – 2015[82]"

- "Ireland's policy makers have set a target of having 40% (recently increased to 42%) of electricity production from renewable generation (primarily wind) by 2020. This target has been set in the absence of credible techno-economic studies to investigate the technical and economic barriers to be overcome".

- "In previous publications the Academy has commented on the obvious inadequacies of the so called "All Island Grid Study". These inadequacies were identified in the report by the report authors themselves and the Academy is strongly of the view that the shortcomings identified by the authors render it unsuitable for use as a basis for national policy".

As the Academy also pointed out the results of the technical modelling in the June 2010 EirGrid / Soni were disturbing. To reach the 40% renewable target, what was now being considered was up to 8,400 MW of wind capacity, a third interconnector would be required, there would be major technical challenges to be overcome, with no guarantee that grid stability could be met and the costs of the wind energy would be more than double what is now paid to conventional generators.

From a technical and economic perspective, what was presented in the All Island Grid Study was completely substandard and non-transparent. There is also the inexcusable fact that raising the target of renewables from 33% to 40% was clearly done without any form of public participation exercise.

5.4 Joint Oireachtas Committee on Climate Change and Energy Security Consultation

This consultation has already been dealt with in some detail in Section 6.2 and 6.3 of the 'book', "Bringing the Irish Administration to Heel". Essentially the staff at the Joint Oireachtas Committee responsible for the consultation relating to "meeting Ireland's electricity needs post 2020", refused for several months in 2009 to post the Submissions received on the website.

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

In reality if one reviews the thirty two Submissions that were posted on the website[83] they fall into two categories (a) business plans to cash in on this renewable energy bonanza and (b) the three Submissions from myself, the Irish Academy of Engineering and the BENE Group pointing out how deeply flawed the programme was and how it should be stopped, i.e. how our energy policy was based on ideology and not sound technical fundamentals.

However, when the Committee on Climate Change and Energy Security did finally come with their report on 2nd December 2009[84], it was about exploiting wind resources and ocean energy. There was no consideration given to the technical content that was submitted, only a review of 'how many said what' and if more said (a) than (b) then of course (a) was perfectly clear as the way forward. Indeed, the whole issue of what the proposed measures would cost to the consumer and the impact on the environment of the thousands of wind turbines and kilometres of additional grid connections was simply ignored.

5.5 Government's policy decision to accelerate the development of Ocean Energy (Wave and Tidal) in Ireland

The 2007 Government White Paper on energy policy 'Delivering a sustainable energy future for Ireland - The Energy Policy Framework 2007-2020' set out a number of strategic goals to support achievement of the overall policy objectives. This included a specific ocean (wave and tidal) energy target of 500 MW by 2020[85]. The Ocean Energy Development Unit (OEDU) was established to implement the Government's policy decision to accelerate the development of Ocean Energy (Wave and Tidal) in Ireland. The objectives were to establish Ireland as a centre of excellence in ocean energy technology and the stimulation of a world-class industry cluster.

- "The Minister for Communications Energy and Natural Resources Eamon Ryan TD, announced on the 15th of January 2008[86], a major programme of activity, grants and supports to develop ocean energy in Ireland. Over €26 million provided for under the Sustainable Environment Sub Programme of the National Development Plan 2007-2013 will go to the sector over the next three years. The Minister also announced a significant boost for the future of the sector with the first ever guaranteed price for wave energy".

In their 2006 Submission to the Government, the Irish Academy of Engineering clearly pointed out the huge costs associated with wave and tidal power. At no stage was it made clear to the public in the Government documentation that they would actually be paying close to five times the going rate for electricity from this source. The only mention of economics in the White Paper was:

- "We will set an initial ambition of at least 500 MW of installed ocean energy capacity by 2020 underpinned by national and international work

83 http://www.oireachtas.ie/viewdoc.asp?fn=/documents/Committees30thDail/J-Climate_Change/Submissions/document1.htm

84 http://www.oireachtas.ie/viewdoc.asp?DocID=13598&&CatID=36

85 http://www.dcenr.gov.ie/Energy/Sustainable+and+Renewable+Energy+Division/Offshore.htm

86 http://www.ndp.ie/viewdoc.asp?DocID=2034

to accelerate technology advances and solutions to infrastructural and economic issues".

When a distorted market like this is created, who is going to hold up their hand and shout stop. As a graduate engineer who did his masters in wave energy told me, it was as clear as daylight that the systems were never going to work as a reliable or economic energy source, but as long as money was being thrown at it in grants and start-up capital, there was a good few lucrative years to be got out of it.

5.6 Offshore Renewable Energy Development Plan

The Ocean Energy Development Unit (OEDU) established a consultation on a draft Strategic Environmental Assessment and a draft Offshore Renewable Energy Development Plan in November 2010[87]. At no stage were the public told of the staggering costs associated with this programme, instead from the lead in from the consultation website it was all about the "wonderful economic opportunity for our country". Indeed it was a very wonderful economic opportunity for the administrators of the project and those that were to supply the infrastructure.

The size of the plan was simply staggering, see below, with both the low and medium scenarios having being included in the National Renewable Action Plan, see Section 7.5 of this Reply to UNECE.

Type	Low Scenario (MW)	Medium Scenario (MW)	High Scenario (MW)
Offshore wind	800	2,300	4,500
Wave and Tidal Current	75	500	1,500

Clearly what was being proposed was an enormous investment in offshore wind energy. If we consider the position in the All Island Grid Study on Renewable Energy Resource Assessment, Workstream 1:

- "Offshore wind was also considered in the analysis, but the portfolios can be fully served at the lower cost of on-shore wind".

Indeed in the portfolios in Workstream 2A, it was only the 8,000 MW portfolio, which contained offshore wind (1,000 MW) and this portfolio was rejected as unfeasible. This is an important point, the cost basis for offshore wind is nearly double that of onshore and the technology has never worked, in that there has been a constant string of major failures with the offshore units installed to date.

Not only was the whole renewable programme growing organically at an exponential rate, but in addition there was a complete failure in the Strategic Environmental Assessment to:

87 http://www.dcenr.gov.ie/Energy/Sustainable+and+Renewable+Energy+Division/Strategic+Environmental+Assessment+on+draft+Offshore+Renewable+Energy+Development+Plan.htm

- **Identify the projected environmental objectives and benefits of this programme, such as the projected greenhouse gas emissions;**

- **Consider any alternatives in which those environmental objectives and benefits could be achieved;**

- Consider in the assessment on the population, the socio-economic impact on the population of the enormous financial burden of up to 4,500 MW of offshore wind and 1,500 MW of wave and tidal energy within Irish waters, in which each MW has an installed cost of over €3.5 million.

Directive 2001/42/EC specifies the requirements for Strategic Environmental Assessment. In the EU Glossary of Terms[88] the principles behind a Strategic Environmental Assessment and an Environmental Impact Assessment are clearly outlined:

Strategic Environmental Assessment: A similar technique to Environmental Impact Assessment but normally applied to policies, plans, programmes and groups of projects. Strategic Environmental Assessment provides the potential opportunity to avoid the preparation and implementation of inappropriate plans, programmes and projects and assists in the identification and evaluation of project alternatives and identification of cumulative effects. Strategic Environmental Assessment comprises two main types: Sectoral strategic environmental assessment (applied when many new projects fall within one sector) and regional Strategic Environmental Assessment (applied when broad economic development is planned within one region).

Environmental Impact Assessment: Study of all the repercussions of an individual project on the natural environment. Environmental Impact Assessment is a requirement in the EU in the selection of major infrastructure projects. By contrast, Strategic Environmental Assessment refers to the evaluation of programmes and policy priorities. Environmental Impact Assessment consists of two steps: screening, which refers to an initial overall analysis to determine the degree of environmental evaluation required before the implementation is approved; and scoping which determines which impacts must be evaluated in depth. The evaluation of environmental impacts examines expected and unexpected effects. The latter are often more numerous.

The EU's: Evaluating Socio Economic Development, SOURCEBOOK 2: Methods & Techniques -Strategic environmental impact assessment[89], is clear in that with regard to preparation of a Strategic Environmental Assessment:

- One of the purposes of the Strategic Environmental Assessment is to identify the significant environmental effects of a plan or programmes and identify reasonable alternative ways of meeting the same objectives. The explicit consideration of alternative routes to the same outcome is integral to the approach.

88 http://ec.europa.eu/regional_policy/sources/docgener/evaluation/evalsed/glossary/glossary_sen.htm#Strategic_Environmental_Assessment

89 http://ec.europa.eu/regional_policy/sources/docgener/evaluation/evalsed/downloads/sb2_strategic_environmental_assessment.doc

- Strategic Environmental Assessment needs to be a transparent process that allows environmental considerations to be highlighted.

- Successful Strategic Environmental Assessment assesses the impacts of alternative options rather than option alternatives. The no action option has to be considered.

- There is widespread involvement of stakeholders, policy makers and the wider public.

- It helps to have an independent body to review or audit the assessment process.

Clearly two of the main steps in the preparation of a Strategic Environmental Assessment are:

- The identification of the environmental and sustainable development objectives, targets and priorities which the Member State and region should achieve through the development plan.

- Draft Development Proposal and identification of alternatives - ensure that environmental objectives and priorities are fully integrated into the draft plan / programme, the initiatives to be funded, the main alternatives for achieving the given development objectives and the financial plan.

The above issues I highlighted in my Submission to the offshore consultation, which has been extended and is still on-going. However, in advance of this I submitted an Access to Information on the Environment Request to the Department of Communications, Energy and Natural Resources on the 11th November 2010:

Question 1: What are the arrangements which will be put in place with regards to the Submissions to this Consultation and access to information on the environment through websites, i.e. compliance with Article 7 of Directive 2003/4/EC?

Response: The draft Offshore Renewable Energy Development Plan (OREDP) and the full Environmental Report that was commissioned with all relevant appendices and a wealth of environmental information are available to the public on the DCENR and SEAI websites. This is in full compliance with Article 7 of Directive 2003/4/EC.

I refer to page 42 of the draft plan concerning submissions on the draft OREDP and Environmental Report. It is noted in section 12.1 that the provisions of the Freedom of Information (FOI) Act apply to submissions received and that information provided in response to the Public Consultation may be subject to publication or disclosure.

It has not yet been finally decided whether submissions will be published, however, it is clear from section 12.1 that this is a possibility although there is no requirement to do so.

We note that Article 7 of Directive 2003/4/EC makes no specific reference to publication of submissions received during public consultation. With regard to this particular consultation as noted, we will decide in due course and the possibility has been left open.

Question 2: How will the post consultation report be disseminated to the public in compliance with Article 7 of Directive 2003/4/EC?

Response: The post consultation report will be published on the websites of the Department of Communications, Energy and Natural Resources and the Sustainable Energy Authority Ireland once it has been finalised.

Question 3: What are the criteria, which will be used in the preparation of this report, such as assessment of additional information to be provided, responses to concerns raised, weighting for decision making in preparation of final OREDP, etc?

Response: The post consultation report will be a review of the verbal and written feedback received during the public consultation. It is clear from the four public consultation meetings held to date that there are diametrically opposed views held by different parties on the same issues. As always in the case of public consultations, it would be impossible to accommodate what every individual is seeking, particularly because, as stated, people hold opposite views on the same issue. **The Department of Communications, Energy and Natural Resources, the Sustainable Energy Authority Ireland and the consultants involved in the process will therefore use their best judgement and experience in reaching a balanced position, as they see fit.**

Question 4: One of the first offshore wind parks ever built was the seven turbines on the Arklow Bank, referred to in your SEA Environmental Report. It has proven impossible to obtain performance data on these units, such as hours of operation since going into service in June 2004, number of MWhs generated, theoretical MWhs at full availability, resulting availability, percentage downtime due to maintenance, estimates for tonnes of carbon dioxide avoided through each year of operation since 2004. The fact that this data was not made available over a year ago is now one of the issues being investigated by the EU Ombudsman. As this data is not available in the Strategic Environmental Assessment and it most certainly should have been, I am formally requesting it under S.I. No. 133 of 2007.

Response: Section 2.2 of the draft Offshore Renewable Energy Development Plan outlines the difference between a Strategic Environmental Assessment and an Environmental Impact Assessment (EIA). An Strategic Environmental Assessment is done at a higher level and is strategic in nature and does not go into specific detail about specific windfarms. The consultants who undertook the Environmental Report have said they did not request information at this level of detail or which was so specific to a particular windfarm. The information they requested from developers was more general in nature.

The completed developer questionnaire which the consultants received did not provide any specific performance data for the Arklow Banks Windfarm, which would be commercially sensitive information. The Department of Communications, Energy and Natural Resources does not collect or hold this type of performance data on any individual developments. As we do not hold any performance data on the Arklow Banks Windfarm, we have nothing to provide you with on this.

This is a very important point, 2,300 MW of offshore wind has an investment cost in excess €7 billion. Not only is that an awful lot of money and has to be recuperated by an electricity tariff of €140 per MWh, which is three times that of generation in a modern high efficiency gas turbine, but what on earth is justifying this cost? Not a single assessment was completed to determine what environmental benefit, if any at all, would occur from this investment.

Indeed the overwhelming evidence is that when penetration levels of wind energy a fraction of what is proposed for Ireland are reached, the inefficiencies due to the operation of thermal plants in a variable manner are so great, that the potential for any savings of carbon dioxide will have been long exhausted. See the next Section of this Reply to UNECE for more details.

Furthermore it has been clearly obvious that two of the seven turbines on the Arklow Bank have been bust for over three years. By plugging away and requesting an Internal Review, etc, I was finally able to access the wind output from the Arklow Banks from the period September 2007 on. Currently in a gale, the maximum output is 10.9 MW, versus the installed capacity of 25.2 MW. As mentioned previously two of the turbines are broken and don't turn, while the electrical output from the others is showing a gradual decline as the units seize up. It is not as if these problems haven't occurred elsewhere, they have, while the costs of sourcing specialised floating cranes to fix them is just horrendous. Yet for that area of the Southern Irish Sea the proposed plan, which was the subject of the Strategic Environmental Assessment, included an additional 1,814 MW of similar wind turbines.

5.7 SEAI's Strategic Energy Plan 2010 – 2015

As I highlighted in Section 6.9 of the book, "Bringing the Irish Administration to Heel", Sustainable Energy Authority of Ireland's (SEAI) Strategic Energy Plan is really just an advertisement for the wind industry, there is no factual analysis or any indication of the cost, technical limitations and environmental impacts of what is proposed. It is therefore simply not transparent.

From a technical viewpoint, the deficiencies in the documentation produced by SEAI are not just limited to failing to inform the citizen of the true costs, technical limitations and enormous environmental impact of wind generation on a massive scale, but inaccuracies are deliberately used to suit the purpose of deception. As engineers we are all too aware of the havoc the variability of wind energy causes on the thermal plants on the grid. In particular as a wind speed of 50 kph is required to enable a wind turbine to reach full output, a speed which is more than twice that of Ireland's average wind speed (about 22 to 25 kph). Furthermore, the power output of a wind turbine, like a pump or a fan, 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. This results in the thermal plants on the grid having to constantly modulate to correct the hugely variable input from the wind turbines. For instance as a low pressure system tracks across the country, thermal plants have to be put onto hot standby, ready to ramp up straight away as the wind drops. It is not uncommon that at low load a thermal plant will be burning four times as much fuel per unit electrical output, as when it is on steady full load.

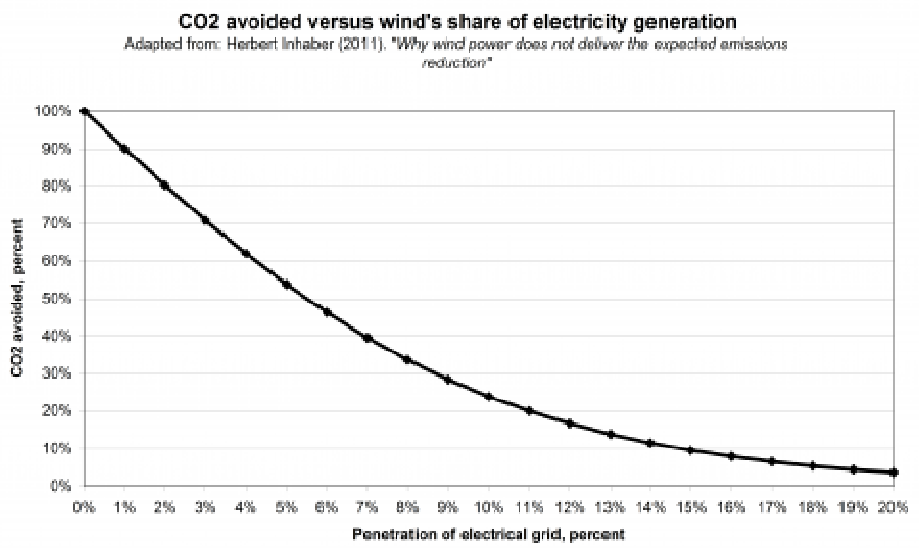
This is recognised in the All Island Grid Study, in which additional investment is foreseen in open cycle gas turbines, which can respond rapidly to the variations in the grid caused by the wind input. Unfortunately these open cycle units are at best 40% efficient, in comparison to the existing closed cycle gas turbines they are displacing, which are over 55% efficient. Given that the amount of electricity produced by wind energy in Ireland is now 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[90].

This is a complex issue. However, it is crucial. **What are the environmental objectives of this massive expansion in wind energy?** If it is savings of carbon dioxide, then what are these savings at different penetrations of wind energy on the grid? If we don't know this then we have completely failed with our legal obligation to provide a proper environmental assessment of the objectives for the programme. Secondly, how much does it cost to reduce carbon dioxide 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, we simply cannot complete a consideration of alternatives.

Unfortunately it is a shocking indictment of how Governments develop policy, that nobody 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 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, see for instance the "Wind Energy – The Facts" website[91] funded by the European Commission, which is further discussed in Section 11.3 of this Reply to UNECE. 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.

90 http://www.masterresource.org/2010/06/subsidizing-co2-emissions/

91 http://www.wind-energy-the-facts.org/en/environment/chapter-1-environmental-benefits/comparative-benefits.html



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.

In fact this can now be seen on EirGrid's on their website[92], which provides for the Republic of Ireland grid thirty minute data on the system demand, wind generation, carbon dioxide emissions and carbon dioxide emissions intensity. Note: These are modelled emissions, which seem to underestimate the annual values reported to the EU Commissions as verified emissions data. Furthermore as determined by an Access to Information on the Environment request to the Environmental Protection Agency by Peter Lang, carbon dioxide emissions data in shorter intervals, such as hourly or half hourly is simply not available in Ireland. If we take the 4th April 2011, which was a record wind energy day, with a value of 1,300 MW of our approximately 1,680 MW of installed wind energy being on-line and even being sustained for most of the day. Then the high pressure came in and we had some lovely calm sunny days, such as the 19th April, with little or no wind. Both days had nearly identical system demands, as can be seen from Figure 1 (the first graph below), with very different wind energy inputs into the grid.

92 http://www.eirgrid.com/

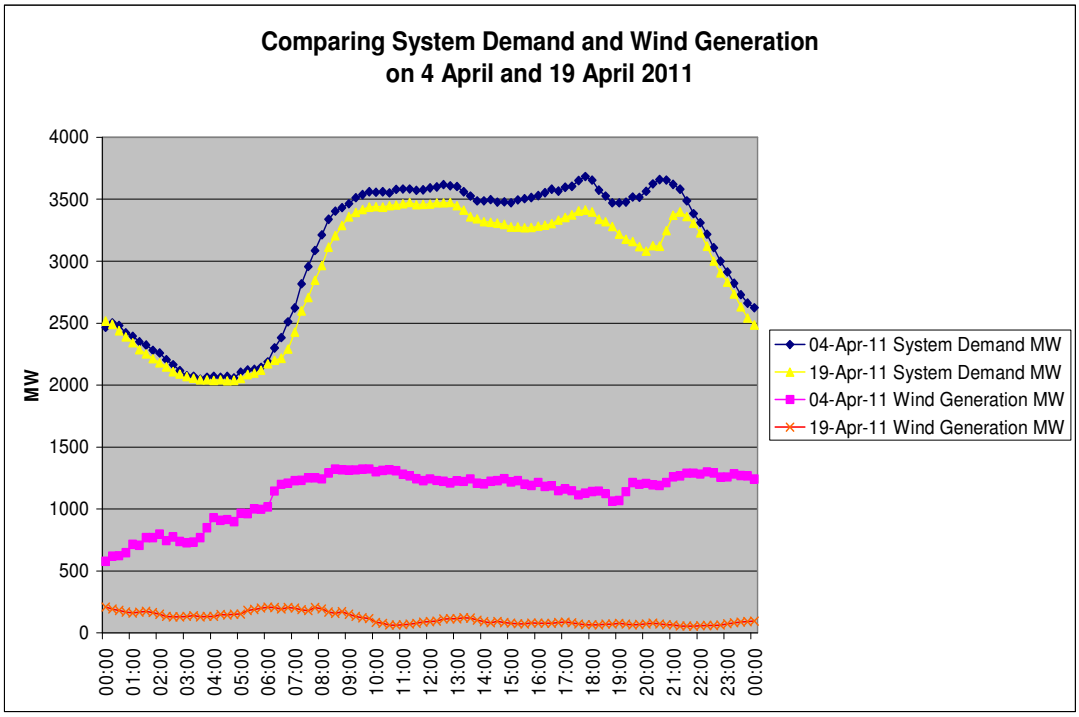


Figure 1: System demand and wind generation in MW on Republic of Ireland grid on the 4th and 19th April

So how much CO_2 did we save in comparing both days? Figure 2 shows the savings graphically, which numerically came to 3,510 tonnes. In effect, as the wind ramped up the power stations had to operate inefficiently, ready in about 20 to 24 hrs for the wind to drop and their output to ramp back up.

