To: Fiona Marshall; Secretary of UNECE Aarhus Convention Compliance Committee
From: Pat Swords
Subject: Draft Report of Compliance Committee to Meeting of the Parties concerning Communication ACCC/C/2010/54
Date: 6th December 2013

Dear Fiona

As Communicant on ACCC/C/2010/54, it is indeed welcome to read the draft report of the Compliance Committee and the concerns expressed by the Committee in Point 12 of its draft report. Furthermore, the Committee's recommendations to the forthcoming Meeting of the Parties expressed in Point 14 of the draft Report are most welcome. However, my main concern is that the Committee may not be fully aware of the current developments with respect to the subject matter of the Communication, as they are very much at variance to the position articulated by the Party in its written response and are a matter of increasing concern with respect to the Convention.

Position of DG Environment and DG Energy

It is not just a question that the Party concerned is denying the findings of the Compliance Committee, but that there is a steely resolve to ignore these findings and recommendations and to continue to proceed with the renewable programme in direct breach of its obligations under the Convention. Indeed, no sooner were the draft findings published on the 29th April 2012 on ACCC/C/2010/54, then two weeks later on the 14th May, Jean Francois Brakeland of Unit A.2 of DG Environment wrote to me stating that the CHAP(2010)0645 complaint file was now closed, as he was not in a position to establish "whether there is an infringement". This can only be considered highly bizarre in that the Convention, since its ratification by the European Community in 2005, is an integral part of Community legal order. His position, as head of Unit A.2 of DG Environment, can only be seen as being in direct opposition to the findings of the Committee, in that a serious non-compliance with the Convention had occurred in Ireland.

Furthermore, as I articulated in my correspondence of 23rd August 2013 to yourselves at UNECE[1], there is no guarantee that any Member State will have to submit an amended National Renewable Energy Action Plan (NREAP). Secondly, Article 4(4) of Directive 2009/28/EC is simply unrelated to Article 7 of the Convention, which in particular requires early public participation when all options are open. The letters sent by DG Energy to the Member States of 12th September 2013, of which you have sent me a copy, do not in any respect address compliance with the findings and recommendations of the Compliance Committee or the EU and Member State obligations for public participation under the International Treaty they have ratified with the UN.

EU Commission and Projects of Common Interest

Furthermore, the Compliance Committee has now received a Communication from the European Platform Against Windfarms (EPAW) in relation to the European Union and its Projects of Common Interest. This Communication has requested the Committee to consider its use of summary proceedings in relation to the existing findings on ACCC/C/2010/54. The Projects of Common Interest comprise a list of

[1] http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-54/Correspondence%20with%20communicant/frCommC54_23Aug13.pdf

248 key energy infrastructure projects[2] adopted by the European Commission on the 14th October 2013. These projects have been selected by twelve regional groups established by the new guidelines for trans-European energy infrastructure (TEN-E). Carrying the label "Projects of Common Interest" (PCI) they will benefit from faster and more efficient permit granting procedures and improved regulatory treatment. They may also have access to financial support from the Connecting Europe Facility (CEF), under which a €5.85 billion budget has been allocated to trans-European energy infrastructure for the period 2014-20.

As the EPAW Communication documents, there is a clear connect between the Projects of Common Interest, Directive 2009/28/EC on renewable energy and the National Renewable Energy Action Plans (NREAPs), which implement this Directive, particular in the area of electricity transmission and storage. In simple terms these Projects of Common Interest in the electricity transmission and storage category are designed to support the implementation of the NREAPs. In the summer of 2012, the EU, namely DG Energy, held a public consultation on the Projects of Common Interest[3]. This was conducted in such a manner as to be non-compliant with the Aarhus Convention and Regulation 1367/2006 which implements the Convention to the EU institutions and bodies.

At no stage were the public to be affected by this decision-making informed about the limited public participation on these Projects of Common Interest, i.e. the public were not identified in compliance with Article 7 of the Convention. There was a complete absence of the 'necessary information' with regard to the requirement of effective participation and the language of the public participation exercise was restricted to English, which would only have been understood by a minority of those affected by the decision-making. Despite repeated requests for environmental information on the projects listed for public participation, it was refused. It later turned out that it effectively didn't exist, which is a breach of the obligation inherent in the Convention to fully integrate *"environmental considerations in governmental decision-making and the consequent need for public authorities to be in possession of accurate, comprehensive and up-to-date environmental information".*

The fact that only 142 Submissions were ever received on this public participation exercise, demonstrates how ineffective it was in reaching the public to be affected by the enormous scale of these Pan-European projects, which are now to be provided with accelerated regulatory approval. Neither were these 142 Submissions taken account of in the final decision, the supporting documentation released by the EU Commission, COM/2013/0711 final, plus additional documentation requested under the Aarhus Convention, demonstrated that the list of Projects of Common Interest was drawn up by a combination of the authorities and the project promoters. The public to be affected by this decision-making having been effectively been shut out of the decision-making and the outcome of the public participation, i.e. the 142 Submissions, being ignored in the final decision.