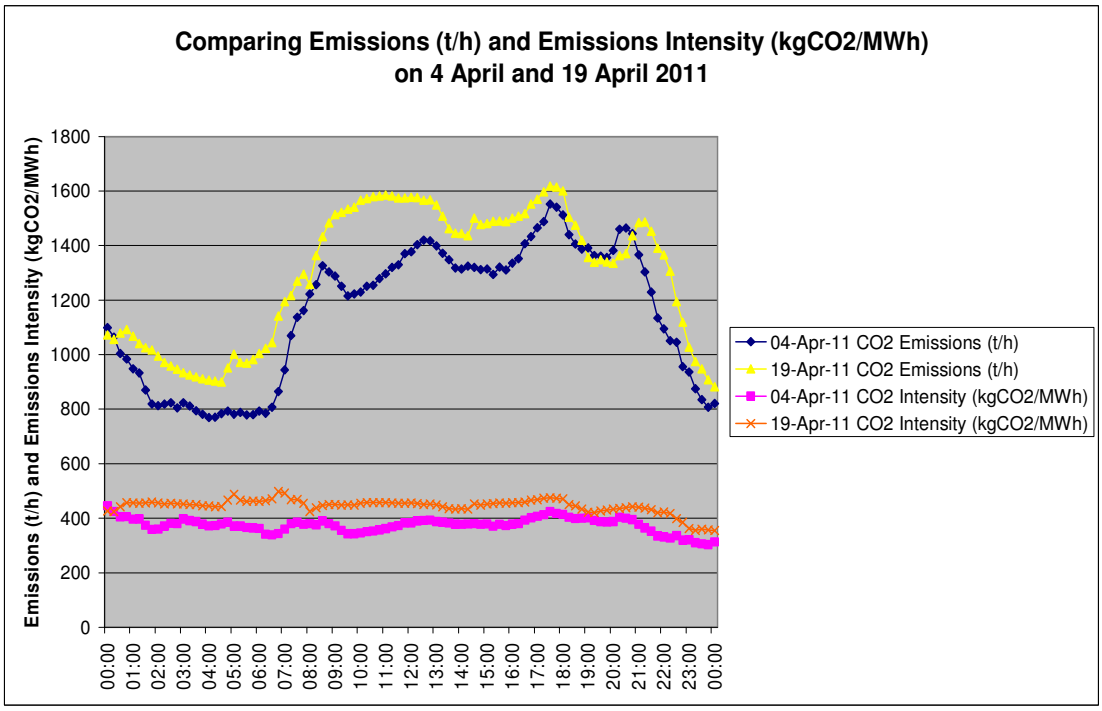


Figure 2 shows that the total emissions per hour and the emissions intensity are little different on 4th and 19th April - when compared with the large difference in the wind generation shown in Figure 1

So what were the costs and benefits of this? The Irish Academy of Engineering in their February 2011 report on "Energy Policy and Economic Recovery 2010 – 2015" [93] estimate that the additional grid costs and the thermal plant inefficiencies alone, without including the higher wind tariff, are adding €30 per MWh in hidden costs to Irish wind energy. So on the 4th April we had more than 27,000 MWh of wind energy generated, which amounted to more than €800,000 in additional charges for electricity that we all have to pay for on that day alone. The only scientific monetary value that the EU has put on the environmental damage caused by carbon dioxide is €9 per tonne[94] and this may well be an overestimation. However, using this figure we derive an environmental benefit of €31,590 for our financial input to wind energy on the 4th April. Another way of looking at this is our carbon savings on the 4th April amounted to more than €220 per tonne, while the same savings can easily be realised using energy efficiency projects at €15 per tonne.

There is therefore a desperate need, as the Irish Academy of Engineering has pointed out several times to the Government, in particular in their February 2011 report on "Energy Policy and Economic Recovery 2010 – 2015", to review the whole programme before any further capital investment takes place. Indeed an assessment of the environmental objectives of the programme and the means in which they would be realised, should clearly have taken place as part of legal obligations deriving from the Aarhus Convention before the programme was initiated. Instead what is produced by the SEAI is false documentation, for instance the "Renewable Energy in Ireland 2010 Update" [95] attributes on page 29 carbon dioxide savings of 1.3 million tonnes in 2008 to wind energy. **However, when one checks the calculation details in Appendix 1, it is admitted that there are clear limitations in the methodology; it simply ignored the instabilities in the grid caused by the wind input**, such as the use of less efficient open cycle gas turbines.

This is not an isolated example, in February 2011 SEAI and Eirgrid produced another report on: "Impact of Wind Generation on Wholesale Electricity Costs in 2011" [96], which had a lack of transparency that could be judged as false information, see Section 7.3.5 of this Rely to UNECE. The fact that wind energy increases the price of electricity to the consumer is indisputable[97]; even Eirgrid pointed out in their 2004 report[98] on the impact of wind power generation on conventional plant, that 1,500 MW of wind energy on the Irish grid would raise generation costs by 15%. Note: 1,685 MW of wind energy are projected for the Irish grid by 2011. However, SEAI and Eirgrid now sought to demonstrate otherwise in their 2011 report. Nice pretty pictures were provided to demonstrate this point, but no evidence of how the data was derived, see Section 7.3.5 of this Reply to UNECE for more details on the Access to Information on the Environment Request in relation to this report.

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93 Chapter 9 of: http://www.iae.ie/news/article/2011/feb/28/new-report-energy-policy-and-economic-recovery-201/

94 See Chapter 8 of the ExternE - Externalities of Energy Methodology 2005 Update: http://www.externe.info/

95 http://www.seai.ie/Publications/Statistics_Publications/SEI_Renewable_Energy_2010_Update/RE_in_Ire_2010update.pdf

96 http://www.eirgrid.com/media/ImpactofWind.pdf

It is clear then that there has been a complete failure by the SEAI to inform the public in a transparent manner of the costs, technical limitations, benefits and impacts of this renewable energy programme.

5.8 Waste Policy

The Energy White Paper was clear in that:

- "The need for action on waste-to-energy potential was another strong theme in the development of sustainable energy supply".

This is an important point; the energy derived from the combustion of municipal waste is approximately 50% renewable due to the biogenic content in municipal waste. Furthermore it has a steady dispatchable output of electricity and associated heat, without any requirement for the major grid connections associated with wind energy. This issue is discussed in more detail in Chapter 8 of the book, "Bringing the Irish Administration to Heel". **Therefore in terms of a renewable energy strategy it is the 'low hanging fruit', in that it brings maximum benefit in terms of minimum cost for greenhouse gas reductions, plus it also has additional environmental benefits in terms of reducing the detrimental impacts associated with landfills and enabling compliance with the Landfill Directive.**

In July 2010[99] the Department of the Environment, Heritage and Local Government opened a public consultation on its Waste Policy[100]. What is deeply disturbing in Ireland is that the development of polices in Ireland clearly ignores the core principles of the Convention and the EU Environmental Acquis. The documentation for this Policy[101], was prepared by the same consultants which prepare policy for Greenpeace[102]. Furthermore not only was this documentation technically false and a complete misrepresentation of EU requirements, which are legally binding through the Environmental Acquis[103], 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, which is clear in Article 4 that:

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97 Excellent technical submission to the UK House of Lords at: http://www.parliament.the-stationery-office.co.uk/pa/ld200708/ldselect/ldeconaf/195/195we52.htm

98 http://www.eirgrid.com/media/2004%20wind%20impact%20report%20(for%20updated%202007%20report,%20see%20above).pdf

99 http://www.environ.ie/en/Environment/Waste/News/MainBody,23402,en.htm

100 http://www.environ.ie/en/Environment/Waste/PublicConsultations/

101 International Review of Waste Management Policy and Environmental Report (Strategic Environmental Assessment) for Section 60 Capping on Incineration: http://www.environ.ie/en/Environment/Waste/PublicConsultations/

102 Eunomia and TBU: http://www.greenpeace.org.uk/files/pdfs/migrated/MultimediaFiles/Live/FullReport/5574.pdf

103 See details, in poor pdf quality on my Submission to the Consultation: http://www.environ.ie/en/Environment/Waste/PublicConsultations/SubmissionsReceived/FileDownLoad,25109,en.pdf . Furthermore the documentation was rightly criticised by ESRI report: http://www.esri.ie/publications/latest_publications/view/index.xml?id=2972

- "The environmental assessment referred to in Article 3 shall be carried out during the preparation of a plan or programme and before its adoption or submission to the legislative procedure".

When I requested access to a Strategic Environmental Assessment for these two elements of the policy, I got the reply below on the 19th July 2011 from the Waste Policy Section of the Department of Environment, Heritage and Local Government:

- "The finalisation of the Strategic Environmental Assessment relates solely to the proposed Section 60 Policy Direction to place a cap on Municipal Solid Waste that can be incinerated. **However, once the Statement on Waste Policy is finalised, and approved by Government, it is anticipated that Strategic Environmental Assessment and / or Regulatory Impact Assessment will be required in respect of certain legislative changes that will be required to give effect to whatever recommendations emerge in the finalised statement following consideration of all the submissions received".**

Unfortunately the development of policies in Ireland regularly ignores the Aarhus Convention's requirements of Pillar II, to "take due account of the outcome of the public participation". It was on this basis that I requested on 3rd October 2010, 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.

On 10th 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 5th 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 7th December which stated that the Department had "decided to post all the records concerned on its website, 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 10th 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 10th January, furthermore no indication had been given to me as to why this had not happened. This appeal was registered as CEI/11/0002.

At 5.30pm on the 11th 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 became the subject to a separate appeal to the Commissioner for Environmental Information; CEI/10/0016.

This separate request must be placed in the context that the Minister of the Environment John Gormley had 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[104]. 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 [105]. 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[106] 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

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104 http://www.ask-eu.com/Default.asp?Menue=161&Bereich=7&SubBereich=0&KW=0&NewsPPV=8769

105 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_Irelands_environmental_compliance_record_in_cross-EU_terms.html

106 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.

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 11th January[107], 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. Indeed the Environmental Protection Agency's Submission was very 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".

- "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".

However, this had been ignored with the publishing in January 2011 of the Bill to introduce the levies on Waste to Energy[108]. 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?

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107 http://www.environ.ie/en/Environment/Waste/PublicConsultations/SubmissionsReceived/

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

It is worth pointing out that on the 3rd 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 to me it was not what I would consider professional, that I had to listen to representatives of Unit ENV A.2, Compliance Promotion, Governance and Legal Issues, repeatedly using as an excuse for their reluctance to take a compliance case against the Irish State, how difficult they found it 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 whole public participation exercise had been by-passed by the failure to (a) produce proper documentation and (b) the complete ignoring of the Submission received, including from State authorities pointing out the clear non-compliance with EU legislation of what was proposed.**

Even more incriminating is that the Minister for the Environment John Gormley sent a letter to his constituents in the Sandymount region in January 2011, 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. See the content below.

- "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 way of dealing with our waste. And this is the policy which our Local Authorities will now have to pursue".

Clearly political 'considerations' applied and, as required, both the Minister and the Department of the Environment, Heritage and Local Government had clearly demonstrated that they would act outside procedures, which were legally binding on them, in order to put legitimate businesses out of operation and hand the market place over to their preferred operators.

Early 2011 saw a change in Government in Ireland and one would have hoped for a more rational policy to emerge. Unfortunately not so, the US Company Covanta is still waiting in early June 2011 for its foreshore licence for the Dublin waste to energy project. However, what was most remarkable was that on 29th March I got the following reply from Eddie Kiernan, Private Secretary to the Minister of Environment, Heritage and Local Government. This related to correspondence of the 6th February 2011 to the Commissioner for Environmental Information, which was copied to the Minister's office and stated:

- "The 2007 Programme for Government contained a commitment to carry out an international review of waste management plans, practices and procedures and to act on the review's conclusions. In November 2009 the International Review of Waste Management Policy was published, commissioned from an international consortium made up of

Eunomia Research and Consulting, and a number of national and international partners".

- "On 15 July 2010 a Draft Statement of Waste Policy was published for public consultation. The draft policy statement was based on the recommendations and analysis of the International Review of Waste Management Policy. In advance of finalising a Statement of Waste Policy by Government, comments were invited from relevant stakeholders and any other interested parties. The closing date for receipt of submissions was 1 October 2010".

- "A decision was made on 7 December 2010 to post the submissions received on the Department's website, with some redactions relating to personal information, legally privileged information or information that might be prejudicial to Garda investigations and this was completed on 11 January 2011".

- "On behalf of the Minister, I would like to comment on your concerns in relation to the application of the Aarhus Convention in respect of the consultation concerning the Draft Statement. It is not accepted that the Department has ignored the Convention's core principles. On the contrary, the consultation process was conducted entirely in accordance with the Articles quoted in your letter".

- "As regards the completion of a Strategic Environmental Assessment, I refer you to the e-mail from this Department sent to you on 19 July 2010, and reiterate that an SEA is not required in respect of a draft waste policy. Such assessments are appropriate at a later stage of the policy formulation cycle".

- "In relation to perceived divergence between submissions received and the Environment (Miscellaneous Provision) Bill 2010, it is entirely a matter for Government to disagree with any submission received during a consultation period, subject, obviously, to legal requirements".

- "I regret that you are of the view that the Department has failed in its duty to provide a satisfactory level of customer service to you, and that you feel that officials have been obstructive. However, the Department is satisfied that its conduct has been entirely in accord with accepted standards of transparency, customer service and administration. Further, the several accusations of illegality made in your correspondence of 6 February have no basis".

- "Providing a high-quality, efficient and effective service is central to our work in the Department of the Environment, Heritage and Local Government. If you, as a customer, are not happy with the quality of the service which you have received from the Department, you may wish to make a customer service complaint. You will find details of how to do so on our website at www.environ.ie "

All I can comment to the point above in relation to the customer service complaint is; can I get a different service provider? However, one does have the option of an Access to Information on the Environment. See Section 7.3.2 of this Reply to UNECE for more details this request and its outcome.

6. COMMC54 QUESTION 2 – INFORMATION WITH REGARD TO SPECIFIC PLANS, PROGRAMMES AND POLICIES (PART B)

Part B of Question2 deals with Allegations of non-compliance of Energy related documents / decisions with the provisions of the Convention

6.1 Renewable Energy Policy of the EU

This matter will be dealt with in more detail in Section 7.5 of this Reply to UNECE. However, it must be realised that the main driver and justification for the renewable energy programme in Ireland, is the policies and legislation derived at EU level.

Requirement of the Convention	Actual situation
Article 5 of the Convention requires that the way in which public authorities make environmental information available to the public is transparent and they publish the facts and analysis of the facts which they consider relevant and important in framing major environmental proposals. Article 7 requires 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. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.	The EU has set ambitious targets for renewable energy in Ireland through mandatory Directives, 2001/77/EC and 2009/28/EC. There has never been a proper assessment of the environmental and economic impacts of those targets on Ireland. Certainly the website of the EU Commission's representation in Dublin does not show that any public participation exercise was carried out as to how these measures would affect Irish citizens. While the Aarhus Convention would clearly have applied to the development of the targets for Directive 2009/28/EC.

6.2 Energy Green Paper and Energy White Paper

As has been previously highlighted there were major deficiencies in the manner in which this documentation was prepared. Firstly the section in relation to nuclear was false. Secondly the section of renewables clearly failed to clarify to the public:

- That Ireland was already in the position of having to a large extent modernized its thermal generating plants. The massive expenditure on wind energy was completely additional to this and would lead to increased inefficiencies in existing thermal plants, some of which would have to be replaced with less efficient open cycle gas turbine power plants.

- The sheer scale of the investment required in relation to the number of turbines and the massive expansions in the grid system, which would be required to accommodate them. Investment costs of the order of €30 billion, i.e. in the region of €7,000 per man, woman and child, are being considered[109].

- The technical challenges, no country had ever tried to install such a high level of wind penetration. It is likely that there will be major reliability problems with the electricity supply at those high levels of penetration.

With regard to the second point in relation to scale of the programme and its environmental impact, the reasoning for this can be best explained by the following example, the skyline of Dublin is dominated by the early nineteen seventies Poolbeg Power Plant, see below.

Dublin's Poolbeg Power Station, the two 200m high chimneys even featured in a well known U2 video

[109] Exactly what is being considered is not known, as it has never been properly costed. It appears that there is 6,000 MW of wind energy for the Republic of Ireland alone, of which 2,300 MW is now offshore. This has an installed cost of nearly €2 million per MW onshore and over €3 million per MW offshore. Eirgrid has been assigned €4 billion for grid upgrades plus several billion more on 'smart networks':
http://www.dcenr.gov.ie/Press+Releases/2009/The+Green+Economy+is+here+%E2%80%93+Minister+Eamon+Ryan.htm

Poolbeg was designed with a capacity of 510 MW. In a very good year one would get a 30% capacity from wind turbines, i.e. they would generated 0.3 MW for each MW installed. So to generation 510 MW of electricity by wind one would need to install 510 / 0.3 = 1,700 MW of wind turbines. For on-shore turbines the largest size is about 2 MW, so one would need 850 of these turbines. Turbulence from one turbine affects the downwind turbine, so a distance of at least five turbine diameters has to be left between the turbines. Note a 2 MW turbine has a 90 m diameter. So for good efficiency, if we were to space the turbines 0.6 km apart, then we would end up with a string of 850 turbines stretched along a line of 510 km. In comparison as the crow flies, from Malin Head to Mizzen Head, the northern most tip of Ireland to the southern most tip, is only 466 km. There would also be periods for days on end, in which no wind energy is produced, so the thermal plants would still be required as back-up.

So what above is highlighting, is that there are massive capital costs and operational costs associated with the installation and operation of what are now two duplicate systems, i.e. the grid we always hand before the investment in wind energy began and now the second parallel one requiring massive investment in turbines and grid expansions. Note: To install the 8,300 MW of wind on the all island grid, the 'string' of turbines mentioned above would have to be increased by a factor of nearly five.

The lack of environmental assessment on this programme is discussed in more detail in Sections 7.1 and 7.5 of this Reply to the UNECE.

Requirement of the Convention	Actual situation
Article 5 of the Convention requires that the way in which public authorities make environmental information available to the public is transparent and publish the facts and analysis of the facts which it considers relevant and important in framing major environmental proposals. Article 7 requires 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. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.	As the EU had ratified the Aarhus Convention in 2005, it applied to Community Legal order and the conduct of the Energy Green Paper consultation, which lead to the finalised Energy White Paper. Clearly the documentation was neither transparent nor adequate and neither was any account taken of the technical content of the Submission made by the Irish Academy of Engineering.

6.3 All Island Grid Study

In a similar manner to the above, the documentation was not transparent. Indeed it was technically deficient and one can only point out how a target of 33% renewables in the White Paper then evolved to a Government target of 40%. At no stage in this process was there a proper environmental assessment, there was simply no consideration of environmental objectives and alternatives[110]. Indeed the whole principle of public participation was bypassed. From a technical perspective, as the level of penetration of wind energy is increased, the technical challenges in terms of grid stability and the increasing inefficiencies associated with increased wind variability rise dramatically, such that it is hard to make any rational justification for this level of penetration. From a layman's perspective, increasing from 33% to 40% may not be significant, but from a power engineering perspective it has enormous significance.

Requirement of the Convention	Actual situation
Article 5 of the Convention requires that the way in which public authorities make environmental information available to the public is transparent and publish the facts and analysis of the facts which it considers relevant and important in framing major environmental proposals. Article 7 requires 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. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.	As the EU had ratified the Aarhus Convention in 2005, it applied to Community Legal order and the conduct of the All Island Grid Study and Government decision to increase the level of renewable sources in electricity generation from 33% to 40%. Clearly the documentation was neither transparent nor adequate. Neither was any proper public participation exercise conducted in the development of the renewable energy portfolios or in the decision to increase the percentage of renewables from 33 to 40%.

6.4 Joint Oireachtas Committee on Climate Change and Energy Security Consultation

This consultation was somewhat unusual, in that it did not lead to a direct legislative act, but a parliamentary committee recommendation to be considered in the development of legislation. As such it is admitted by the Author that it may not directly fall under the terms of the Aarhus Convention, but it is an example of the substandard manner for conducting public participation by the legislature.

[110] The only section related to environmental impacts being Section 3.6.1 of Work Stream 4: http://www.dcenr.gov.ie/NR/rdonlyres/43CF090D-22AD-40FC-9C7E-02948122D35F/0/AllIslandGridStudyAnalysisofImpactsandBenefitsJan08a.pdf

Requirement of the Convention	Actual situation
Articles 4 and 5 of the Convention require that public authorities provide access to information on the environment and that such information progressively becomes available in electronic databases. Article 7 requires 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. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.	As the EU had ratified the Aarhus Convention in 2005, it applied to Community Legal order and the conduct of the consultation on "Meeting Ireland's electricity needs post 2020". There was deliberate obstruction with regard to ensuring access to the Submissions to the consultation. Furthermore there was a failure to take account of the technical content of the Submissions, the final report by the Committee being nothing more than the results of a straw poll.

6.5 Government's policy decision to accelerate the development of Ocean Energy (Wave and Tidal) in Ireland

Requirement of the Convention	Actual situation
Article 5 of the Convention requires that the way in which public authorities make environmental information available to the public is transparent and publish the facts and analysis of the facts which it considers relevant and important in framing major environmental proposals.	As the EU had ratified the Aarhus Convention in 2005, it applied to Community Legal order and the conduct of Ocean Energy development in Ireland. Wave and tidal energy are most certainly not technically proven with regard to the situations which apply in Irish marine waters. Furthermore the cost basis for this energy is about five times that of standard generating costs. This was never explained in a transparent manner to the public in the relevant documentation. Any references to job potentials, etc, must be placed in the perspective that investment by taxpayers in this sector is extremely speculative, with a very high risk of failure.

6.6 Offshore Renewable Energy Development Plan

As highlighted previously the renewable target to be produced from electricity just kept getting bigger and bigger. Now with the offshore renewable energy development plan there was 2,300 MW of wind energy to be generated offshore, when clearly it had already been demonstrated in the earlier All Island Grid Study, that 8,000 MW of wind energy on the all island grid was not feasible, a figure which was now being exceeded in this Offshore Renewable Energy Development Plan. This was therefore a total lack of transparency.

- 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 above requirement, which is connected to Article 7 of the Convention in relation to public participation in decision-making, has already been discussed in some detail in Section 4.4.2 of this Reply to the UNECE, in particular the interface with Strategic Environmental Assessment.

While a Strategic Environmental Assessment was completed for this offshore programme, it completely failed to address what the environmental objectives of the programme were and what alternatives were considered to reach them. This is in complete breach of the requirements of Annex I of Directive 2001/42/EC, the EU Directive on Strategic Environmental Assessment. Furthermore the Environmental Report in accordance with Annex I has to describe; "the relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the plan or programme". This was never done.

One could simply ask; why are we doing this plan? The only answer in the documentation related to political considerations, without any quantification of environmental aspects to justify the massive capital expenditure. The documentation prepared clearly did not meet the requirements of Article 7 of the Convention. One can also point out the reply to my Access to Information on the Environment Request, in which the manner in which the Submissions received were to be considered and the failure to disseminate them on the website could not be considered to be within a fair and transparent framework for public participation.

Furthermore not only was there non-compliances with Directive 2001/42/EC, but the EU is since November 2008 a Party to the UNECE (Kyiv) Protocol on Strategic Environmental Assessment[111], which entered into force on the 11th July 2010. The substantive content of this Protocol should have applied to the development of the Offshore Renewable Energy Plan and is very similar in content to Directive 2001/42/EC. Therefore the above mentioned non-compliances are also in variance to what the EU agreed to with regard to the Kyiv Protocol on Strategic Environmental Assessment, even though the Protocol didn't enter into force until 11th July 2010, as other Parties had to complete their ratification. Note: A minimum of 16 Parties were required for the Protocol to enter into force.

111 http://www.unece.org/env/eia/sea_protocol.htm

Requirement of the Convention	Actual situation
Article 5 of the 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. Article 7 requires 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. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.	As the EU had ratified the Aarhus Convention in 2005, it applied to Community Legal order and the conduct of the consultation on the "Offshore renewable energy plan". As the EU had become a Party to the UNECE (Kyiv) Protocol on Strategic Environmental Assessment in November 2008, this protocol, although not yet legally binding, should also have been applied to the conduct of this consultation. The consultation was clearly not transparent. The public were simply presented with a massively expensive programme costing billions and told it was "a wonderful economic opportunity". There was no data provided on; what environmental benefits would ensue, what alternatives were considered to achieve those environmental benefits, what would be the state of the environment if the programme did not proceed, the technical limitations, etc. The sole justification was on political considerations.

6.7 SEAI's Strategic Energy Plan 2010 – 2015

Clearly the documentation being produced SEAI in relation to the greenhouse gas savings, costs of the resulting electricity and the absence of any mention of the enormous technical limitations and environmental impact of the scale of this wind energy programme, can only be described as having a lack of transparency.

Requirement of the Convention	Actual situation
Article 5 paragraph 2 requires that within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent.	National legislation is S.I. No. 133 of 2007, which implements Directive 2003/4/EC. This is clear in that as a matter of course, 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. Member States shall, so far as is within their power, ensure that any information

Requirement of the Convention	Actual situation
	that is compiled by them or on their behalf is up to date, accurate and comparable. The documentation produced by SEAI is clearly not transparent.

6.8 Waste Policy

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 (Strategic Environmental Assessment) for Section 60 Capping on Incineration, were a false reflection of technical facts and EU Environmental Legislation and are a violation of Article 5 paragraph 2 of the Aarhus Convention. For instance the significant health, odour and land use planning implications associated with mechanical biological treatment of municipal waste were simply not addressed. 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;
- 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.

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 1st 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 was 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 Pleanala. 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 properly complete the necessary strategic environmental assessment required by both EU and National[112] legislation, or indeed any environmental assessment for these two plans and programmes, the Department of the Environment, Heritage and Local Government was in clear violation of Article 7 of the Aarhus Convention. Furthermore the EU is since November 2008 a Party to the UNECE (Kyiv) Protocol on Strategic Environmental Assessment and this protocol, although not yet legally binding, should have been applied to the waste policy consultation.

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 11th October 2010 to me, 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. The fact that the Department initially refused to provide access to these Submissions and has still refused to post part of my Submission, considering it prejudicial to a Garda investigation, demonstrates that the framework was not fair and transparent.

112 http://www.environ.ie/en/DevelopmentandHousing/PlanningDevelopment/EnvironmentalAssessment/EIASEALegislation/

On the 11th 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. Ignoring the outcome of the public participation process is a violation of Article 6, paragraph 8 of the Aarhus Convention. Note: The failure to provide access to the documentation related to 'taking account of the outcome of the public participation exercise' on the waste policy is discussed further in Section 7.3.2 of this Reply to UNECE. However, the key issue is the manner in which the Irish Administration facilitated the political ambitions of the Green Party Minister for the Environment John Gormley, to the point of using the apparatus of the State to clearly obstruct and indeed use financial levies to put Waste to Energy projects in the country out of business.

Requirement of the Convention	Actual situation
Article 5 paragraph 7 (a) requires that each party shall publish the facts and analyses of facts which it considers relevant and important in framing major environmental policy proposals. Article 7 requires 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. Furthermore Article 7 references Article 6 paragraph 3 which states that each party shall provide for early public participation, when all options are open and effective public participation can take place.	The requirements for Strategic Environmental Assessment are defined both in Directive 2001/42/EC and the UNECE (Kyiv) Protocol on Strategic Environmental Assessment. The EU became a Party to this protocol in November 2008 and although not yet legally binding, it should have been applied to the conduct of this consultation. The documentation produced for the consultation was a false reflection of technical facts and EU environmental policy. There was also a complete failure to produce an environmental assessment for two of the components of the policy, the Department clarifying that they would complete this requirement after adoption by the Government. The consultation was not conducted in a transparent and fair framework. There was a refusal to make available the Submissions received and they were clearly ignored in the preparation of the resulting legislation.

7. COMMC54 QUESTION 2 – INFORMATION WITH REGARD TO SPECIFIC PLANS, PROGRAMMES AND POLICIES (PARTS C TO G)

7.1 The manner in which decision CEI/09/0016 of the Commissioner for Environmental Information amounts to non-compliance with the Convention

The result of this Appeal in September 2010 demonstrated that:

- There was there no Strategic Environmental Assessment completed for the renewable energy programme. Furthermore the Department of Communications, Energy and Natural Resources had no information on; (a) a ranking system for technology alternatives in terms of their ability to meet the criteria in the Directive and (b) options to reach the objectives in legislation.

- With regard to the Section on nuclear energy in the Green Paper, which was also highlighted by the Irish Academy of Engineering in their Submission to be factually incorrect, it was clear in their response to the Commissioner for Environmental Information that the Department could not justify its source and accuracy.

Note: Ireland submitted its National Renewable Energy Action Plan to the EU Commission in July 2010[113]. This included a significant roll out of offshore wind energy of between 555 and 2,048 MW by 2020. This massive roll out had, as highlighted previously in relation to the All Island Grid Study, not featured in this analysis or the subsequent adoption of the 40% renewable target in the October 2008 carbon budget. It had occurred since then. The EU had become a Party to the UNECE (Kyiv) Protocol on Strategic Environmental Impact Assessment in November 2008. Although not yet legally binding, as other Parties had to ratify the Protocol, the development of this National Renewable Energy Plan originating from Directive 2009/28/EC should have been subject to this protocol. Article 8 of this Protocol in relation to Public Participation is clear in that:

- "Each Party shall ensure early, timely and effective opportunities for public participation, when all options are open, in the strategic environmental assessment of plans and programmes"

This clearly did not happen; the National Renewable Energy Action Plan is in place and being used for planning decisions under the Environmental Impact Assessment Directive, while the strategic environmental assessment for this offshore component, with all its limitations, is still ongoing.

Regardless of the failure to comply with the Kyiv protocol above, there has been a complete failure to comply with Directive 2001/42/EC on strategic environmental assessment. Furthermore, while the Aarhus Convention does not specify directly that a strategic environmental assessment is completed, the Aarhus Convention: An Implementation Guide states:

113 http://www.dcenr.gov.ie/Energy/Sustainable+and+Renewable+Energy+Division/National+Renewable+Energy+Action+Plan.htm

- "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".

The principles of the EU's renewable energy legislation included that it served to meet greenhouse gas reduction commitments, it therefore had environmental effect. Clearly appeal CEI/09/0016 demonstrated that there was no consideration of the environmental objectives of the Directive and the alternatives to meet them, which would be considered the minimum necessary to comply with the 'consideration of environmental aspects' specified above, i.e. the whole programme has been developed without any environmental foresight.

Requirement of the Convention	Actual situation
Article 5 paragraph 2 is clear in that the manner in which public authorities make environmental information available to the public is transparent. Article 5 paragraph 7 (a) requires that each party shall publish the facts and analyses of facts which it considers relevant and important in framing major environmental policy proposals. Article 7 requires 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.	The section on nuclear energy in the Green Paper was clearly false and could not be verified by the Department when questioned under appeal CEI/09/0016 The requirements for Strategic Environmental Assessment are defined both in Directive 2001/42/EC and the UNECE (Kyiv) Protocol on Strategic Environmental Assessment. The EU became a Party to this protocol in November 2008 and although not yet legally binding, it should have been applied to the preparation of the National Renewable Energy Action Plan. The fact that there has never been the most basic consideration of the environmental aspects of the renewable energy programme in Ireland is a clear breach of Article 5 paragraph 7(a) and Article 7 of the Convention.

7.2 The possibility of appealing decision CEI/09/0016 to the High Court

S.I. No. 133 of 2007 enables:

- "A party to the appeal or any other person affected by this decision may appeal to the High Court on a point of law from the decision. Such an appeal must be initiated not later than two months after notice of the decision is given".

To date there has only been one appeal from the Commissioner for Environmental Information, which has been appealed to the High Court; indeed it is now with the Supreme Court. In this appeal CEI/07/0005[114] the Commissioner of Environmental Information took the case, as it involved a refusal of a public authority, the Department of the Taoiseach (Prime Minister), to disclose information relating to emissions. This is a complex case relating to the supremacy of EU law and indeed the Aarhus Convention over that of National Law.

Requirement of the Convention	Actual situation
Article 4 paragraph 4 states that the 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.	Directive 2003/4/EC implements Pillar I of the Convention in the EU. This Directive is clear in Article 4 that Member States may not provide for a request to be refused where the request relates to information on emissions into the environment. This is clearly being breached in appeal CEI/07/0005 and is now subject to proceedings at the Supreme Court.

In the case of decision CEI/09/0016, what had been demonstrated were the failures of the Department of Communications, Energy and Natural Resources in the conduct of their administrative duties. If any case were to be brought to a court of law it was these failures, in which the decision CEI/09/0016 would have been part of the evidence, rather than the subject of the appeal. Indeed the Commissioner in her previous decisions has been clear in that she does do not consider that her Office has jurisdiction, nor would it be appropriate, to pursue a public authority in relation to how it fulfils its statutory role.

This leaves a concerned citizen only with the option of taking a legal case against the State in relation to its failure to complete the necessary procedures in relation to development of energy policy, such as compliance with Directive 2003/4/EC on quality of information and Directive 2001/42/EC on strategic environmental assessment. As has already been highlighted in Section 4.5.2 of this Reply to UNECE, this would be a horrible financial burden on the citizen.

114 http://www.ocei.gov.ie/en/DecisionsoftheCommissioner/Name,8962,en.htm

7.3 Additional requests for information and appeals to the Commissioner for Environmental Information

7.3.1 CEI/10/0016 Appeal to the Commissioner for Environmental Information in relation to the Department of the Environment, Heritage and Local Government and Poolbeg Waste to Energy Plant

The fundamentals behind this Access for Information on the Environment Request and its subsequent appeal have been referred to already in Section 5.8 of this Reply to UNECE in relation to waste policy. Indeed preventing the construction of municipal waste to energy plants is a complete obsession of the Irish Green Party and its leader John Gormley TD, who was Minister for the Environment between 2007 and 2011. The Poolbeg waste to energy plant for the Dublin region had full planning permission and environmental permitting, but required a foreshore licence for the discharge of its cooling water to the nearby Dublin Bay. This should have been a formality, there were no technical issues involved, but it turned out to be a political stance by the Minister. The company which had won the public private partnership contract tendered by Dublin City Council was the US Company Covanta. As part of the project development Dublin City Council applied for the foreshore licence in February 2008, which fell under the 1933 Foreshore Act[115].

Under Section 10 (2) of the Foreshore Act the grounds of refusal to grant a licence for erection of a structure are limited to the likelihood of an obstruction to navigation or to fishing. However, it is up to the Minister to grant a licence and there is no timeframe set in the Act for this duty. In late June 2010 controversy erupted when it became public knowledge that this project was effectively stalled as it could not get a foreshore licence. Despite protests from both Covanta and the US Ambassador to Ireland, Minister Gormley was refusing to process the foreshore licence. Indeed it was clearly indicated to the media that legal action would have to be considered and how the irregularities and delays in the foreshore licensing process was having a hugely detrimental impact on any potential US investors, who would be considering Ireland as an investment location.

On the 27th June I sent in an Access to Information on the Environment Request to the Department of Environment, Heritage and Local Government requesting:

- On what basis of 'Public Interest' has this foreshore licence not been awarded given that it was applied for two years ago?
- What is the official position of the Department of the Environment 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.

Note: As was discussed in Section 5.8 of this Reply to UNECE, under the 2001 Act an omission in relation to the Minister's office for the position of a consideration is an offence. The Act further defines a consideration as valuable consideration of any kind, which is particularly relevant given that Minister Gormley was never shy in his opposition to this project and the manner in which it could boost his re-election prospects.

115 http://www.irishstatutebook.ie/1933/en/act/pub/0012/index.html

On the 26th July I received my reply:

- "As the foreshore licensing function is exempt from the terms of the Access to Information on the Environment (AIE) regulations, the records that you have requested will not be released to you at this point. Regulation 3(2) of the AIE Regulations states "Notwithstanding anything in sub-article (1), "public authority" does not include any body when acting in a judicial or legislative capacity". The published guidance notes on Access to Information on the Environment explains that "judicial…capacity" refers, for example, to processes of determination (normally statutory in nature) which are open to the hearing of submissions from different parties, and where the authority concerned is required to act in a judicial manner". Since this Department and its Minister act in a judicial capacity in exercise of its statutory functions under the Foreshore Act, requests of this nature come within the scope of Regulation 3(2)".

This is quite amazing in that an administrative function in processing a licence application can now be considered as acting in a judicial or legislative function. Note: Article 4 paragraph 4 (c) of the Aarhus Convention does provide grounds for refusal if the disclosure would adversely affect:

- "The course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature".

However, the "Aarhus Convention: An Implementation Guide" is clear in that "the course of justice refers to active proceedings with the courts. The term 'in the course of' implies that an active judicial procedure capable of being prejudiced must be under way. This exception does not apply to material simply because at one time it was part of a court case".

This approach is also carried through to Article 4 paragraph 2 (c) of Directive 2003/4/EC. However, S.I. No. 133 of 2007 does under Article 3 (2) state that: "Notwithstanding anything in sub-article (1), "public authority" does not include any body when acting in a judicial or legislative capacity". Clearly then this is not a correct transposition of the Aarhus Convention and Directive 2003/4/EC with regard to the 'course of justice'.

At no stage in the reply was any attempt made to address the two requests I had made. The schedule of records I was provided with just listed the applicants documents going back to February 2008, to which I was been refused access. This was most interesting in that in a period of nearly two and a half years no other documents had been generated by the competent authority, so what exactly was going on? Furthermore, I was informed in my reply that:

- "I would like you to know however that it is normal practice for foreshore applications to be notified publicly for consultation purposes. Where an application to the Minister is publicly advertised, the application form and all supporting documents are made available to the public at the nearest 24 hour Garda station and, where possible, other accessible locations, including an applicant's website, for a 21 day period. It is my view therefore that the information you have requested will become available when the application in question progresses to public notice stage. Unfortunately, I cannot confirm at the moment, precisely when that will be".

So I went ahead and requested an Internal Review. As this had not been answered a month later, there was a refusal to do so, I then went on-line on the 30th August and requested an appeal with the Commissioner for Environmental Information. This was accepted as CEI/10/0016 on the 18th November 2010 in which:

- "It is noted that this case has come before the Commissioner on the basis of a non-reply to the request for internal review by the Department of the Environment, Heritage and Local Government. As you are aware, the time for making a decision in this case has expired. However, this Office has asked the Department to arrange for an effective "decision" to issue to you and this Office. The Commissioner's review will then proceed on the basis of that effective "decision". There is, of course, no right to internal review of that "decision". If, having received notification of the Department's effective decision, you no longer wish to proceed with this review, please notify this Office. Alternatively if you are not satisfied with their decision, you should let us know what aspect(s) of its decision you find unsatisfactory".

On the 2nd December I received my reply from the Department.

- "Mr Swords requested an internal review, in particular on the decision made in respect of part two of his original request: "What is the official position of the Department of the Environment 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".

The same record of documents was given and the same grounds for refusal, i.e. Article 3(2) of S.I. No. 133 of 2007.

On the 17th December 2010 I received the following reply from the Office of the Commissioner for Environmental Information:

- "Analysis: The Regulations and Directive refer to information in the possession of a public authority and produced or received by it. Article 7(5) of the Regulations allows a public authority to refuse a request by notifying the requester that it does not hold the material sought. In relation to the interpretation of Article 7(5) of the Regulations, as you are aware from previous appeals to this Office, the Commissioner has taken a similar approach to that developed and approved by the High Court in relation to section 10(1)(a) of the FOI Acts".

- "I do not consider that this Office has jurisdiction to pursue the Department / Minister in relation to how it / he fulfils its statutory role in the processing of applications for foreshore licences. The Department have stated in writing that it does not hold any record which contains the information sought by you in relation to the timeframe for processing licences. There appears to be no reason to doubt the Department's assurances that it did not create or receive the information you seek. I consider, therefore, that article 7(5) of the Regulations applies".

- "It is not clear from your email whether you accept the Department's position that it does not hold any relevant records in relation to the matter raised in your internal review request. I would be obliged if you could now clarify whether you accept the Department's stated position

and therefore wish to withdraw your request for review by this Office, in which case your file would be closed and your application fee refunded. Alternatively, if you wish this Office to continue to process your application for review in this case please provide a submission to this Office by Friday, 7 January 2010[116] and provide any information / details which lead you to believe that the Department holds relevant records which it has not found / released to you".

It was actually the 10th of January 2011 that I replied, as I had been delayed by bad weather and the break for holidays, so had to be reminded again on the 10th of January. However, what I stated was:

- "Given the political implications and the resulting loss of jobs and investment opportunities in Ireland as a result of this blatant maladministration, I would like a binding decision by the commissioner on this appeal to be printed on the website. With regard to the fact that it is now essentially three years since Covanta applied for a Foreshore Licence, not to mention that Minister Gormley is bypassing Public Participation procedures on his Waste Policy to force incineration companies out of business, what is occurring is clearly maladministration".

- "Specifically with regard to the timeframe involved and an 'omission in a duty for the purpose of a consideration', if the Department of Environment, Local Government and Heritage have no records, such as procedures, etc for their officials to comply with the Prevention of Corruption (Amendment) Act, 2001, then it is a clear indication to all of us who do business in this country that this illegal behaviour is condoned. If they have no such records then this should be recorded. Furthermore the reasons given by the Department for denial of access to the records listed, i.e. a judicial process, is not in compliance with S.I. No. 133 of 2007 (Directive 2003/4/EC) and their incorrect reference to this legislation should also be recorded".

As of early June 2011, I am still awaiting my decision in the case of this appeal.

Requirement of the Convention	Actual situation
Article 4 of the Convention provides Access to Environmental Information, although there are limited exemptions in which environmental information may be refused if the disclosure could adversely affect, for instance the course of justice. Article 9 of the Convention requires that in relation to access to information, the citizen shall have access to a review procedure, which shall be fair, equitable, timely and	As the EU is a Party to the Convention, it applies to Community Legal Order in Ireland, in particular Directive 2003/4/EC. Clearly the Department of Environment, Heritage and Local Government were supporting the political ambitions of their Minister. Not only had they no right to refuse access in claiming that they were a public authority acting in a judicial capacity, but clearly Article 3 (2) of S.I. No 133 of 2007 is an incorrect transposition of Article 4 of Directive

[116] They should have written 2011.

Requirement of the Convention	Actual situation
not prohibitively expensive.	2003/4/EC and Article 4 paragraph 4 (c) of the Aarhus Convention. The fact that the appeal to the Commissioner for Environmental Information was made on the 30th August 2010 and there is still no decision nine months later demonstrates that the review procedure is not timely.

7.3.2 CEI/11/0002 Appeal to the Commissioner for Environmental Information and AIE/2011/012 in relation to the Department of the Environment, Heritage and Local Government and the Waste Policy Consultation

The Irish Waste Policy, in particular the obstacles that are placed in the development of Waste to Energy facilities, has already been discussed in Section 5.8 and 6.8 of this Reply to UNECE. The initial request of the 3rd October 2010 was that in accordance with Article 7 of Directive 2003/4/EC the Department should disseminate the Submissions received on their Waste Policy Consultation 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.

On 10th 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 5th 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 7th December which stated that the Department had "decided to post all the records concerned on its website, 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".

Furthermore by the 10th 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. 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 as adequate for the necessary provisions to be made to post the Submissions on the website, this clearly had not occurred by the 10th January, furthermore no indication had been given to me as to why this had not happened. This appeal was registered as CEI/11/0002.

At 5.30pm on the 11th 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 the Appeal CEI/10/0016, described in the previous Section 7.3.1, in relation to the Poolbeg Foreshore Licence.