The refusal of the EU Ombudsman to address the legal non-compliances

On the basis of the findings of the Compliance Committee on ACCC/C/2010/54 and other legal breaches which were occurring, EPAW also submitted a formal complaint

[2] http://ec.europa.eu/energy/infrastructure/pci/pci_en.htm

[3] http://ec.europa.eu/energy/infrastructure/consultations/20120620_infrastructure_plan_en.htm

to the EU Ombudsman in September 2012[4]. It took a year until this matter reached a decision by the Ombudsman in September 2013 on Complaint 1892/2012/VL[5] and the result was completely unsatisfactory, particularly with regard to the obligations of the EU Ombudsman under Article 9(2) of the Convention. For instance, with regards to **"Insufficient Grounds – Article 228 TFEU"**, the Ombudsman concluded in Point 12:

- *With regard to Case ACCC/C/2010/54, the Aarhus Compliance Committee issued its findings to the Commission on 16 August 2012. On 31 August 2012, the Commission informed the complainant that it had commenced to reflect on how to address these findings. The Aarhus Compliance Committee, on 15 July 2013, asked the European Union for information to its follow-up, which is still to be assessed further. Therefore, given that the Aarhus Compliance Committee currently continues dealing with this matter, an inquiry into how the Commission has complied with the Aarhus Compliance Committee's findings would, at this stage, be premature.*

One can only conclude that the findings of the Compliance Committee in relation to non-compliances with both Articles 7 and 3(1) of the Convention were completely irrelevant, as according to the EU Ombudsman no breach of Community law, which is inherent maladministration, had occurred.

While the Ombudsman in his decision did claim, that he investigated the breach of the Strategic Environmental Assessment Directive in Ireland, in relation to the adoption of the National Renewable Energy Action Plans, this needs to be clarified. While Point 30 of his decision, see below, is not disputed, it has to be analysed with regards to the commitments that the European Community has already given to UNECE, which are now clearly worthless.

- *First, in its finding on Case ACCC/C/2010/54, the Aarhus Compliance Committee did not appear to suggest that applying Directive 2001/42/EC, which sets the framework for carrying out a Strategic Environmental Assessment (SEA), was the only option available in order to comply with the requirements of Article 7 of the Aarhus Convention. In fact, it appeared to imply that the parties to the Aarhus Conventions were free to decide on how they intended to fulfil the obligations on public participation laid down in Article 7 of the Aarhus Convention.*

In the Aarhus Convention Implementation Report submitted by the European Community to UNECE in June 2008, ECE/MP.PP/IR/2008/EC[6], it is stated in Section XIX in relation to Article 7:

89. Public participation concerning plans and programmes relating to the environment prepared and adopted by Member States' authorities is ensured through the implementation and application of the following legislation:

(a) Article 2 of Directive 2003/35 (already mentioned above) in conjunction with Annex I thereto;

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[4] http://www.epaw.org/legal.php?lang=de&article=c4

[5] http://www.ombudsman.europa.eu/de/cases/decision.faces/de/51946/html.bookmark

[6]http://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_ir_2008_EC_e.pdf

(b) Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.

Note the above point was made clear to the EU Ombudsman in the EPAW Complaint and that a key element of the EU's compliance with Article 7 of the Aarhus Convention was that plans and programmes related to the environment should undergo a Strategic Environmental Assessment.

Clearly, this fact is now disputed by the EU Ombudsman in his decision on Complaint 1892/2012/VL, as he choose to completely ignore it as if it didn't exist, which clearly given the actions of both himself and the EU Commission it now does.

Secondly the EU Ombudsman goes further and states in Point 31 of his decision:

- *The complainant also put forward its interpretation of Directive 2001/42/EC and Directive 2009/28/EC. As a preliminary point, the Ombudsman recalls that the only body competent to provide a binding interpretation of EU law is the Court of Justice of the European Union. At this point in time, no such interpretation with respect to the issue in question appears to have yet been made by the Court of Justice. Thus, the Commission, in its role as Guardian of the Treaties, was obliged to develop and apply its own interpretation of the provisions of Directives 2001/42/EC and 2009/28/EC.*

This primarily related to the point raised in the complaint that the National Renewable Energy Action Plans 'set the framework for future development consent' and thus under Article 3(2)(a) of Directive 2001/42/EC should have undergone a process of Strategic Environmental Assessment before adoption.