On the 13th February I sent in my Submission to the Commissioner for Environmental Information on appeal CEI/11/0002, in it I stated:

- "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[117], clearly demonstrates there was a deliberate violation of Articles 4 and 5 of the Aarhus Convention".

Over three and a half months later I am still awaiting a decision on this Appeal.

As was explained in Section 5.8 on the 29th March I got a reply from Eddie Kiernan, Private Secretary to the Minister of Environment, Heritage and Local Government, which was very much unsatisfactory with regard to the Department's views on how public participation in policy development should be conducted. So I considered an Access to Information on the Environment request was appropriate, which I submitted on the 8th April 2011 requesting access to:

- All documentation relating to 'taking account of the public participation exercise' in relation to the waste policy and preparation of the Environment (Miscellaneous Provisions) Bill 2011. As the Submissions

[117] 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).

themselves have, with the exception of those details subject already to an Appeal to the Commissioner for Environmental Information, already been posted on the website, these are not necessary to be included in the previous definition of documentation.

- All documentation related to procedures and norms for the preparation of public documentation as part of public participation exercises. Particular attention is drawn to the requirements of the Aarhus Convention, Directive 2001/42/EC and Directive 2003/35/EC.

- All documentation related to procedures and norms for 'taking account of the public participation'.

On the 20th April, I received a reply to this request AIE/2011/012, I which I was quoted a 'search and retrieval' cost of €146.65 based on 7 hours at €20.95 per hour, with the proviso that this sum was an estimate. The final cost of search and retrieval of the records may vary from the estimate. So I requested an Internal Review pointing out:

- "It has long been recognised internationally that public participation exercises in Ireland is like a charade - See page 24 of "How far has the EU applied the Aarhus Convention" / Publications / Books[118]".

- "Others have commented publicly on this matter in their Submissions to the Waste Policy - Sections 1 and 2.1 of CEWEP Submission[119]".

- "The Aarhus Convention is perfectly clear in Article 3 paragraphs 2 and 3 about the promotion of access to information and public participation in decision-making. Furthermore Article 5 of the Convention and Directive 2003/4/EC (S.I. No. 133 of 2007) are abundantly clear about the active and systematic dissemination of environmental information. In particular I would like to point out that:

  - (i) The fact that you have to engage in a 'search and retrieval' for these procedures and norms is a clear indication that you are not actively using them and therefore in breach of the Convention.

  - (ii) Article 7 Paragraph 1 of Directive 2003/4/EC is very clear in that "Member States shall take the necessary measures to ensure that public authorities organise the environmental information which is relevant to their functions and which is held by them or for them, with a view to its active and systematic dissemination to the public, in particular by means of computer telecommunication and/or electronic technology, where available". Therefore in my opinion, when you find these records which are essential to the proper legal compliance of your Department, you should put them on the web for public dissemination purposes and not be charging me.

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118 http://www.participate.org/index.php?option=com_jdownloads&Itemid=62

119 http://www.environ.ie/en/Environment/Waste/PublicConsultations/SubmissionsReceived/FileDownLoad,25063,en.pdf

- (iii) The Aarhus Convention - An Implementation Guide, which is disseminated on the website of UNECE, is very clear within its Section in relation to Article 7 on Public Participation concerning Plans, Programmes and Policies; "Each Party shall ensure that in the decision due account is taken of the public participation", and that "a failure to take due account of the outcome of the public participation is a procedural violation and may invalidate the decision". "The relevant authority should therefore be able to show why a particular comment was rejected on substantive grounds". Therefore that documentation should be readily available to the public so as not to invalidate their Rights under Article 9 of the Convention".

On the 20th May 2011 I was issued with a reply to my Internal Review, which confirmed that the initial reply was reasonable and justified. As I was clearly of the viewpoint, that such information should have been made readily available as part of a transparent and fair framework for public participation, I paid my €150 to the Commissioner for Environmental Information and lodged an appeal.

Requirement of the Convention	Actual situation
Article 4 of the Convention provides Access to Environmental Information, although there are limited exemptions in which environmental information may be refused if the disclosure could adversely affect, for instance the course of justice, 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". Article 5 requires that the way in which public authorities make environmental information available is transparent and that environmental information is effectively accessible. Article 7 provides for public participation in decision-making in	The EU is a Party to the Convention and has implemented public participation in decision-making through Directive 2003/35/EC. Clearly the waste policy public participation was conducted in anything but a transparent and fair framework. When requests for access to information and its dissemination were made, they were obstructed. Furthermore the outcome of those requests for information clearly demonstrate that at no point in time was it the intent of the Department of the Environment, Heritage and Local Government to conduct a public participation in decision-making exercise within a transparent and fair framework.

Requirement of the Convention	Actual situation
polices, plans and programmes relating to the environment, within a transparent and fair framework. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.	

7.3.3 CEI/11/0003 Appeal to the Commissioner for Environmental Information in relation to the Department of Communication, Energy and Natural Resources and statements on TV by Minister Ryan

On the RTE Prime Time programme on the 14th December related to Ireland's Wind Energy Programme, it was stated repeatedly by the Minister of Communications, Energy and Natural Resources, Eamon Ryan of the Green Party, that wind energy brings down the cost of electricity to the consumer. This is completely false, even his own Department had to provide support mechanisms for wind energy, such as the REFIT tariff[120], this simply demonstrated that he was actively and systematically disseminating false information on the environment. In my Access to Information on the Environment request under S.I. No. 133 of 2007 on the 23rd December 2010 to Minister Ryan's office, I stated:

- "I completely fail to how the existing and proposed wind energy installations are going to bring down electricity costs for the consumer. It clearly defies logic. I am therefore requesting a full list of the documentation that Minister Ryan said existed and the relevant sections in them indicated, which confirm that the above analysis is wrong and thereby justify the statements made on Prime Time, with regard to reduced costs for the end user versus the option of a generation system with no wind energy on the grid".

Given the billions of Euros involved in this programme, it is completely unacceptable that the Department of Communications, Energy and Natural Resources could not provide an official document of the cost to the consumer related to the implementation of this wind energy programme. Instead what was received in reply was:

- The ESRI Working Paper No. 334 on: "The Likely Economic Impact of Increasing Investment in Wind on the Island of Ireland[121]".
- SEM-09-002: "Impact of High Levels of Wind Penetration in 2020 on the Single Electricity Market[122]".

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120 See also the International Energy Agency report: http://www.iea.org/Textbase/npsum/ElecCost2010SUM.pdf

121 http://www.esri.ie/publications/latest_publications/view/index.xml?id=2936

122 http://www.allislandproject.org/en/project_office_sem_publications.aspx?year=2009&section=2

- Wind Energy and Electricity Prices: A literature review by Poyry for the European Wind Energy Association[123].

- The "Impact of Wind on the LMP Market". By Dale L. Osborn, Member, IEEE[124].

These documents are discussed in more detail in the Submission to the Commissioner for Environmental on this appeal CEI/11/003, see Annex 14. However, they clearly did not even remotely verify the statements made by the Minister. If we consider the first two reports, both related to Ireland, but assumed a minimum installed capacity of 2,000 MW of wind energy on the grid. They therefore cannot be used to present a comparison of wind energy costs versus the situation without installation of wind energy. It is also worth pointing out that there was a serious lack of quality in this documentation, discussed further in Annex 14.

With regard to the third report, the cost of generation, which is paid by the consumer, is a combination of the spot price plus the fixed price provided to renewable generators. These issues are not addressed in the European Wind Energy Association report, as it stated on the Note at the bottom of page 12: "The calculation only shows how the production contribution from wind power influences power prices when wind is blowing. The analysis cannot be used to answer the question - what would the power price have been if wind power was not part of the energy system?"

If we consider the IEEE paper, this is solely based on a simulation of prices completed in 2005 for the US Midwest region, prior to the significant investment in wind energy there, in which the data on which the simulation is run is not presented. Indeed the Author even concluded that: "Some inferences may be made, but more experience will be needed for definitive conclusions". With regard to this factor a number of points can be made, the Midwest is characterised by coal plants which are experience major problems adjusting to the variability, which has now been introduced into the grid by these wind generators[125]. This variability is causing increased cost and emissions in the necessary thermal plants, a factor apparently not addressed in the IEEE simulation report.

123 http://www.ewec2010.info/index.php?id=185

124 http://www.labplan.ufsc.br/congressos/IEEE_2006_ATLANTA/0000216.pdf

125 http://www.bentekenergy.com/WindCoalandGasStudy.aspx

Secondly a capacity factor of 40-45% was used, with a statement that the majority of the wind resources are in the western MISO states of MN, IA, SD, ND. However, if we consider the Iowa (IA) Utilities Board[126], then the Iowa average wind capacity factor is now reported as 33.3%, a reduction of 25% on the figure used for the simulation. While measurements have shown high wind speeds in the Midwest States near the Rockies, which in places correlate with a capacity factor of 40-45%, it is another thing to actually generate that level of electrical output on a proven basis. Furthermore, those wind speeds do not occur in Ireland, even for off-shore locations the SEAI is using a figure of 35% (Reply to and Access to Information on the Environment request by Jerry Waugh on 14th September 2010). Furthermore capacity factors in Ireland for on-shore wind over the last few years have ranged from 23 to 32%, i.e. a far lower electricity output for the same investment in a turbine installation.

I therefore pointed out these issues when I requested an Internal Review on the 22nd January 2011. On the 25th January I got a reply to this which included the following:

- "Having reviewed the response provided to you by Mr McTiernan and after careful consideration, I am satisfied that the Department has complied with Article 7 (1) of SI 133 of 2007 and has provided you with the information available to the Department in terms of national and international reports that underpin the then Minister's assertions on Prime Time on the impact of wind on electricity prices for consumers".

- "While it is your contention that the response provided and the content of the reports that were attached are insufficient to justify the comments made by the then Minister, it is our assertion that there these are the studies referred to that underpin the assertions made. We have no other material to provide you with and nothing more to add on the matter".

So I then went to appeal to the Commissioner for Environmental Information, which was registered on the 15th February as CEI/11/0003. My position in my Submission to the Commissioner on this case was that Article 7 (2) of Directive 2003/4/EC is clear in that the information to be made available and disseminated shall be updated as appropriate and shall include at least policies, plans and programmes to the environment. Furthermore Article 8 (1) is clear in that: Member States shall, so far is within their power, ensure that any information that is complied by them or on their behalf is up to date, accurate and comparable.

126 http://www.state.ia.us/government/com/util/energy/wind_generation.html

Given the enormous sums of money, which have been approved by the Department of Communications, Energy and Natural Resources for investment in wind energy in Ireland, it is not only astounding that on request they were unable to produce documentation related to the resulting electricity costs to the consumer, it is also a clear breach of the relevant legislation. With regard to the four reports, which were submitted by the Department of Communications, Energy and Natural Resources in reply to my Access to Information on the Environment Request, none can be considered; up to date, accurate and comparable to the situation of the wind energy programme in Ireland and the resulting cost of electricity to the end-user. Furthermore they were clearly at variance to the documentation and funding programmes, which were in place in the Department of Communications, Energy and Natural Resources to support wind energy. Therefore with regard to Article 9 paragraph 1 of the Aarhus Convention, my request for information was inadequately answered.

It is also necessary to point out public consultations have been held, such as highlighted previously by the Joint Oireachtas Committee on Climate Change and Energy Security and also by the Commissioner for Energy Regulation[127]. Both industry and the Irish Academy of Engineering pointed out the high costs which were resulting and the inappropriateness of this wind energy programme. It seems that once again these are a charade, in which the Minister can then go on National TV and ignore these issues, in fact saying exactly the opposite as what the figures demonstrate.

On the 17th June 2011 I received a preliminary view on this appeal from the Office of the Commissioner for Environment. In it was stated that the Department's position was:

- "In its decisions and submission to this Office, the Department clearly states that it has provided you with all the relevant information available to it which informed the remarks of Minister Ryan on the Primetime programme, and that it has no further information to add. It has also pointed out that it has provided you with the basis of the Minister's assertion and that it is the Minister's prerogative to draw the conclusions he deemed appropriate from the reports and other information available to him".

The preliminary findings were:

- "It seems to me that there is no reason to doubt the Department's assertions that it has identified all information relevant to your request and has made that information available to you. While it may not provide you with what you consider to be a satisfactory explanation or justification for the remarks made by the Minister, the Department cannot be expected to create information for this purpose under the Regulations".

- "It seems to me that Article 7(5) of the Regulations, which provides that a public authority may refuse a request on the basis that the information requested is not held by or for the authority concerned, and that the authority shall inform the applicant as soon as possible that the

[127] http://www.cer.ie/en/renewables-current-consultations.aspx?article=d7a3e817-e64d-47e4-8f50-e0b6b187ad69

information is not held by or for it, applies in this case to any further information you contend should exist in relation to your request".

My position was that: "the information provided was not relevant to the request, it failed to answer the subject matter and was in direct variance with published information on the website and agreed as part of funding programmes. Article 2 1(b) of Directive 2003/4/EC clearly includes energy. Article 8 (2) of the Directive is clear in that with regard to a request for information on energy the public authority shall report to the person making the request, if available, the method of analysis used in compiling the information. Clearly the Department of Communications, Energy and Natural Resources has no methods for analysis of the cost of energy, unless they can demonstrate so with provision of additional information. However**, it is standing over the remarks expressed by Minister Ryan, who according to the Department, has prerogative to draw whatever conclusions he likes for Prime Time TV, based on the limited nature of the reports, which the Department has complied on the subject matter with regard to its compliance with Article 5 paragraph 1 of the Aarhus Convention (Article 7 of Directive 2003/4/EC)".**

I then concluded that if this was indeed the situation then it should be recorded as such in the final decision and published.

Requirement of the Convention	Actual situation
Article 5 of the Convention states that public authorities must ensure that they possess and update environmental information which is relevant to their function. Furthermore, they must ensure the way in which they make environmental information available to the public is transparent. Article 6 paragraph 8 is clear in that: "Each Party shall ensure that in the decision due account is taken of the outcome of the public participation".	The EU is a Party to the Convention and has implemented the access to information pillar through Directive 2003/4/EC and was therefore binding on Ireland, a Member State. Clearly the Minister was making statements to the public which were not transparent, i.e. false information on the environment. This was confirmed by the inability of his Department to providing transparent supporting documentation for his claims. Furthermore the results of the public participation, in which the Irish Academy of Engineering and Industry were pointing out the devastating impact of the rising electricity prices, were simply being ignored.

7.3.4 CEI/10/0020 Appeal by Jerry Waugh to the Commissioner for Environmental Information in relation to the Commission for Energy Regulation (CER)

This appeal is very similar to the above and reflects the enormous frustration that occurs within the technical community, from the constant false statements that are made by senior elected and non-elected officials. Furthermore, it highlights that the measures in relation to Access to Justice in this situation are inadequate and potentially in non-compliance with the Convention.

On the 9th August 2010, speaking on RTÉ's Morning Ireland, the chairman of the Commission for Energy Regulation (CER), Michael Tutty, said electricity prices had not increased for some time and that the levy was needed to ensure security of future supply. "It is just reflecting the actual costs that are out there - it's not that someone decided there should be a price increase," he said. "The public service obligation levy is there to protect the consumer in the future through promoting renewables, which will give us security of supply. We are very dependent on imported fossil fuels. Most of our electricity is produced from gas, which is almost all imported. The renewables will help us a lot in the future, will help to keep prices down, will give us security of supply".

Jerry Waugh BE CEng MIEI MIEE sent in an Access for Information on the Environment request to the CER regarding:

- Reports that the CER holds that support the assertion that renewables will help to keep prices down.
- Data that the CER holds that supports the assertion that renewable generation supports security of supply.

In a similar manner to my previous appeal, the request was not answered in an appropriate manner, i.e. the information provided did not support the statements made by Chairman Tutty on National Radio. Jerry Waugh then requested an Internal Review. The internal reviewer confirmed that the original decision issued on the 10th September 2010 constituted the relevant records arising from the original request and that no further relevant records have been found on foot of his review. Jerry then lodged an appeal with the Commissioner for Environmental Information, which resulted in the following:

- "I refer further to your appeal to this Office in relation to your request for access to environmental information, and in particular to your letter of 15 November, sent by e-mail".
- "In your original request to CER you sought copies of environmental information held by that authority that support the statements of its Chairman, Mr Michael Tutty, on RTE on 9th August 2010. The CER provided you with copies of two reports / studies in response to your request and in its internal review decision stated that these constitute the only relevant records held".
- "Your position appears to be that the reports provided by the CER do not, in fact, support Mr Tutty's statements. However, this is not a dispute on which the Commissioner can comment. As previously explained the Commissioner's role is confined to ensuring access to records held by a public authority and does not extend to commenting on the content or usefulness of such records, nor does it extend to

requiring a public authority to create a record where the information sought does not already exist".

- "Please consider the above and let me know whether you wish to have a formal, binding ruling by the Commissioner. If you do not, it would be open to you to have the case treated as withdrawn and the fee paid refunded".

Frustrated by the fact that this was going nowhere, in particular the Irish Administration had no effective measures in respect to the quality of environmental information, Jerry withdrew the case and had his fee refunded. However, there are several issues which need to be raised about this case, which undoubtedly will be the result of appeal CEI/11/0003 above. Firstly senior officials can clearly make false statements to media in the knowledge that if their official are queried on the matter, all they have to do is answer with some completely inadequate and in many cases irrelevant documentation. So where does this leave the Aarhus Convention and in particular Article 5 paragraph 2, which states:

- "Each Party shall ensure that, within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible".

"The Aarhus Convention: An Implementation Guide" provides additional guidance on 'within the framework of national legislation':

- "First, this means that Parties must have placed the obligations and mechanisms of Article 5, paragraph 2, in their national legal framework. It also means that Parties can be flexible in implementing this provision within their own national legal frameworks. Article 5, paragraph 2, does require a minimum of several concrete mechanisms for ensuring transparency and effectively accessible information – all of which can be structured slightly differently depending on the system of national law".

As the EU is the Party to the Convention it is necessary to review the legislative framework, in this case Directive 2003/4/EC, which states in Article 8 of the Directive on the quality of environmental information:

- "Member States shall, so far as is within their power, ensure that any information that is complied by them or on their behalf is up to date, accurate and comparable".

However, how is this ensured? Article 6 of Directive 2003/4/EC with regard to access to justice states:

- "Member States shall ensure that any applicant who considers his request for information has been ignored, wrongfully refused (whether in full or in part), **inadequately answered** or otherwise not dealt with in accordance with the provisions of Articles 3, 4 or 5, has access to a procedure in which the acts or omissions of the public authority concerned can be reconsidered by that or another public authority or reviewed administratively by an independent and impartial body established by law. Any such procedure shall be expeditious and either free of charge or inexpensive".

This would appear to implement Article 9 paragraph 1 of the Aarhus Convention, which 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 of 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 body established by law.

The situation that pertained in this case, as it does in the previous case CEI/11/003 above, is that the public authority inadequately answered the request for information, as they were not in a position to provide adequate supporting information for the statements made to the media by their senior official / minister. As "The Aarhus Convention: An Implementation Guide" states:

- "Transparency means that the public can clearly follow the path of environmental information, understanding its origin, the criteria that govern its collection, holding and dissemination, and how it can be obtained. Article 5, paragraph 2, thus builds on Article 3, paragraph 1, requiring Parties to establish and maintain a clear and transparent framework to implementing the Convention, and Article 3, paragraph 2, requiring officials to assist the public in seeking access to information".

However, **the reply from the Commissioner for Environmental Information in this case is perfectly clear; they will only provide access to documentation if it is there, if not they will record that it is not. They will not comment or rule on whether it was adequately answered or not. So who enforces Article 8 of Directive 2003/4/EC on the quality of environmental information?** This was a subject I raised in some detail on the 3rd December in my meeting with the DG Environment and DG Energy in Brussels. In particular I pointed out the SEAI report "Renewable Energy in Ireland 2010 Update", highlighted already in Section 5.7 of this Reply to UNECE, in which even the Appendix of the report admits that there are clear limitations in the methodology for calculating carbon dioxide savings of wind energy, which is a charitable way of putting it. I had also raised at the meeting in some detail the problems associated with public participation in decision-making in relation to the Offshore Renewable Energy Development Plan and the Waste Policy, in which clearly false and inadequate documentation had been prepared, details of which already been submitted on the CHAP(2010)00645.

In my Access to Information request to the EU Commission in relation to the approval of the REFIT programme in Ireland, see Section 9 of this Reply to UNECE, all I received was a Note to File 0645 in relation to my meeting on the 3rd December 2010 with DG Environment and DG Energy, see Annex 15. As the Note to File 0645 stated: "Mr Swords made a Power Point presentation of issues he has already set out in his CHAP complaint, covering in particular the following claims":

- "With regard to access to information, Ireland does not provide enough information by way of active dissemination (Art.7), provides inaccurate information (Art.8) and is obstructive on specific access to document requests".

From the Commission perspective the following point was made:

- "So far as Directive 2003/4 was concerned, there would need to be specific evidence of a failure to comply with obligations. Submissions to

the Irish Parliament did not appear to come within scope of the items mentioned in Article 7. With regard to dissemination of inaccurate information, there would need to be strong supporting evidence for purposes of Article 8".

Clearly, it is one thing for the documentation relating to systematic breaches of Pillar I of the Aarhus Convention to be presented to the EU Commission; it is a very different thing for them to actually do anything about it. One must concluded that the Irish Administration and the EU have failed to comply with Article 5 paragraph 2 and Article 9 paragraph 1 of the Aarhus Convention, i.e. to ensure that the way in which public authorities make environmental information available is transparent and provide access to justice where a request for information is inadequately answered. Instead we have a situation in which false statements are made to the media by senior officials, while their public authority has no hesitation in deliberately answering any resulting request in an inadequate manner. In this regard supplying documentation which is not up to date, accurate or comparable and at variance to their published documentation, policies and state aid funding mechanisms. If this documentation is then presented to the EU, there is clearly no enthusiasm or mechanisms in place with regard to enforcements, as the Note to File 0645 concluded:

- "Against this background, the Commission will complete its examination of the CHAP complaint submitted by Mr Swords and inform him of the outcome".

Requirement of the Convention	Actual situation
Article 5 paragraph 2, states: "Each Party shall ensure that, within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible". 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 of 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 body established by law. The procedure shall provide adequate and effective remedies and be fair, equitable, timely and not prohibitively expensive.	There is constant dissemination of false information by senior officials in Ireland. When requests for information are made and demonstrate the inadequacies of the information held within their departments to support these statements, the Commissioner for Environmental Information refuses to comment on the content or the usefulness of such records. The EU is a Party to the Convention and it applies to Community Legal order in Ireland. Directive 2003/4/EC implements the measures associated with Articles 4, 5 and paragraph 1 of Article 9 of the Aarhus Convention. Even though the EU is a Party to the Convention there are clearly no measures in place to ensure the transparency of environmental information made available to the public in Ireland, in particular measures related to access to justice which are fair, equitable, timely and not prohibitively expensive.

7.3.5 Access to Information on the Environment Request to Eirgird / SEAI related to report on wind generation and electricity costs

As has been stated in Section 5.7 of this Reply to UNECE, in February 2011 SEAI and Eirgrid produced another report on: "Impact of Wind Generation on Wholesale Electricity Costs in 2011[128]", which had a total lack of transparency. In their reply to my Access to Information on the Environment Request in relation to Minister Ryan's statements, which lead to the Appeal CEI/11/0003 dealt with previously, it was stated by the Department of Communications, Energy and Natural Resources that:

- "The Irish Wind Energy Association (IWEA) are currently finalising a study being undertaken by Redpoint on the Impact of Wind on SEM prices. They hope to have a final report shortly. We understand this report will show a reduction in Single Electricity Market (SEM) prices due to the impact of wind".

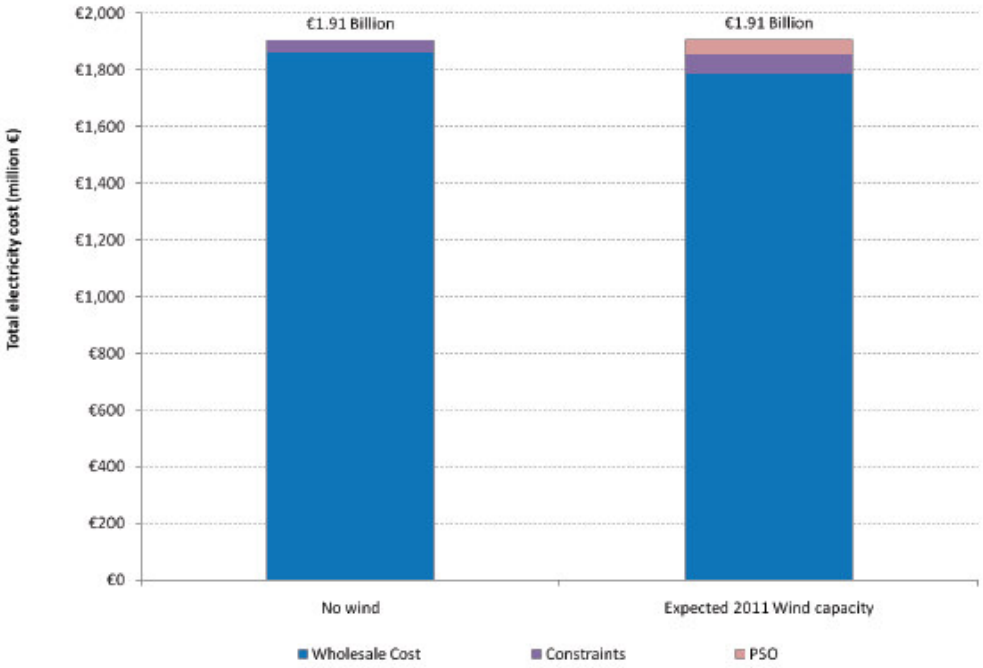
- "The Sustainable Energy Authority Ireland (SEAI) has recently indicated that they are commencing an analysis of the effect of wind on energy prices".

With regard to the first point, as will be highlighted later again, one really has to seriously question the position of administrations, which are using as a decision criterion, the technical reports of lobby groups, which are characterised by a lack of objectivity, such as the wind energy associations. Clearly a case of deliberate application of 'confirmation bias'.

With regard to the SEAI report, this ten page document was prepared in association with Eirgrid and issued in February 2011. It can be charitably described as journalistic in nature with a paucity of facts, or as I have mentioned previously a lack of transparency leading to falsehood, i.e. there was a 'key message' in that wind generation was expected to reduce Ireland's wholesale market price of electricity by around €74 million and some pretty graphs.

128 http://www.eirgrid.com/media/ImpactofWind.pdf

Figure 1: Projected Cost of Electricity Generation in 2011



However, where did these figures come from? So I sent in an Access to Information on the Environment Request relating to:

- "1. Access to all documentation justifying the decision not to include the additional grid costs, generation portfolio and transmission losses associated with electricity produced in the 'wind' scenario versus 'no wind' scenario. In particular the justification in the report that: "these factors relate to future wind and no wind scenarios".

- "2. Access to the documentation used for calculating both the production cost of electricity and IMR for the 'no wind' scenario".

- "3. Access to documentation used for calculating the production cost of fossil based generation and IMR for the 'wind' scenario. This should clearly demonstrate how the additional charges associated with having to operate the thermal plant at part load and consequently reduced efficiency, the cost of increased number of starts required of thermal plant, which has an energy, availability and maintenance penalty, etc".

- "Please note items 1 and 3 (additional charges) have been estimated by the Irish Academy of Engineering's recent report on "Energy Policy and Economic Recovery 2010 – 2015" to add €30 per MWh to the cost of wind generation".

The Eirgrid reply to this request did not resolve the questions asked and as a result an Internal Review was requested. For instance with regard to the first question their position was:

- "The initial aim of the study was to examine the wholesale cost of electricity in 2011, how it was affected by wind generation, and how this

related to expected Public Service Obligation (PSO) costs for wind generation. The study is therefore short-term and looks at the operation of existing investment of plant on the power system. However a study looking further out into the future should carry out a full cost-benefit analysis on new investment".

My position is that somewhere in SEAI / Eirgrid a decision was taken to ignore the very substantial grid costs associated with wind energy, for instance as is pointed out in Section 7.4 of this Reply to UNECE, the interconnector, whose sole basis is wind energy, has a price tag of €600 million. This decision should be on some form of documentation and that documentation should have been made available to me.

With regard to the other two questions their position was:

- "The production costs and IMRs were calculated using electricity market and power system simulation software (Plexos), incorporating a full model of the Irish electricity system. The model we used was a modified and updated version of the Single Electricity Market (SEM) model published by Redpoint on behalf of the Commission for Energy Regulation (CER). The fuel costs we used can be found in the appendix of the report. More information on the Plexos software can be found at http://www.energyexemplar.com/ . The Redpoint model can be found at http://www.allislandproject.org/en/market_decision_documents.aspx?page=2&article=cb4ee33b-a83a-47ce-956a-6cff30900495 "

My position is that whatever they put into their software determines the outcome. For all I know they put the same data in for the 'no wind' as they did for the 'with wind', therefore:

- "With regard to questions 2 and 3, it is simply not adequate to reply that a computer programme was used. Clearly what were the main inputs for the two scenarios considered? If these have been programmed without production of documents, then clearly it should be stated that no records exist, otherwise access to the documentation should be provided".

On the 3rd May I received my reply to the Internal Review from Kevin Connolly, Senior Legal Advisor, EirGrid PLC, which stated:

- "With regard to question 1, I am instructed that we do not have any documentation".

- "With regard to questions 2 and 3, we have already directed you to the inputs used in the models with our original response. These are the generator characteristics to which you were sent a link, and also the fuel forecasts and installed wind capacities as set out in the report itself".

- "Unless there are further more specific questions you wish to ask, I believe that EirGrid has responded in accordance with the Regulation".

Note: The failure to inform me, as required by the Regulations, of my legal Right to an Appeal to the Commissioner for Environmental Information. **It is sad, that despite the massive sums of money spent on wind energy to date and billions more to be spent, the Irish public are simply not being provided with any information, which can be considered any way transparent, with regard to the environmental performance and costs of this programme. Neither is there any effective manner, such as appeal to the Commissioner for Environmental Information, for dealing with cases of environmental information being disseminated by public authorities, which is clearly not transparent.**

Requirement of the Convention	Actual situation
Article 5 paragraph 2, states: "Each Party shall ensure that, within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible". "The Aarhus Convention: An Implementation Guide" states: "Transparency means that the public can clearly follow the path of environmental information, understanding its origin, the criteria that govern its collection, holding and dissemination, and how it can be obtained. Article 5, paragraph 2, thus builds on Article 3, paragraph 1, requiring Parties to establish and maintain a clear and transparent framework to implementing the Convention, and Article 3, paragraph 2, requiring officials to assist the public in seeking access to information".	As has been highlighted previously there is a clear problem with the transparency of environmental information in Ireland. The EU as a Party to the Convention may have brought in legislation in the form of Directive 2003/4/EC, but in reality in Ireland there are no effective measures to ensure that the way in which public authorities make environmental information available is transparent.

7.3.6 AIE/2009/039 in Relation to the Department of the Environment, Heritage and Local Government and the Implementation of the Environmental Acquis

In mid-2009 I was becoming increasing frustrated with was what was becoming self evident was the obstruction, at will, of senior elected and non-elected officials in the Irish Administration of the implementation of the EU Environmental Acquis. This ultimately ended up as an Access to Information on the Environment Request being answered as AIE/2009/039 by the Department of the Environment, Heritage and Local Government:

"I refer to the request which you have made under the European Communities (Access to Information on the Environment) Regulations 2007 *(S.I. No. 133 of 2007*) for records held by this Department relating to":

- "1. Disciplinary procedures of the Irish State for elected and non-elected representatives of the State who obstruct / prevent proper implementation of the Directives and legislative measures associated with the Environmental Acquis".

- "2. Disciplinary procedures of the Irish State for elected and non-elected representatives of the State who obstruct / prevent proper dissemination of information related to the environment".

- "3. The information as requested in the Aarhus request to the Head of State on 23-8-09 in relation to the Irish State's compliance programme with the EU Environmental Acquis".

- "4. A copy of the submission to the Commission under Article 9 of 2003/4/EC".

"Summary of Decision"

"I have made a decision on your request on 11 December 2009 as follows".

<u>"Points 1 and 2 (as set out above)"</u>

"**There are no dedicated disciplinary procedures of the Irish State for either elected or non-elected representatives who obstruct or prevent proper implementation of the Directives and legislative measures associated with the Environmental Acquis or with the proper dissemination of information related to the environment.** Accordingly, I am refusing this aspect of your request in line with Section 10(6) of the Regulations".

"You may wish to note however that civil servants, as non-elected representatives of the State, must comply with codes of standards and behaviour, including Department of Finance circular 26/2004:- *'The Civil Service Code of Standards and Behaviour*'; and Department of Finance Circular 14/2006:- *'Civil Service Disciplinary Code revised in accordance with the Civil Service Regulation (Amendment) Act 2005'*.

"You may also wish to note that ethics legislation is in place under the *Ethics in Public Office Act 1995* and the *Standards in Public Office Act 2001.* The Ethics Acts provide for disclosure of interests, including any material factors which could influence a Government Minister or Minister of State, a member of the Houses of the Oireachtas or a public servant in performing their official duties. The principal objective of the legislation is to demonstrate that those who are participating in public life do not seek to derive personal advantage from the outcome of their actions. To meet this objective, a statutory framework has been put in place to regulate the disclosure of interests and to ensure that other measures are taken to satisfy the broad range of obligations arising under the legislation. The legislation is founded on the presumption of integrity but recognises that specific measures should exist to underpin compliance. The legislation also requires the drawing up of codes of conduct for ordinary members of the Houses, for office holders (e.g. Ministers of the Government and Ministers of State) and for public servants. These codes are published by the Standards Commission".

"Point 3"

"Regarding point 3 of your request, seeking a copy of the Irish State's compliance programme with the EU Environmental Acquis, I regret to inform you that such a report does not exist for the reasons outlined below. I am therefore refusing this aspect of your request in accordance with Section 10(6) of the Regulations".

"Ireland joined the then European Economic Community in 1973. As environmental policy did not become a priority of the European Union until the introduction of the Single European Act in 1986, there was no requirement placed on Ireland in 1973 to prepare such a report, unlike the present requirements on current candidate member countries, such as Croatia".

"The Department of the Environment, Heritage and Local Government in Ireland is liaising on an ongoing basis with the EU Commission in order to resolve any issues arising from the infringement or potential infringement of EU environmental legislation. Our aim is to prevent problems reaching infringement stage where possible. Ireland has never been fined by the EU for an environmental infringement and every effort is being made to resolve outstanding issues before the question of a fines application would arise in any particular case".

"Point 4"

"Regarding point 4 of your request, I regret that the submission to the Commission under Article 9 of 2003/4/EC, which you have requested, has not yet been finalised. I am therefore refusing your request in accordance with Section 10(6) of the above mentioned Regulations. However, I expect that the report will be finalised as soon as possible in the coming weeks, at which time I will provide you with a copy".

Requirement of the Convention	Actual situation
Article 5 paragraph 2, states: "Each Party shall ensure that, within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible".	The EU is a Party to the Convention and Article 8 paragraph 1 of Directive 2003/4/EC is clear on the duty of the Member State to ensure the quality of information on the environment. As has been highlighted previously there is a clear problem with the transparency of environmental information in Ireland. Clearly the Administration in Ireland has no measures in place to deal with officials making claims to the media that are not transparent or otherwise producing documentation that is not transparent.

7.4 How decision-making regarding the interconnector between Ireland and the United Kingdom amounts to non-compliance with the Convention

Some of the issues related to the interconnector have been raised already. However, to clarify the justification behind this project it is necessary to review how it arose and the manner in which the Aarhus Convention was ignored. As The Irish Academy of Engineering stated in its Submission to the Joint Oireachtas Committee on Climate Change and Energy Security in June 2009:

- "In July 2006 the Irish Government decided to construct an interconnector from Ireland to Great Britian. It would appear that this decision was taken without the benefit of a robust techno-economic study or cost benefit analysis. In February 2008 Eirgrid submitted a "Business Case" to the Commission for Energy Regulation (CER) supporting the investment. The estimated cost is €596 million and the EU has indicated support of up to €100 million resulting in a net investment of €496 million".

From a geographical perspective Ireland is a relatively small island with a maximum width of 280 km and a maximum length of 480 km. A wind turbine will not reach its maximum output until the wind speed reaches 50 km/h. Therefore when a frontal system occurs, which has sufficient wind speed to generate significant wind energy, that wind pattern moves from one side of the island to the other in about six hours. In effect then the wind energy system on the island behaves nearly as one unit, which ramps up and ramps down as the frontal system rapidly moves over the island. Huge problems start to occur as more and more wind energy is installed, i.e. increasing penetration. As the thermal plants have to be kept running ready to ramp up as the wind can rapidly drop, there will become times in period of low system demand when the wind generated cannot be accepted on the grid, it has to be curtailed.

Furthermore as more and more wind energy is installed; it is less and less profitable for a thermal plant operator to stay in business. There will come a time of peak demand and no wind energy availability, where there is simply insufficient thermal capacity available. The solution to this is of course interconnection to the UK, with the assumption that they would buy our surplus wind energy and supply us with electricity in periods of no wind, all of course at favourable prices. Therefore, as has been highlighted in Section 5.3 of this Reply to UNECE, the All Island Grid Study assumed that there would be a further 500 MW of interconnection to Great Britain, this time from the Republic of Ireland to Wales. Indeed, the levels of wind energy proposed by this Study, would simply have not worked if there had not been the availability of this second interconnector. Furthermore, as has been also highlighted in Section 5.3, the technical modelling in the June 2010 EirGrid / Soni report is now stating that a third interconnector will be required to meet the 40% renewable target that had already been set.

Ireland's electricity system functions perfectly well without this second 500 MW interconnector. The costs associated with it are simply not justified, this point I had highlighted in my Communication to the Aarhus Compliance Committee[129], referencing three engineering reports that demonstrated this. Indeed one could build a high efficiency Combined Cycle Gas Turbine power station, with the same capacity, for less than €500 million. Furthermore, as Jerry Waugh had demonstrated in his Aarhus information request (Environmental Information Regulations, 2004) to the UK authorities in August 2010, there were simply no arrangements in place then with the UK for importing and exporting power, even though the interconnector project had been funded by the EU to the tune of €110 million in March 2010[130] and was actually progressing forward with a construction start in July 2010.

The sole justification for this project therefore was to facilitate Irish wind energy, a programme which had never been properly assessed or subject to proper public participation procedures. This point is perfectly clear from examination of the Environmental Impact Assessment for the East – West Interconnector project[131]. Section 1.4 on the 'need for the project' clearly highlights the Energy Policy White Paper of 2007, which requires 33% of electrical energy to be produced from renewable sources and the EU Commission's 'Priority Interconnection Plan' of January 2007 (COM (2006) 846 final)[132] . Furthermore it is clearly stated that:

- "The East – West Interconnector will provide access to a more diverse range of electricity sources to the Irish grid such as wind power (which is seen as pivotal in achieving Ireland's renewable targets) that will reduce the reliance on fossil fuels and cut Ireland's carbon emissions".

In Section 1.5 it is further stated that:

- "On occasions when wind energy generated in Ireland exceeds demand, it could be exported to Great Britain. The interconnector allows more wind energy to be accommodated because the link to the larger British market will allow energy variations to be managed more easily".

129 http://www.unece.org/env/pp/compliance/C2010-54/Communication/CommunicationACCC.pdf

130 http://www.eirgridprojects.com/media/FINAL%20East%20West%20-%20EU%20Grant%20Announcement%2003.03.10.doc

131 http://www.eirgrideastwestinterconnector.ie/

132 http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0846en01.pdf

As an engineer all I can say is that this may be the 'perception' sold to the public, but the reality is that at the high levels of wind energy penetration to be facilitated by this interconnector, the carbon savings potential will have been long since exhausted due to the inefficiencies on the grid. One can also point out that the abundance of interconectors connecting Denmark with hydro-plants in Scandinavia and their potential customers in Germany, has allowed Denmark to install significant levels of wind energy, but they are also dumping nearly 50% of this highly subsidised low quality power onto the surrounding grids for little or no revenue[133]. Indeed, as has been demonstrated by the reply from the UK authorities, there are no arrangements in place or any enthusiasm to purchase Irish wind energy. Furthermore they are simply not contributing to financing the interconnector.

With regard to the 'do nothing option' discussed in Section 1.6 of the Environmental Impact Assessment of the report it is stated that:

- "The absence of the East West Connector would also lead to a situation where energy demands of a growing economy and population could not be met reliabily".

This is a completely false statement, as has been mentioned already a high efficiency power station of the same capacity could have been built for less cost, which would have provided a more reliable energy supply, in particular as the UK is facing severe power capacity problems itself and is certainly not in the position to be an electricity exporter. The 'do nothing option' then concludes:

- "It is therefore considered that the do-nothing scenario would fail to meet the EU energy policy and the White Paper's objective of ensuring a secure supply of electricity for Ireland and could hinder sustainable development in Ireland".

This is worthy of some detailed examination. Firstly the interconnector has nothing to do with ensuring a secure supply of electricity for Ireland, there are other technical options for that which are far more cost effective; there was simply just a failure to consider them. Secondly what is left then, the EU energy policy and the White Paper and a reference to sustainable development. As has been discussed already in this Reply to UNECE, the White Paper Energy Policy of 2007 had clearly bypassed the fundamental principles of public participation in decision-making. One can also point out with regard to sustainable development, which is a term often abused by An Bord Pleanala in its planning decisions, if reference to sustainable development is made and it does have a legal implementation in the Environmental Acquis, then it should be quantified in a proper assessment. This was of course never done. Note: Section 4.3.4 of this Reply to UNECE and case C-50/09 of the European Court of Justice with regard to planning decisions in Ireland and the failure of the competent authority to complete proper assessments.

[133] This has been looked at in some detail by a number of organisations, such as the Renewable Energy Foundation: http://www.ref.org.uk/

The socio-economic section of this Environmental Impact Assessment is also noteworthy from its complete absence of any reference, as to who is going to pay for this interconnector and the associated wind energy developments it is going to facilitate. In reality of course the citizen through increased electricity costs, which is going to have a detrimental impact on the economic viability of many enterprises.

From the perspective of the Aarhus Convention, to which the EU had become a Party to in February 2005, there are many interesting non-compliances with this project. The reasons for approval of the project by An Bord Pleanala, case reference number 17.VA0002, were the 2007 Energy White Paper and the National Development Plan of 2007-2013, neither of which went though the process of a strategic environmental assessment or proper public participation in decision-making. If we consider **the EU Commission's 'Priority Interconnection Plan' of January 2007 (COM (2006) 846 final)**, the same conclusion can be reached. Indeed **the document is very critical of 'time consuming public consultation procedures'**. Yet here in this plan on 'Priority Interconnection' one has an investment of €30 billion in infrastructure by the EU by 2013, no doubt to be paid in one way or the other by the citizens, which really needs to be 'got right'. In the case of the East – West Interconnector it is clear in that €110 million, not to mention the balance from Irish electricity consumers to bring the total to essentially €600 million, is being wasted on nothing more than the perception that 'green electricity' and its increased connection to the grid actually works.

The Aarhus Convention is clear in that there has to be early public participation, when all options are open and effective public participation can take place. This did not happen. No efforts were made at either the EU or National level to quantify the environmental aspects of the Irish renewable energy programme, including the associated interconnection to the UK, not to mention conduct the proper public participation. **At a project level the Environmental Impact Assessment was clearly not transparent, with both it and the resulting planning permission being based on those polices, which had been developed basically by diktat, without any proper environmental assessment or public participation.**

Requirement of the Convention	Actual situation
Article 7 requires 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. With this regard the following Sections of Article 6 apply: "Each party shall provide for early public participation, when all options are open and effective public participation can take place".	Even though the Aarhus Convention was in force following its ratification by the EU in February 2005, there simply was no proper public participation completed on the EU Priority Interconnection Plan or the Irish White Paper Energy Policy of 2007. These were then used to 'rubber stamp' the approval of the Environmental Impact Assessment and planning decision for the interconnector. In the 'Reasons and Considerations' for the planning approval, which amounted to less than a page, it is clear in that An Bord Pleanala did not fulfil its legal

Requirement of the Convention	Actual situation
"The public concerned shall be informed, either by public notice or individually as appropriate, early in the environmental decision-making procedures, and in an adequate, timely and effective manner". Environmental impact assessment is a fundamental requirement of Article 6 paragraph 6 of the Aarhus Convention and Article 6 paragraph 8 requires that this documentation be taken into account in the decision reached by the competent authority. Article 5 requires Public Authorities to ensure that the way they make environmental information available to the public is transparent.	obligations to conduct an environmental assessment, an issue that was the subject of the European Court of Justice March 2011 Decision C-50/09 (See Section 4.3.4 of this Reply to UNECE). A failure therefore to comply with the structured public participation in decision making under Article 6 of the Convention. Indeed the decision had absolutely no consideration of alternatives. Furthermore the environmental impact assessment, completed by EirGrid, a public authority, was as, is highlighted above, clearly not transparent.

7.5 How the Renewable Energy Action Plan submitted to the European Commission amounts to non-compliance with the Convention

In Sections 5.1.2 and 6.1 of this Reply to UNECE, I have already highlighted the limitations with regard to the development of EU legislation in relation to renewable energy and the principles of the Aarhus Convention. This needs to be expanded upon here. The EU's "20-20-20 by 2020" plan is without doubt the most radical and dramatic alteration to the European economic, technical, administrative and environmental landscape since the rebuilding of the continent following the Second World War. The goals of this plan are to ensure a 20% reduction in greenhouse gas emissions, a 20% renewable energy contribution and a 20% improvement in energy efficiency by 2020.

European citizens have a right to expect that a plan of such magnitude would be subject to detailed technical, environmental and economic analysis. However, this is unfortunately untrue as the plan has not been subject to proper technical, environmental or economic assessment and has by-passed legally binding procedures for public participation in decision-making.

Commission Staff Working Document SEC(2008) 85/3 of January 2008 on Impact Assessment of Package of Implementation Measures for EU's Objectives on Climate Change and Renewable Energy for 2020[134] was part of the proposal for an updated renewable energy directive, which was finalised as Directive 2009/28/EC[135]. It is worth examining this Staff Working Document as it is very clear in the opening paragraph:

- "In the opening months of 2007, the European Union stepped up its energy and climate change ambitions to new levels. The Commission

134 http://ec.europa.eu/energy/climate_actions/doc/2008_res_ia_en.pdf

135 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:140:0016:0062:en:PDF

put forward an integrated package of proposals calling for a quantum leap in the EU's commitment to change. A political consensus grew up in support of this approach, with the support of the European Parliament and the Member States at the 2007 European Parliament and the Member States at the 2007 European Spring Council. This culminated in agreement on the principles of a new approach and an invitation to the Commission to come forward with concrete proposals, including how efforts could be shared among Member States to achieve these targets".

The point to note here is that this plan originated out of political ambitions, in which there was a complete failure to assess the technical, environmental and economic parameters prior to implementation of the legally binding targets. Furthermore, the principles of public participation in decision making are clear. The first step is that the public be provided with adequate documentation, in particular Article 5 paragraph 7 (a) of the Aarhus Convention requires parties to publish background information underlying major policy proposals, and thus contribute to effective public participation in the development of environmental policies. This clearly did not take place, there has yet to be a Strategic Environmental Assessment completed for the renewable energy programme in Ireland or any consideration of alternatives to meet the objectives in the legislation[136]. The next step is that the public be consulted within a transparent and fair framework. Article 7 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".

Simply put, none of this happened. In layman's terms, the cart was put before the horse, i.e. the targets were set by 'political consensus' and then the attempt was made to complete the documentation and public participation exercise to fit. The most extreme example of this is how the renewable energy aspects of the '20-20-20 by 2020' programme were implemented, as the Commission Staff Working Document states; there were two main options for the distribution of the effort in renewable energy:

- "On the basis of Member States' national renewable energy resources potential".

- "On the basis of requiring half of the effort to be made through a flat-rate increase in the share of renewable energy and other half weighted by GDP, modulated to take account of national starting points and efforts already made".

136 http://www.ocei.gov.ie/en/DecisionsoftheCommissioner/Name,12832,en.htm

The document concluded that the combination flat rate / GDP option was more appropriate and better respects the criterion of fairness. Indeed Recital (15) of Directive 2009/28/EC, which set a 20% target for renewable energy, is clear in that this was the manner in which the targets were allocated to each Member State:

- "The starting point, the renewable energy potential and the energy mix of each Member State vary. It is therefore necessary to translate the Community 20% target into individual targets for each Member State, with due regard to a fair and adequate allocation taking account of Member States' different starting points and potentials, including the existing level of energy from renewable sources and the energy mix**. It is appropriate to do this by sharing the required total increase in the use of energy from renewable sources between Member States on the basis of an equal increase in each Member State's shares weighted by their GDP**, modulated to reflect their starting points, and by accounting in terms of gross final consumption of energy, with account being taken of Member States' past efforts with regard to use of energy from renewable sources".

One can point out that the most fundamental prerequisite of an environmental assessment is knowledge of:

- The environmental objectives of the programme;
- The alternatives considered to achieve them and;
- The current state of the environment and the likely evolution thereof without implementation of the plan or programme.

If we consider the case of Ireland, which is no different than the other Member States, then clearly no assessment was made of how this target was to be achieved from either a technical, environmental or economic perspective. How then did the Aarhus Convention's requirement for the consideration of the environmental aspects of plans, programmes and policies, which is a prerequisite for the application of Article 7, get applied?

With regard to public participation requirements, these were by-passed by the EU; the Irish public were simply not engaged in the development of this 16% target for Ireland. Firstly, no assessment was completed in the development of this 16% target, as to how this would be achieved, what environmental impacts there would be, what environmental benefits, if any, would occur and what alternatives were considered. However, the Aarhus Convention is clear in Article 6 paragraph 4 that:

- "Each party shall provide for early public participation, when all options are open and effective public participation can take place".

So what exactly happened to comply with the above? One can be very diligent and check the website of the EU Commission in Dublin and route through to the general section on consultations[137], but that takes an awful lot of effort. Can it be considered as informing the public? The European Court of Justice in case C-427/07 has found against the Irish State in a case taken by the European Commission over the implementation of Directive 2003/35/EC, which implements many of the requirements of the Aarhus Convention on public participation. In fact they made it very clear:

- "The Court pointed out that one of the underlying principles of Directive 2003/35 was to promote access to justice in environmental matters, along the lines of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters. Therefore, the obligation to make available to the public practical information on access to administrative and judicial review procedures laid down in the sixth paragraph of Art. 10a of the EIA Directive and Art. 15a of the IPPC Directive, amounted to an obligation to obtain a precise result which the Member States must ensure was achieved".

- "The Court held that, in the absence of any specific statutory or regulatory provision concerning information on the rights thus offered to the public, the mere availability, through publications or on the internet, of rules concerning access to administrative and judicial review procedures and the possibility of access to court decisions could not be regarded as ensuring, in a sufficiently clear and precise manner, that the public concerned was in a position to be aware of its rights on access to justice in environmental matters".

Clearly just putting something on the website of the Commission's office in Dublin is not informing the public in 'an effective manner'. It is also interesting to see what was put on the website with regard to Biofuels in April 2007[138], which was one component of the 20% EU target for renewable energy by 2020 and forms part of Ireland's renewable target and Renewable Energy Action Plan:

- "The Commission's public consultation addresses questions such as how to achieve a 10% biofuel share by 2020 and how to ensure environmental sustainability. As part of a range of proposals for an Energy Policy for Europe adopted earlier this year, the Commission set out to encourage the production and use of biofuels by proposing a minimum target for biofuels of 10% of vehicle fuel by 2020 and a 20% target for the overall share of renewable energy. The consultation is aimed at helping the Commission to draft proposals on incorporating these targets into legislation".

It was essentially a 'vox pop' based on four questions:

- How should a biofuel sustainability system be designed?

- How should overall effects on land use be monitored?

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137 http://ec.europa.eu/ireland/press_office/media_centre/april2007_en.htm

138 http://ec.europa.eu/ireland/press_office/media_centre/april2007_en.htm

- How should the use of second-generation biofuels be encouraged?

- What further action is needed to make it possible to achieve a 10% biofuel share?

There was simply no environmental assessment presented for review. The reality of the situation is very disturbing, as in 2003 when the EU set an indicative target of 5.75% biofuels penetration in the EU transport sector by 2010, the Irish Food and Agricultural Development Authority Teagasc quietly pointed out that even if our available land under tillage was doubled, we would struggle to produce 5.75% of our diesel requirement by planting rapeseed, and that was ignoring the Petrol replacement target.

Unfortunately what we now have is binding National renewable targets set by essentially diktat, in Ireland's case a 16% target, in the complete absence of any form of proper public participation. As mentioned already at a National level there has yet to be a Strategic Environmental Assessment completed for the renewable energy programme or any consideration of alternatives to meet the objectives in the legislation. The whole programme has been politically driven, one could say with some ruthlessness by the previous Administration. With regard to the simple question related to the justification for this enormous expenditure, i.e. how many million tonnes of greenhouse gases were to be saved by increasing the country's share of renewable energy to 16%? No idea, it was never assessed.

Article 4 of Directive 2009/28/EC required that each Member State submit a National Renewable Energy Action Plan (NREAP) to the EU Commission by 30th June 2010, according to a template defined by Regulation 2009/548/EC[139]. These plans provided detailed roadmaps of how each Member State expected to reach its legally binding 2020 target, for the share of renewable energy in their final energy consumption. Member States were required to set out the sectoral targets, the technology mix they expected to use, the trajectory they were to follow and the measures and reforms they were to undertake to overcome the barriers to developing renewable energy. What is interesting is that this Regulation simply did not require the projected greenhouse gas savings to be specified, even though Recital (1) of Directive 2009/28/EC clearly stated:

- "The control of European energy consumption and the increased use of energy from renewable sources, together with energy savings and increased energy efficiency, constitute important parts of the package of measures needed to reduce greenhouse gas and comply with the Kyoto Protocol to the United Nations Framework Convention on Climate Change, and further Community and International greenhouse gas emission reduction commitments beyond 2012".

Indeed Member States were required by Regulation 2009/548/EC to give a summary of the National Renewable Energy Policy:

- "Please give a short overview of the national renewable energy policy describing the objectives of the policy (such as security of supply, environmental, economic and social benefits) and the main strategic lines of action".

139 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32009D0548:EN:NOT

That was the only reference to environmental in the regulation. Furthermore, **Section 5.3, the assessment of impacts, such as greenhouse gas savings and expected job creation, is completely optional. Indeed the Irish National Renewable Energy Action Plan doesn't even attempt to quantify any environmental objectives and it certainly doesn't contain any data on greenhouse gas savings or alternatives considered.** Indeed when one goes in to the EU website[140] and reviews the assessment of impacts for many of these National Renewable Energy Action Plans, such as France, the Netherlands, Denmark, Sweden, or the EU's own assessment report[141] there is nothing on the environmental impacts or benefits of these plans.

Furthermore as regards details on public consultation specified in Section 5.4 (c) of the National Renewable Energy Action Plan template, the Irish Action Plan stated:

- "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".

- "Following this 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".

On the website of the Department of Communications, Energy and Natural Resources, there is no access to the submissions or information on how due account of the public participation exercise was taken account of in the final decision.

In my Access to Information request to the EU Commission in relation to the approval of the REFIT programme in Ireland, see Section 9 of this Reply to UNECE, all I received was a Note to File 0645 in relation to my meeting on the 3rd December 2010 with DG Environment and DG Energy, see Annex 15. This included the following point made by the Commission:

- "**So far as Directive 2001/42 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. Ireland had confirmed that several plans relevant to renewable energy would undergo a Strategic Environmental Assessment process, including an offshore plan for which the Strategic Environmental Assessment process had already been launched".

[140] http://ec.europa.eu/energy/renewables/transparency_platform/action_plan_en.htm

[141] http://www.ecn.nl/units/ps/themes/renewable-energy/projects/nreap/

However, the Irish National Renewable Energy Action Plan is clearly being used as a decision criterion for wind farm developments which fall under the Environmental Impact Assessment Directive, 85/337/EEC as amended. See for example the decision by An Bord Pleanala in case PL 05B.237656, in which the first reason for approving 19 wind turbines in a sensitive landscape in Co. Donegal was:

- "The National Renewable Energy Action Plan to deliver 40% of electricity from renewable resources by 2020".

A similar case involving five turbines is PL 24.237469. Furthermore, when Strategic Environmental Assessments are completed in Ireland, such as for the offshore component, see Section 5.6 of this Reply to UNECE, or for the Grid 25 expansion[142], there is a complete failure to quantify the environmental objectives in terms of actual savings in greenhouse gases and alternatives considered. Instead everything is justified by reference to renewable targets, which were never properly assessed or subject to proper public participation.

The Aarhus Convention is completely clear, there has to be an element of environmental foresight in the decision-making process, the reality is that both at an EU and Member State level with regard to the renewable energy programme, this simply has not occurred.

Requirement of the Convention	Actual situation
Article 5 paragraph 7 (a) requires that each party shall publish the facts and analyses of facts which it considers relevant and important in framing major environmental policy proposals. Article 7 requires 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. With this regard the following Sections of Article 6 apply: "Each party shall provide for early public participation, when all options are open and effective public participation can take place". "The public concerned shall be	There was a complete failure to comply with these measures both at EU and Member State level. No documentation has been prepared that provides as a minimum; (i) an environmental assessment of the mandatory targets set, (ii) a consideration of the alternatives to meet the relevant environmental objectives and (iii) the current state of the environment and the likely evolution thereof without implementation of the plan or programme. The fact that there has never been the most basic consideration of the environmental aspects of the renewable energy programme in Ireland is a clear breach of Article 5 paragraph 7(a) and Article 7 of the Convention. Furthermore the general Irish Public were simply not given an opportunity to participate during preparation of this plan when all options are open and

142 http://www.eirgrid.com/media/Draft%20Environmental%20Report%20for%20Implementation%20Programme.pdf

informed, either by public notice or individually as appropriate, early in the environmental decision-making procedures, and in an adequate, timely and effective manner".	effective public participation can take place. Indeed they were never properly informed or provided with a real and effective opportunity to engage, in a transparent and fair public participation exercise, at any stage of the development and implementation of this renewable energy programme.

8. COMMC54 QUESTION 3 – PENDING REMEDIES, BOTH THOSE OF A JUDICIAL AND OF AN ADMINISTRATIVE NATURE, AT NATIONAL AND EUROPEAN LEVEL

8.1 Possible appeal to the High Court of decision CEI/09/0016 by the Commissioner for Environmental Information

In Section 7.2 of this Reply to UNECE the possibility of appealing the decision CEI/09/0016 to the High Court was discussed. The Commissioner's role is limited to providing access to documentation, when it is there. She is very clear in that it is outside her remit as Commissioner to adjudicate on how public authorities carry out their functions generally. Therefore the option would be to pursue a legal case against the State in relation its failure to complete the necessary procedures, such as Strategic Environmental Assessment or equivalent procedures related to public participation in decision-making. However, as has been pointed out in Section 4.5.2 of this Reply to UNECE, there are huge problems with regard to Access to Justice, in particular the prohibitive costs.

8.2 Other decisions pending before the Commissioner for Environmental Information

As has been documented in detail in Section 7.3 there are three outstanding appeals being processed by the Commissioner for Environmental Information:

- CEI/10/0016 in relation to the Poolbeg Waste to Energy Plant and the Department of the Environment, Heritage and Local Government.
- CEI/11/0002 in relation to access to the Waste Policy Submissions and the Department of the Environment, Heritage and Local Government.
- CEI/10/0003 in relation to statements made by Minister Ryan with regard to the cost of wind energy and the Department of Communications, Energy and Natural Resources.

In addition an appeal was lodged on the 20th May 2011 in relation to AIE/2011/012 of the Department of the Environment, Heritage and Local Government, which involved the Waste Policy Submission and the Department's requirement for financial payment for search and retrieval, for documents relating to procedures and norms for public participation and those generated with regard to taking due account of the outcome of the public participation exercise on the waste policy. As of early June 2011 and official appeal number had not been assigned to this case.

8.3 Investigation by the EU Ombudsman (2587/2009/JF) concerning infringement of Environmental Legislation

On the 16th January 2011, I submitted my final documentation to the Ombudsman, based on an opportunity to comment on the reply from the Commission, which had finally be supplied in early January to his 29th October request[143]. About two weeks later I contacted the case officer to confirm that the documentation had been received and to enquire about when the case would be resolved. I was told that due to the complexity of the issues it would be early summer.

After receiving at the end of January notice of the UNECE communication being accepted as ACCC/C/2010/54 and the questions in Communicant's letter relating to the EU Ombudsman, EU Commission (CHAP (2010) 00645) and Garda Bureau of Fraud Investigation, I did contact these three organisations by e-mail, pointing out the questions in relation to themselves. None chose to reply to this issue.

On the 25th May I received a letter from the EU Ombudsman P. Nikiforos Diamandouros, in which he acknowledged receiving the information on the UNECE Communication in January and further information related to the complaint on the 12th March, see Section 11.2 of this Reply to UNECE. In it he stated:

- "Given the time that has elapsed since you last wrote to me, I am writing to give you an update on the handling of your complaint".
- "I regret that it has not been possible to complete my examination of the case. Please be assured, however, that every effort is being made in order to complete the necessary analysis as soon as possible".
- "I will inform you of the next steps relating to the above inquiry as soon as possible and, in any event, before the end of August 2011".

8.4 Formal complaint investigation by EU Commission (CHAP(2010) 00645) related to compliance with EU Environmental Legislation

There is extensive scope and detail in the issues covered in this Reply to UNECE. However, it is also relevant to point out that most of the material has already been submitted on the CHAP (2010)00645 complaint file. Indeed over a 20 month period since documentation was first submitted to the Commission in August 2009, they were informed of:

- Constant failures with regard to Pillar I of the Convention, in which not only was there a refusal to answer requests for information, but that there was a culture of dissemination of information which clearly was not transparent, coupled to constant failures to have information that was required for proper legal compliance of the relevant public authority. Indeed, this information generated by myself and others lead to twelve cases with the Commissioner for Environmental Information.
- With regard to Pillar II what can only be described as a complete debacle in relation to the Corrib development, which in no uncertain

[143] http://www.unece.org/env/pp/compliance/C2010-54/Communication/Annex%203%20(a-c)%20file%20on%20EU%20Ombudsman/OmbudsmanRequestToCommission29.10.10.pdf

terms can be traced back to the situation that almost 26 years since the Environmental Impact Assessment Directive 85/337/EEC was introduced, it is still not transposed into Irish law. Furthermore with regard to Directive 2003/35/EC, which amended this Directive to meet the requirements of Article 6 and Article 9 of the Aarhus Convention, there has been no effort made to either transpose or comply with its requirements, particularly in relation to the Corrib development, where the decision of the competent authority based solely on consequence assessment, had no basis in either EU or National law.

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

- The implementation of a massive wind energy programme, which has never been through the most rudimentary of environmental assessments, with unknown economic costs and glaring technical limitations[144]. Where clearly whatever tenuous connection with environmental benefit in relation to greenhouse gases would have been obtained at a fraction of the cost by other technical approaches. With regard to the legalities of this programme, despite no environmental assessment of this programme ever been completed at EU and National level, we have not only 1,680 MW of wind energy in operation, representing about a thousand turbines in our landscape and €3 billion in capital expenditure, but a further 1,000 MW in construction. The reason for the granting of the planning approvals for these numerous projects was the very policies, which had completely bypassed the principles of the Aarhus Convention.

Clearly there has been no urgency at the EU Commission for enforcement measures related to the Environmental Acquis and / or the Aarhus Convention. Simply put they never contacted me about progress on the complaint file. When I contacted them at the end of August 2010 about a meeting with myself and others to discuss the huge problems in Ireland[145], it took three months until that meeting occurred. Indeed on that meeting with DG Environment and DG Energy in Brussels on the 3rd December, there was very little interest in the issues raised on the CHAP(2010)00645 file or at the meeting, see the Commission's Note to File 0645 in Annex 15. As regards the critical aspect of Access to Justice, all that was stated in this note was:

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[144] Even the Government's own economic advisory institute, the ESRI, in their April 2011 Review of Irish Energy Policy is calling for a significant reduction in the financial support for the renewable sector and that "Ireland should contribute to a review of EU Policy on renewables, as current European policy is likely to increase the cost of reducing emissions while providing limited security of supply advantages":
http://www.esri.ie/news_events/latest_press_releases/a_review_of_irish_energy_/index.xml

[145] See Annex 4 of:
http://www.unece.org/env/pp/compliance/Compliance%20Committee/54TableEU.htm

- "So far as Directive 2003/35 was concerned, the Commission was aware of access to justice problems in Ireland and was addressing these".

This is not very encouraging given that nearly six years previously, in February 2005, when the EU ratified the Aarhus Convention; there was a commitment that those rights were in place. Furthermore there was clearly no concept or consideration of the appalling damage the resulting rampant maladministration was doing to people's businesses and livelihoods. As far as DG Environment was concerned, the environmental and legal aspects of the renewable energy programme, being driven remorselessly by DG Energy, had nothing to do with them. Furthermore the fact that the citizen in Ireland certainly didn't have access to justice and was left powerless to do anything about the systematic and deliberate failures of the Irish Administration, was clearly not a priority or anything they had to be apologetic about. My position was, as I outlined in my 16th January Submission to the EU Ombudsman below.

- "If we consider the position with regard to the EU Commission, then this is clearly addressed in COM(2002) 725 on "Better Monitoring of the Application of Community Law", which clearly highlights how the Commission is the Guardian of the Treaties and has a duty to remind the Member States of their commitments and to seek the best instruments at all times. The document clearly states that merely enforcing the law against infringement is not enough; there is a need for prevention also. COM(2002) 725 also states that "it is not only the European and national institutions that are concerned by all this. Ultimately this communication in many respects concerns the citizens themselves. Through information, participation and access to justice, they are to be actors of a Community based on the rule of law". The key aspect of this is the United Nations Economic Commission for Europe (UNECE) Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters. COM(2008) 773 on "Implementing European Community Environmental Law" further stresses how preventative and corrective action is required".

While I sent them in the information related to maladministration as I and others gathered it, I certainly was not of the opinion as to why I or others should, at our own time and expense, be preparing detailed court evidence for the EU Commission, which they, based on their own agendas, may or may not then progress to an enforcement action. Furthermore, the only feedback I got on the complaint process was made clear in the Commissions reply to the EU Ombudsman in April 2010 with regard to the CHAP (2010)0645 investigation:

- "Where information provided by the complainant identifies cases where issues of non-compliance with the provisions of Directive 2003/4/EC are raised and the review mechanisms of Article 6 of the Directive have been exhausted, the Commission will raise these with the Irish authorities directly under the EU Pilot scheme".

Anything to do with the environmental aspects of the renewable energy programme was clearly 'off-limits'. One would also draw the conclusion from the Note to File 0645 in December 2010 that the point the Commission made, see below, clearly demonstrated that it was in no mood to do anything:

- "In general, the Commission needed to have very clear, precise evidence if it was to be in a position to substantiate a breach of EU legislation".

If we consider the Aarhus Convention, then as a Party to the Convention the EU has obligations to 'ensure' certain requirements, such that the way in which public authorities make environmental information available to the public is transparent, and to 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. In addition as has being pointed out before, there is a requirement for proper enforcement measures, to maintain a clear, transparent and consistent framework to implement the provisions of this Convention.

Not only have the EU Commission failed to provide assistance in relation to the systematic maladministration occurring in Ireland, but in the more than two years since I first contacted them in February 2009 with a letter highlighting the irregularities in connection with the renewable energy programme, they have regularly broken administrative rules binding on them, to avoid having to take action. It may well be that DG Environment Unit 2A, Compliance promotion, governance and legal issues is under resourced, such as their clearly expressed reluctance to challenge legal teams from the Irish State, but at the same time the financial and other losses that are occurring due to the extent of maladministration occurring are enormous. One can also point out that €110 million can be easily found for an interconnector, based on nothing but the perception that green electricity actually works.

On the 2nd April, I made an online request for documentation[146] related to:

- All documentation on case CHAP (2010)00645 generated by the EU Commission excluding that provided by myself to the case file.

Note: This was prompted by an observation that an Irish Environmental Consultancy had a case opened in March 2011 with the EU Ombudsman[147], which alleged that the European Commission failed to inform it about the status of its infringement complaints against the Irish authorities, complaints which related to infringements of environmental law by the Irish Authorities:

- 1) The Commission failed to provide the complainant with copies of its correspondence with the Irish authorities relating to complaint P2001/4715 and complaint 2002/4473.

- 2) The Commission failed to provide the complainant with information relating to the status of complaint CHAP (2010) 01173 and complaint CHAP (2010)03320.

While **I never received a reply from my on-line request**, I got a reply from Jean-Francois Brakeland, Head of Unit 2A of DG Environment on the 26th April, see Annex 16. Their position was that:

146 http://ec.europa.eu/environment/env-informa/

147 http://www.ombudsman.europa.eu/en/press/release.faces/en/10183/html.bookmark

- "Based on a first review of the documents you have sent us and the discussions that took place during your meeting with DG ENV and ENER officials on 3 December 2010, **we are not in a position to clearly establish any infringement of EU law**".

Clearly they were unhappy with the quantity of information, which had been sent to them, amounting to some sixty e-mails. Their position was:

- "If you wish to pursue this matter further, we would ask you to send us a new complaint, setting forth clearly what infringements are you alleging and attaching the most relevant documents. Alternatively, please refer us to a specific e-mail already sent and we will regard that as the complaint. But please bear in mind that we would not then further examine all the other correspondence in the file. Otherwise, I cannot see grounds for further pursuing this complaint file and will propose to close it. Please provide me with your reply within one month of your receipt of this letter".

Indeed Jean-Francois Brakeland made it clear once again in his letter of 20th May to me that; (a) his unit was in charge of Aarhus Convention issues and (b) he saw no grounds for further pursuing this complaint file.

There is only one conclusion, which can be drawn to date from the CHAP (2010)0645 complaint investigation to date, and that is that the EU Commission does not ensure or enforce any of the Articles of the Aarhus Convention in Ireland.

Requirement of the Convention	Actual situation
Article 3 paragraph 1: Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access to justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.	While the EU ratified the Convention in February 2005, the situation is that the necessary legislation is not in place in Ireland. Furthermore the CHAP (2010)00645 complaint process clearly demonstrated that the EU has no proper enforcement measures in relation to the Convention and clearly does not ensure that the necessary provisions are adhered to.

8.5 Complaint submitted to Garda Bureau of Fraud Investigation concerning elected and non-elected officials (FB 11/242.09)

It is a sad but indisputable fact that the Irish Police has always been a deeply politicised body. For years it failed to prosecute numerous instances of clerical sexual abuse. In recent years it has been essentially completely absent in the face of serious white collar crime, both within the political system and the financial system. Indeed the Moriarty Tribunal, which ran for 14 years, demonstrated in early March 2011 that the former Minister for Communications, Michael Lowry, passed in 1995 confidential information on to the eventual winner of the national mobile phone tender, Denis O'Brien, who reciprocated with payments and loans. All the Police could say at the end of this tribunal in March 2011 was that they were adopting a 'wait and see approach[148]'.

The Garda Bureau of Fraud Investigation have been made well aware and in turn have acknowledged, the irregularities in the Irish Administration with regard to development of policies, including those which are clearly designed to put legitimate businesses out of operation, in order to provide the market place for those seen as political favourites, see Annex 17. The simple fact is they have chose not even to contact me about it, let alone do anything about it. While there is a Garda Ombudsman, they will only investigate cases against individual members of the force. They will not investigate the conduct of an investigation under the remit of the Garda Commissioner. In other words there is nobody investigating the 'gamekeepers', who clearly don't investigate the ruling elite.

[148] http://www.breakingnews.ie/archives/2011/0330/ireland/gardai-adopt-wait-and-see-approach-to-moriarty-report-499234.html

9. COMMC54 QUESTION 4 - HOW IT IS CONSIDERED THAT THE SEPTEMBER 2007 DECISION OF THE EUROPEAN COMMISSION TO APPROVE THE REFIT I PROGRAMME AMOUNTS TO NON-COMPLIANCE WITH THE CONVENTION

The origins of the REFIT I programme can be traced to the 2001/77/EC Directive on the promotion of electricity from renewable sources. While development of this Directive predated the ratification of the Aarhus Convention by the EU in February 2005, the implementation of its provisions in Ireland, starting with the Energy Green paper in 2006, certainly fell within the provisions of the Convention. As has been clearly outlined already, the renewable energy programme in Ireland has bypassed legal requirements for environmental assessment and proper public participation.

The impact of REFIT can be seen in Eirgrid's figures[149] for March 2011 in that they expect an installed capacity of 1,685 MW in 2011, of which 1,384 MW derived from the REFIT scheme and 300 from the previous schemes which dated back to pre 2006. So this REFIT scheme has had a massive impact, not only in terms of financial cost, but in that it has lead to the more than seven hundred wind turbines around the Irish landscape. Furthermore none of this would have happened if the EU had not approved, in September 2007, this State Aid N 571/2006 – Ireland support scheme.

Under Article 3 paragraph 1 the EU had a clear obligation to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention. Clearly the Irish authorities had not complied with the terms of the Convention. When I highlighted this at my meeting with the EU Commission on the 3rd December 2010 and asked how exactly DG Environment and DG Energy had reviewed the environmental aspects of this programme, I was astounded to get 'blank faces' and then the reply that the Competition Directorate General had approved it, or as the Note to File 0645, Annex 15, stated:

- "So far as approval of the feed-in tarriff was concerned, this appeared to relate to Commission state aid approval managed by DG COMP".

As will be highlighted further in Section 11.2 of this Reply to UNECE, I did sent an access for information on the environment request on the 12th December 2012, under Regulation 1367 of 2006, to DG Environment and DG Energy relating to REFIT, requesting:

- "What is the approval process at Community level for state aid for Renewable Energy? In particular I am highlighting the role of public participation at National Level, the adequacy of the Strategic Environmental Assessment, the assessment of how the opinions at the public consultation on the Strategic Environmental Assessment are taken into account, how the Community Guidelines on state aid are applied with regard to the amount of aid being the minimum needed to achieve the environmental protection sought, the procedures which

[149] Appendix of: http://www.seai.ie/Publications/Statistics_Publications/Energy_Modelling_Group/Impact_of_Wind_Generation_on_Wholesale_Elec_Costs/Impact_of_Wind_Generation_on_Wholesale_Electricity_Costs_in_2011.pdf

allow NGOs to request an Internal Review of the decision on state aid under Regulation 1367 of 2006".

- "How are the REFIT II Tariffs in Ireland for renewable energy going to be approved given that there was no Strategic Environmental Assessment, cost / benefit analysis, or consideration of alternatives for the REFIT I Tariffs (http://www.ocei.gov.ie/en/DecisionsoftheCommissioner/Name,12832,en.htm), which were approved in September 2007 under State Aid N 571/2006?"

When I finally got an answer to this on the 19th April it was:

- **"Please find attached the only document that falls within the scope of your request. All other documents in this file were submitted by you".**

The document in question comprised the Note to File 0645.

Requirement of the Convention	Actual situation
Article 3 paragraph 1: Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access to justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.	The EU ratified the Convention in February 2005 and approved the REFIT programme in September 2007. Without this approval for State Aid, the resulting 1,384 MW of wind farm construction in Ireland would not have occurred. Not only did this wind energy programme by-pass the provisions of the Convention, which applied to its implementation at National level, but the EU failed to take any considerations of environmental aspects or obligations under the Aarhus Convention in its approval process for the State Aid.

10. COMMC54 QUESTION 5 – HOW IT IS CONSIDERED THAT THE MARCH 2010 DECISION OF THE EUROPEAN COMMISSION TO ALLOCATE €110 MILLION TO THE INTERCONNECTOR BETWEEN IRELAND AND THE UK AMOUNTS TO NON-COMPLIANCE WITH THE CONVENTION

Clearly the €110 million input from the EU into this €600 million investment project played a significant role in the decision making process to proceed with this project. As has been discussed in Section 7.4 of this Reply to UNECE, the EU Commission's 'Priority Interconnection Plan' of January 2007 (COM (2006) 846 final) was a key justification for this project. The fact that there are serious technical and economic limitations with the East-West Interconnector project has already been pointed out. However, so too are there such questions in relation to the EU Commission's 'Priority Interconnection Plan' in relation wind energy growing from 41 GW in 2005 to nearly 67 GW in 2008. As the Commission's document states:

- "Connecting more electricity generated from renewable sources to the grid and internalising balancing costs for intermittent generators will for instance require an estimated €700 – 800 million yearly".

Once again these are staggering costs, not only financial but from the impact these additional high voltage transmissions systems will have on the environment. One can of course ask; why are we doing it? Where for example is the environmental assessment in relation to this wind programme, with its associated major grid expansions? What exactly are the environmental benefits, such as in terms of greenhouse gases, and what were the alternatives considered to achieve them? The reality is I simply cannot find any environmental assessment in this regard completed for either the EU's renewable energy programme or Priority Interconnection Plan. Furthermore there clearly was no proper public participation with regard to Article 7 of the Convention completed for this plan, even though the terms of the Convention at that time were binding. Indeed recent studies completed by the Renewable Energy Foundation[150] and Poyry have demonstrated that:

- "(i) A geographical spread of wind (and, Pöyry argue, solar) supported by a supergrid would not resolve the problems of intermittency because similar weather patterns can extend across much of the continent of Europe and the UK and Ireland".

- "(ii) A substantial deployment of intermittent renewables leads to increased price volatility".

- "(iii) Intermittent renewables force the remaining fossil-fuelled plants to run in an inefficient manner, which in turn increases consumer costs".

[150] http://www.ref.org.uk/publications/227-new-study-confirms-ref-intermittency-studies

So why is this information coming to light after the funding programmes have been put in place and with regard to the €600 million interconnector between Ireland and the UK, the construction already started? Even the Irish Government's own economic advisory institute, the ESRI, in their April 2011 energy review,[151] clearly **highlighted the risks and costs that the Irish consumer will have to carry due to this interconnector. The whole reason why proper public participation procedures are mandatory under the Aarhus Convention is to reduce the incidence of this type of inappropriate project development.**

Section 5 and specifically Section 7.4 of this Reply to UNECE has already demonstrated how these procedures were bypassed, not only in the development of policies which were related to this interconnector, but with regard to the approval of the project's planning permit, which fell under Article 6 of the Convention. Despite this the EU approved the €110 million in funding.

Requirement of the Convention	Actual situation
Article 7 of the Convention relates to public participation concerning plans, programmes and policies relating to the environment. Article 6 relates to public participation in decisions on specified activities.	The EU ratified the Convention in February 2005 and allocated €110 million to the interconnector in March 2010. This project and the policies to which it related were subject to Articles 6 and 7 of the Convention. However, at both EU and National level these articles were not complied with.

151 http://www.esri.ie/news_events/latest_press_releases/a_review_of_irish_energy_/index.xml

11. COMMC54 QUESTION 6 – VARIOUS ALLEGATIONS THAT THE EUROPEAN UNION IS IN NON-COMPLIANCE WITH THE CONVENTION FOR HAVING FAILED TO PROVIDE ACCESS TO ENVIRONMENTAL INFORMATION AND / OR FAILED TO COLLECT AND DISSEMINATE ENVIRONMENTAL INFORMATION

11.1 General

As has already been highlighted in the UNECE webpage related to this Communication[152], the then EU Commissioner for Energy, Andris Piebalgs, was certainly not holding back his support for wind energy at the Irish Offshore Wind Energy Conference in Dublin on the 12th October 2009. As engineers in the private sector, who are constantly working in a competitive environment where money has to be used wisely, one can only look with utter amazement at how enormous sums of money, with a complete absence of accountability, are being poured into renewable energy, through either direct support schemes or very generous feed in tariff arrangements. In addition, when one questions these schemes, such as by seeking information or requesting it through the measures of the Aarhus Convention, one frequently comes up against a 'brick wall'.

Indeed if one goes into the EU's own website for the Aarhus Convention[153], which was significantly updated in the Spring of 2011, then there is a link to DG ENER activities, which when opened up solely relates to nuclear energy. There simply is nothing on the massive renewable energy programme that is now underway and how the Convention applies to it. Indeed as has been highlighted with regard to the CHAP(2010)0645 complaint and the 2587/2009/JF case with the EU Ombudsman, there is a complete refusal by the EU Commission to take into account any consideration of the environmental aspects of this renewable energy programme. Admittedly when one does examine more closely the 2009/28/EC Directive on renewable energy, it does state in Recital (90) that:

- "The 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, in particular as implemented through Directive 2003/4/EC on public access to environmental information".

The reality of how this applies can be best highlighted by the two examples in the next sections of this Reply to UNECE and, as has been already highlighted in Section 7.5 of this Reply to UNECE, the fact that the Renewable Energy Action Plans do not inform the public in a transparent manner as to what exactly are the environmental benefits, such as in terms of quantified greenhouse gas savings.

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152 http://www.unece.org/env/pp/compliance/C2010-54/Communication/Annex%204%20(a-f)%20Coirrespondence%20to%20EU%20Sept%202010/Annex4d_Reply_from_EU_Commission_DG_Energy_on_Statements_wrongly_attributed.pdf

153 http://ec.europa.eu/environment/aarhus/

If we consider Pillar I of the Convention, then this is applied to the EU Institutions under Regulations 1367 of 2006 and Regulation 1049 of 2001. While there is now more information on this on the EU Aarhus webpage, it is worthwhile considering COM(2010)351[154] on the "Report from the Commission on the application in 2009 of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents". The total number of applications was 5,055 in 2009, of which 8.37% or 423, related to DG Environment. In my opinion, given that we have 470 million citizens in the EU, this is a very small number and certainly does not indicate that the Aarhus Convention is working well. In particular with regard to Article 3 paragraph 2 of the Convention, which requires each Party shall endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters.

11.2 Request under Regulation 1367 of 2006 in relation to REFIT tariffs, offshore wind energy and statements made by the EU Commissioner for Climate Action

As I have stated in Section 9 on the 12th December 2010, I submitted a request under Regulation 1367 of 2006 in relation to REFIT, to the attendees from DG Environment and DG Energy at the meeting of the 3rd December. Note: At that stage there was no specific e-mail address in relation to access to information that I could find on the web pages of the Commission. As I had been unable up to that point to find any information on the performance of the Arklow Bank offshore wind energy farm, one of the first such built in Europe, see Section 5.6 of this Reply to UNECE, I had also included this fact and the following request for information:

- "Given that the Arklow Bank project was one of the first offshore wind energy parks completed and DG Energy's promotion of this technology (http://ec.europa.eu/energy/renewables/studies/doc/renewables/energy_rtd_success_stories.pdf), does DG Energy have the performance data for the Arklow Bank project request below or the same performance data on any European Offshore Wind Energy project?"

It may well be that such information should, according to the regulations, be supplied to the requestor within 15 working days, this certainly did not happen, as the chronicle of time events described later demonstrates.

On the 3rd February RTE made a broadcast on prime time morning radio praising the offshore wind industry, which included statements made by the EU Commissioner for Climate Action, Connie Hedgaard[155]. I was astounded at what the Commissioner was saying, the transcript of which is below:

- RTE: "Every EU country now has mandatory renewable energy targets to reach by 2020, since Ireland is blessed by perhaps the most

154 http://ec.europa.eu/transparency/access_documents/docs/rapport_2009/COM2010351_EN_ACT_part1_v1.pdf

155 When an Access to Information on the Environment Request was made by Jerry Waugh in relation to the environmental information supporting the technical content of the programme, RTE claimed exemption from the Regulations based on an exemption in the Freedom of Information legislation for journalistic sources.

abundant wind resources on the planet could we reach those targets and then become a net exporter? Connie Hedegaard is the EU Commissioner for Climate Change".

- Commissioner Hedegaard: "I think that it is very clear that in Ireland, particularly on the West Coast, you will have a huge potential, for instance for offshore wind. Now I myself come from Denmark, where we have done this for a number of years, we have seen that in some of our most rural areas, that actually creates jobs. It is not something that we can just claim that can be proven".

- RTE: "Dirk Liedfried from Strabag in Cuxhaven claims that what has been achieved there can be replicated in Ireland …… The investment will have to come from the private sector".

- Commissioner Hedegaard: "A lot of long term investors, for instance pension investors, they really put their money into this because they can see with the target we have set and also with the prospect of the European Area continuing to look for more energy efficient and resource efficient solutions. This is not just a trend that will be over in one year or two years from now. It actually pays off, it is sound economics.

So on the 5th of February I sent in a request under Regulation 1367 of 2006 stating:

- "As you can see from the attached, the UNECE Aarhus Convention Compliance Committee has started a case against the EU with regard to implementation of the renewable energy programme in Ireland. It is clear that Commissioner Hedegaard supports this programme, particularly the offshore renewable energy section. I refer to her statements made on the National Broadcaster RTE on 3/2/2011: http://www.rte.ie/news/2011/0203/morningireland.html (4th item on morning Radio programme). The Aarhus Convention Compliance Committee has specifically requested that I reply to them in June with further details, in particular with regard to the offshore renewable energy programme. My experience to date is that not only at a National level, but at EU level, public officials do not see themselves obliged to reply to Aarhus requests for information on the environment nor ensure that information on the environment disseminated by them is "up to date, accurate and comparable". Given the Commissioner's enthusiasm for offshore wind energy on RTE, I consider it only appropriate that her officials in DG Clima provide the information requested already on the 12-12-2010 to DG Energy and DG Environment, but never answered by them in accordance with Regulation 1367 of 2006 (Aarhus Convention Pillar I), see attached. Furthermore given the support and enthusiasm of the Commissioner for offshore renewable energy in Irish waters, even the West Coast, I am requesting a copy of the documentation at the EU Commission for such developments under Regulation 1367 of 2006".

As by the 26th February I had not received a reply, I sent in a confirmatory application. Finally on the 3rd March I received a reply from DG Clima:

- "Thank you for your e-mail of February the 5th, sent to the assistant of Director General Mr Delbeke, plus follow-up email of 26 February also sent to Commissioner Ms Hedegaard".

- "In your message you point out that: a) you have already sent an access to document request to DG ENER and DG ENVI - where you ask for documentation referred to in the case open by the UNECE Aarhus Convention Compliance Committee against the EU with regard to implementation of the renewable energy programme in Ireland - on December 12th and that; b) in the context of the Commissioner Ms Hedegaard's intervention during a radio programme on February the 3rd regarding off-shore energy wind energy in Ireland, you request a "copy of the documentation at the Commission for such developments".

- "Due to internal delays, for which we sincerely apologise, your request was encoded yesterday under Gestdem number 2011/1106".

- "Therefore, under the terms of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, you will receive a reply within the next 15 working days, precisely by March 23rd".

- "Regarding point b) above, please note however that no background documentation is connected to your request, as the Commissioner's statement did not refer to any particular project or development, nor was it based on any one or particular piece of documentation but on publicly available information and her general experience, knowledge and political views [1[156]]".

On the 12th March 2011, I sent in a complaint to the EU Ombudsman highlight firstly that I had not received the information I had requested in December, despite a confirmatory application sent on the 13th February 2011 to DG Environment and DG Energy. Furthermore with regard to the Commissioner's statements on the National Broadcaster, to me it was clear that the Irish public are entitled to clear and accurate statements of fact from such a senior Member of the Commission. Clearly this did not happen, as has now been confirmed in the reply finally received from DG Clima. As I stated in the complaint:

- "**Transparent environmental information, as is specified in the Aarhus Convention, is not based on publicly available information, general experience, knowledge and political views. It is as is specified in the relevant legislation[157] relating to Access to Information on the Environment, based on information which is up to date, accurate and comparable.** In this regard with regard to the statements below and the reply received, I am pointing out":

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156 [1] For example, the significance of Ireland's wind potential has been established in a publicly available report from the European Environment Agency: http://www.eea.europa.eu/publications/europes-onshore-and-offshore-wind-energy-potential

157 Directive 2003/4/EC, Regulation 1367 of 2006.

- "The complete failure of Wind Energy to provide sustainable jobs, despite the huge export market for this technology, blatantly being promoted by Commissioner Hedegaard[158]".

- "The appalling lack of quality in the quoted European Environment Agency report, which draws on its source of 'facts' from the 'unbiased' position of the European Wind Energy Association (EWEA), which in turn has been extensively financed by the EU Commission[159]. An example of the appalling lack of quality in this Report can be seen by comparing Sections 6.2 and 6.3 with the proper, i.e. 'transparent', assessment in the Irish Academy of Engineering report[160]".

With regard to the other aspects of the request for information I finally received the following reply on the 4th April from Tom Howes, Deputy Head of Unit C1 - Renewable energy policy, Directorate General for Energy:

- "In reply to your request for access to documents GESTDEM/2011/1406 we regret to inform you that we are not in the possession of the performance data for the Arklow Bank project".

- "As far as your request for access to documents containing performance data for any other offshore wind energy projects is concerned, we regret to inform you that it is unfortunately not sufficiently precise to be tackled in the framework of Regulation 1049/2001. We would therefore appreciate if you could clearly define the specific documents you are asking for".

So on the 11th April I replied:

- "The longest operational offshore wind parks in Europe are":
    - "Horns Rev 1 in Denmark: 80 by 2 MW turbines"
    - "Nysted (Rodsand 1) in Denmark: 72 by 2.3 MW turbines"
    - "North Hoyle in Great Britain: 30 by 2 MW turbines"

- "The offshore park with the largest turbines is Alpha Ventus in the German North Sea with 12 by 5 MW turbines. If you are in the possession of performance data on these units I would be interested to review".

158 http://www.cepos.dk/fileadmin/user_upload/Arkiv/PDF/Wind_energy_-_the_case_of_Denmark.pdf

159 http://www.ewea.org/index.php?id=91

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

Two months later in early June I am still awaiting a reply to the above. **One can only ask the obvious question, if they themselves don't have the data, how did they assess the policy and programme they are pursuing with such vigour**[161]? Furthermore their; "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Offshore Wind Energy: Action needed to deliver on the Energy Policy Objectives for 2020 and beyond", despite the staggering costs involved, simply doesn't quantify what environmental benefits, such as in terms of tonnages of greenhouse gases avoided, are involved. Does anybody actually look at actual performance data and do some arithmetic before setting mandatory targets?

To me it is just incredible that so much money is being poured into this sector, with respect to Ireland it is planned under REFIT II to give a tariff of €140 per MWh to offshore wind, which is four times what reliable electricity can be generated for in a modern high efficiency combined cycle gas turbine. Yet clearly the EU Commission, who is driving this relentlessly, have never done proper assessments on how it works, either from a technical or environmental perspective. If we take the Arklow Bank for instance, the data for which I now have, when this was installed in 2004 it had seven 3.5 MW turbines, for a total of 25 MW. Clearly as it can be seen from the shoreline for more than three years, two of the turbines are bust, while the data shows that the others are seizing up, such that the whole wind farm is now only producing an absolute maximum of 10.9 MW. The media reports on other offshore wind farms in Europe report similar technical malfunctions. So why on earth do we have a Policy to put hundreds more of these units into the Irish Sea, in addition to the seven there since 2004, which are clearly a complete failure?

Finally to conclude this section, on the 19th April I received my reply in relation to the REFIT questions, discussed in the previous Section 9 of this Reply to UNECE, i.e. the Note to File 0645. So all in all it took four months to get an answer, an answer which demonstrated that by and large they had no data, data which is necessary to complete the most basic of environmental assessments.

Requirement of the Convention	Actual situation
Article 4 of the Convention relates to Access to environmental information. Information should be made available at the latest within a month. Article 5 requires that each Party shall ensure that the way public authorities make environmental information available to the public is transparent.	While the EU ratified the Convention in February 2005, the example above clearly highlights the limitations with regard to access to information and the transparency of information. Furthermore the absence of such data clearly demonstrates that EU officials have not completed the most rudimentary assessments of the policies and programmes they are promoting.

[161] The Commission's support for offshore wind energy is classified as a 'particular priority': http://ec.europa.eu/energy/renewables/wind_energy/wind_energy_en.htm

11.3 Access to Information Request in relation to EU Commission and the European Wind Energy Association (EWEA)

What is extremely disturbing is that when official documentation has been produced by the EU Commission and related institutions on renewable energy, there is a complete absence of independent technical analysis. Instead there are constant references to the European Wind Energy Association (EWEA) to justify the position taken. It goes without saying that the EWEA's role is to protect the interests of their members. It is certainly not their role to highlight the technical, economic and environmental limitations associated with their technology. They most certainly cannot be considered as a transparent, independent and objective source of information.

For instance to expand on the European Environment Agency report on "Europe's onshore and offshore wind energy potential", which was used to support Commissioner Hedegaard's statements, first of all it fails to quantify what the greenhouse gas savings are going to be. Secondly in Section 6.2 and 6.3 it concludes that wind energy penetration "of up to 40% of electricity demand can be achieved and that technical limitations do not appear to play any significant role"; as to the justification for reaching this conclusion, it used a report from the EWEA. The Irish Academy of Engineering have simply not support this conclusion and instead have voiced grave warnings about the technical limitations of such energy policies. Indeed they are not the only ones in Europe to have done so[162].

Furthermore, the EU Commission, while completely failing to take on independent technical advice in this area which does not meet its views, does not simply limit itself to using the EWEA to justify its position, but also is an active contributor to the funds of this organisation in order to promote its aims. As over the last two years I have had active contact and shared interest with the European Platform Against Windfarms (EPAW)[163], so I assisted them in preparing an access for information request under Regulation 1367 of 2006, which they submitted on the 6th April. This in particular related to the website Wind Energy - The Facts[164], which was developed by the European Wind Energy Association (EWEA) with funding from two projects from the EU Commission's Directorate General for Transport and Energy. The specific questions in the request related to:

- "The terms of reference for the two projects listed above, which resulted in the funding for this website and programme; for example, the costs, the justification and the measures to ensure compliance with Article 5 of the Aarhus Convention, i.e. that the information compiled by this project was up-to-date, accurate and comparable".

- "The consideration of alternatives and the selection process for the project team. In particular were independent environmental / energy consultants not considered for this funding rather than the European Wind Energy Association (EWEA)?"

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[162] For instance, the Institute of Engineers and Shipbuilders in Scotland are highly critical of their Government's wind energy strategy: http://www.iesisenergy.org/

[163] http://www.epaw.org/

[164] http://www.wind-energy-the-facts.org/

- "Note: wind farms are a 30-year old industry whose existence continues to depend upon annual multi-billion-euro support from the public purse. PR men from the industry itself (EWEA) are funded by the EU to write on a webpage, on behalf of EU institutions, "factual" information about their industry's environmental and other impacts. Surely, this must be considered bizarre in terms of objectivity and impartiality. Indeed, the webpage contains many inaccuracies. Their effect is to mislead the public, and the whole webpage reads like an apology of the industry whereas it was supposed to be an objective presentation of facts".

- "The consideration of alternatives and the selection process for designating the persons who will disseminate the information in question, inaccurate as it is: "The second year of the project will be dedicated to the updates on the website and to the organisation of a dissemination campaign through 5 workshops in France, Hungary, Latvia, Romania and Sweden." http://www.wind-energy-the-facts.org/"

- "The documentation relating to the criteria for assigning funding arrangements, such as to the two project examples above, to the eleven energy types defined as renewable in Directive 2009/28/EC. Considerations would be, for instance, the objectives in recital (1) of Directive 2001/77/EC and recitals (1), (12), (24), (26), (46) and (90) of Directive 2009/28/EC".

On the 19th May 2011 EPAW received a reply from Hans van Steen, Head of Unit C.1 – Regulatory policy & Promotion of renewable energy, Directorate-General for Energy. Details were provided on the second project, which was submitted under the Intelligent Energy Europe (IEE) programme. Note the EU contributed 50% of the €773,662 cost of the second project. As this dated to 2007, as opposed to the earlier project in 2002, it most certainly fell within the terms of the Aarhus Convention. It was then suggested that the EWEA should be contacted for further information on the project, while the letter then concluded with:

- "Finally I would like to draw your attention to the disclaimer included in the publication which makes it clear that 'the sole responsibility for the content of this webpage lies with the authors. It does not necessarily reflect the opinion of the European Communities".

EPAW has now sent in a confirmatory application on this request, in which clearly the requirements of the Aarhus Convention have not been met. In particular as to **how the EU Commission consider their disclaimer is compatible with Article 5 of 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."**

Requirement of the Convention	Actual situation
Article 4 of the Convention relates to Access to environmental information. Information should be made available at the latest within a month.	Regulation 1367 of 2006 implements Articles 4 and 5 of the Aarhus Convention as they apply to institutions of the EU. While the EU ratified the Convention in February 2005, the

Article 5 paragraph 2 requires that each Party shall ensure that the way public authorities make environmental information available to the public is transparent.	example above further highlights the limitations with regard to access to information and the transparency of information. Indeed the very fact that there is an absence of independent transparent analysis on the wind energy programme, instead of industry association funded programmes, is a clear example of a lack of intent to comply with Article 5 paragraph 2.

11.4 Some comments on availability of information

Clearly the EU as a Party to the Convention has failed to ensure the proper availability of adequate environmental information related to the massive renewable energy programme, which is now under way and has an even greater impact to follow. In addition proper environmental assessment and foresight is required for a programme of this nature, which will have not only massive financial costs, but will transform Europe's landscape, to a degree never before completed. There is also increasing frustration among citizens in the manner in which this is happen and in the increasing visible democratic deficit, in which mandatory targets have been assigned based on virtual diktat by officials, who do not appear to be answerable to anybody.

With regard to the basics of strategic environmental assessment, then clearly it should be known:

- What are the environmental objectives? In particular, exactly what quantity of greenhouse gas reduction is being achieved over the situation of no wind energy on the grid, versus the level that has now been installed and the level which is projected to be installed?
- What were the alternatives considered to achieve those objectives, for instance could greater use have been made of energy efficiency projects, as has been pointed out time and time again by the engineering profession?
- What would be the state of the environment without implementation of the plan? The key aspect here is what damage exactly is carbon dioxide causing? This has to be quantified, a point I have already raised in my case with the EU Ombudsman[165] with regard to the Principle of Proportionality.

[165] http://www.unece.org/env/pp/compliance/C2010-54/Communication/Annex%203%20(a-c)%20file%20on%20EU%20Ombudsman/FinalSubmissionComplaintToEUOmbudsmanMay2010.pdf

These most fundamental questions, clearly required by law under Annex I of Directive 2001/42/EC on Strategic Environmental Assessment, have never been addressed. There is therefore, such as in the Irish case, a pressing demand for a proper, fully transparent study to be completed by a panel of experienced international experts in association with Irish technical resources. This study will take time and effort, which should be funded by the EU which initiated this programme. In addition there should certainly be no more development of renewable energy until as such time as it is completed, given that legally the renewable programme should never have been initiated, in the absence of such a study being available for public participation.

12. EU QUESTION 1 – WHAT ACTIVITIES OR STEPS HAVE THE EUROPEAN UNION, THE EUROPEAN COMMISSION IN PARTICULAR, TAKEN TO MONITOR THE IMPLEMENTATION OF THE CONVENTION IN IRELAND, AND HOW DO THESE ACTIVITIES OR STEPS RELATE TO THE SUBJECT MATTER OF THE COMMUNICATION?

This Reply to UNECE has already demonstrated considerable maladministration in Ireland, which can be directly attributed to the failings to properly implement the Aarhus Convention. Furthermore the EU has clearly failed to ensure that the citizen's rights under the Convention are respected, indeed many of these rights, such as access to justice, are not even on the Statute Book. If the EU has taken steps to monitor the implementation of the Convention in Ireland, I simply cannot find the documentation to support that assertion, and I have looked. Indeed, neither can one find any documentation in which the EU has made an effort to educate the Irish public about the Rights they enjoy under the Convention. To me it is both very sad and strange that those few people, who seem to be trying to raise awareness of Ireland's failure with regard to ratification of the Convention[166], don't seem to be aware that it applies to EU Community Legal Order in Ireland, so in effect those Rights were in legal terms guaranteed already to citizens in Ireland, when the EU ratified in 2005.

With regard to Article 3 paragraph 1 of the Convention, the "Aarhus Convention – An Implementation Guide" is clear in that:

- "Paragraph 1 clearly states the connection between having a clear, transparent and consistent framework for implementing the Convention, and properly enforcing it. It implies that even the most highly developed legislative or regulatory framework will deteriorate if it is not constantly renewed through enforcement mechanisms".

The track record and procedures related to enforcement by the EU Commission of the principles of the Convention in Ireland has been nothing short of abysmal. As has been pointed out already, the Directive 85/337/EEC on environmental impact assessment has yet to be properly transposed and there have been completely inadequate measures put in place to comply with Directive 2003/35/EC on public participation. One could certainly come to the conclusion that officials in Ireland are well aware that they really do not have to fear enforcement action, from either members of the public or the EU Commission.

The system, in which it takes the EU Commission something in the region of a decade, or even more, to bring an enforcement case through to conclusion at the European Court and then ensure its effective implementation, is clearly not working with regard to the Rights of the citizen and is not in compliance with the responsibilities of the EU as a Party to the Convention. This therefore needs to be reformed.

166 http://www.livingdemocracy.ie/index.php?option=com_content&view=article&id=28&Itemid=77

In addition as a Party to the Convention, the EU has responsibilities in relation to ensuring, among others, that environmental information is transparent and there is a transparent and fair framework for public participation. This Reply to UNECE has most certainly demonstrated that with regard to Ireland, no such measures to ensure these critical aspects are actually in place. **I certainly have no hesitation in pointing out that if a non-transparent advertisement is published, the citizen has access to redress that is fast, efficient and free. In contrast if environmental information is being disseminated in Ireland, or indeed by the EU Commission itself, which is clearly not transparent, there is no such mechanism for redress.**

13. EU QUESTION 2 – WHEN TAKING THE SEPTEMBER 2007 DECISION TO APPROVE THE REFIT I PROGRAM FOR STATE AID (STATE AID N571/2006 IRELAND) DID THE EUROPEAN COMMISSION ASCERTAIN IF THE PROGRAMME WAS IN COMPLIANCE WITH THE CONVENTION?

Sections 5, 6, 7 and 9 of this Reply to UNECE demonstrated that there was essentially no observance taken of the environmental aspects of the renewable energy programme and the principles of the Convention, when the REFIT I programme was approved. If the EU Commission has such documentation, then they most certainly have not made it public, neither did it surface when I sent in my access for information request in relation to REFIT under Regulation 1367 of 2006.

14. EU QUESTION 3 – WHEN TAKING THE MARCH 2010 DECISION TO ALLOCATE €100 MILLION TO THE INTERCONNECTOR BETWEEN IRELAND AND THE UK DID THE EUROPEAN COMMISSION ASCERTAIN IF THE DECISION-MAKING PROCESS REGARDING THE INTERCONNECTOR WAS IN COMPLIANCE WITH THE CONVENTION?

As I have already pointed out in Sections 7.4 and 10 of this Reply to UNECE there are significant limitations with regard to the East-West Interconnector project and the principles of the Convention. I am not aware of any such documentation, in which the EU Commission ascertained if the decision-making process on this project was in compliance with the Convention.

15. EU QUESTION 4 – HAS THE EUROPEAN UNION, THE EUROPEAN COMMISSION IN PARTICULAR, ASCERTAINED WHETHER THE RENEWABLE ENERGY ACTION PLAN SUBMITTED BY IRELAND TO THE EUROPEAN COMMISSION WAS DEVELOPED IN COMPLIANCE WITH THE CONVENTION?

The limitations with regard to the Aarhus Convention of the renewable energy programme in Ireland and the Renewable Energy Action Plan in particular, have already been addressed in Sections 5, 6 and 7 of this Reply to UNECE. However, it is worth while taking a step back from these details and considering the analogy with Ireland's current financial crises and how this evolved. As the "Report of the Commission of Investigation into the Banking Sector in Ireland[167]" pointed out:

- "On the whole, it appears that actions taken by various institutions in the run-up to the Irish crises did exhibit the kinds of behaviour generated by the 'herding' and 'groupthink' hypotheses".
- "Herding implies that management groups in different banks implicitly follow each other with little or only modest analysis and discussion".
- "Groupthink occurs when people adapt to the beliefs and views of others without real intellectual conviction. A consensus forms without serious consideration of consequences or alternatives, often under overt or imaginary social pressure. Recent studies indicate that tendencies to groupthink may be stronger and more common than previously thought. One consequence of groupthink may be herding, if the views in question relate to institutional policies, but this need not be the case".
- "Ireland's systematic banking crises would have been impossible without widespread suspension of prudence and care by those responsible for bank management as well as by those charged with ensuring financial conduct".

The origins of this renewable energy programme, as has been pointed out already, clearly lie with 'political consensus' at the EU level. Yet there has been a complete failure at EU level to complete the necessary environmental assessments and public participation procedures. The programme, particularly the wind energy element, is based on nothing but the perception that it will (a) work and (b) bring some element of benefit, particularly in relation to the environment. While it no doubt is perceived to be popular, based on the criteria of (a) and (b), this has never been demonstrated to be the case. The fact that political careers have benefited from association with the programme, not to mention considerable financial gain to others, does not absolve the officials at the EU and National level from their legal duties to ensure that the proper assessments and public participation exercises were complete before the programme was initiated.

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167 http://www.bankinginquiry.gov.ie/

With regard to the EU as a Party to the Convention, the setting of targets for renewable energy and greenhouse gas emissions reductions for Member States certainly falls within the framework of Article 7 of the Convention. Simply allocating these targets on GDP basis to Member States, without any form of technical, economical and environmental assessment at Member State level is a clear abdication of the EU of its responsibilities with regard to Article 7. Neither is it adequate to leave effective public participation to a later stage, when the target has already become mandatory for the Member State.

Furthermore the "Aarhus Convention – An Implementation Guide" is clear is that there is a "responsibility on the public authority to make efforts to identify interested members of the public and, while not bound to accept every expression of interest, should be as inclusive as possible. In any case, the strategy for identification of the public should be transparent and accessible". This simply did not happen with regard to the setting of the renewable energy targets for the Republic of Ireland, it was instead a 'fait acompli'.

That public should also have 'access to justice' with regard to the development of such plans, programmes or policies. In this regard the EU has failed to implement the terms of the Convention. Under Regulation 1367 of 2006, there is indeed a mechanism in which a request for an Internal Review of a Legislative Act can be made under Article 10 of the Directive. However, this is limited to the criterion that such a non-governmental organisation must have as "the primary stated objective of promoting environmental protection in the context of environmental law".

The Aarhus Convention is however clear in Article 9 that "members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene the provisions of its national law relating to the environment". Article 2 is also clear in that "the public concerned means the public affected or likely to be affected by, or having and interest in environmental decision-making". Certainly, in my case I have worked in regulatory compliance and industrial development, but why should I be derived of my rights to challenge what is clearly dysfunction decision-making based on nothing but perception and political consensus, just because I or others are not a non-governmental organisation with the primary stated objective of promoting environmental protection in the context of environmental law?

To conclude the limitations of this Renewable Energy Action Plan with regard to the Aarhus Convention, discussed already in detail in Section 5, 6 and 7 of this Reply to UNECE, lie not only with the failings of the Irish Administration, but also with the manner in which the EU developed its '20-20-20 by 2020' programme and Directive 2009/28/EC on the promotion of use of energy from renewable sources.

Requirement of the Convention	Actual situation
Article 7 of the Convention relates to public participation concerning plans, programmes and policies relating to the environment. Article 9 of the Convention provides	While the EU ratified the Convention in February 2005, there are clear limitations with regard to how the public participation in relation to the Renewable Energy Action Plan for Ireland was completed.

Requirement of the Convention	Actual situation
for access to justice to members of the public.	While the EU continues to set mandatory targets for Member States, there are clear limitations with regard to the access to justice (Internal Review) provisions in its Regulation 1367 of 2006, which are in effect disenfranchising a very significant percentage of the European public.

However, it is recognised by the Author that in its May 2011 decision in Communication ACCC/C/2008/32[168], the Compliance Committee is addressing the Access to Justice provisions of the European Union, which are not aligned with the Convention.

[168] http://www.unece.org/env/pp/compliance/CC-32/ece.mp.pp.c.1.2011.4.add.1.edited.adv%20copy.pdf