However, the Ombudsman in his decision, in particular Point 31 is being inaccurate in that if one considers the Opinion of Advocate General Kokott of the European Court, as delivered on 4 March 2010 in *Terre wallonne ASBL (C-105/09) and Inter-Environnement Wallonie ASBL (C-110/09) v Région wallonne*[7], where it was necessary to consider the meaning of the terms "plan" and "programme" and the circumstances in which they set a 'framework for development consent' of projects, the Advocate General was very clear:

- *60. The term 'framework' must reflect the objective of taking into account the environmental effects of any decision laying down requirements for the future development consent of projects even as that decision is being taken.*

- *61. It is unclear, however, how strongly the requirements of plans and programmes must influence individual projects in order for those requirements to set a framework.*

- *62. During the legislative procedure the Netherlands and Austria proposed that it should be made clear that the framework must determine the location, nature or size of projects requiring environmental assessment. In other words, very specific, conclusive requirements would have been needed to trigger an environmental assessment. As this proposal was not accepted, the concept of 'framework' is not restricted to the determination of those factors.*

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[7] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CC0105:EN:NOT

- *63. The view of the Czech Republic is based on a similarly narrow understanding of the setting of a framework. It calls for certain projects to be explicitly or implicitly the subject of the plan or programme*

- *64. Plans and programmes may, however, influence the development consent of individual projects in very different ways and, in so doing, prevent appropriate account from being taken of environmental effects. Consequently, the Strategic Environmental Assessment Directive is based on a very broad concept of 'framework'.*

- *65. This becomes particularly clear in a criterion taken into account by the Member States when they appraise the likely significance of the environmental effects of plans or programmes in accordance with Article 3(5): they are to take account of the degree to which the plan or programme sets a framework for projects and other activities, either with regard to the location, nature, size and operating conditions or by allocating resources (first indent of point 1 of Annex II). The term 'framework' must therefore be construed flexibly. It does not require any conclusive determinations, but also covers forms of influence that leave room for some discretion.*

- *66. … The wording [of point 1 of Annex II] implies that the various characteristics may be concerned in varying intensity and, therefore, possibly not at all. This alone is consistent with the objective of making all preliminary decisions for the development consent of projects subject to an environmental assessment if they are likely to have significant effects on the environment.*

- *67. To summarise, it can therefore be said that a plan or programme sets a framework in so far as decisions are taken which influence any subsequent development consent of projects, in particular with regard to location, nature, size and operating conditions or by allocating resources."*

Furthermore, the Judgment of the European Court on Terre Wallonne ASBL v. Région Wallone [2010] ECR I-5611[8] was very clear on the obligation of the National Courts, when it is determined that the Strategic Environmental Assessment Directive has not been complied with:

- *Where a national court has before it, on the basis of its national law, an action for annulment of a national measure constituting a 'plan' or 'programme' within the meaning of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment and it finds that the 'plan' or 'programme' was adopted in breach of the obligation laid down by that directive to carry out a prior environmental assessment, that court is obliged to take all the general or particular measures provided for by its national law in order to remedy the failure to carry out such an assessment, including the possible suspension or annulment of the contested 'plan' or 'programme'.*

It was also pointed out in the EPAW complaint that not only had the National Renewable Energy Action Plan been used to justify planning decisions in Ireland, but in this plan based on the template prepared by the EU Commission[9], sectoral targets are set in Section 3, the measures for achieving those targets are set in Section 4, in

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[8] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011CJ0041:EN:NOT

[9] http://ec.europa.eu/energy/renewables/doc/nreap__adoptedversion__30_june_en.pdf

particular those for the electricity infrastructure development in Section 4.2.6 and the support schemes in Section 4.3, while in Section 5, the contribution of each renewable technology is defined, as the template states:

- "*For the electricity sector, both the expected (accumulated) installed capacity (in MW) and yearly production (GWh) should be indicated by technology".*

To summarise, the NREAP is a ten year plan in which defined infrastructure is to be supported and brought through the regulatory framework. In therefore in no uncertain terms sets out the framework for future development consent. It also in no uncertain terms implements mandatory targets, so its measures are by definition mandatory.

Clearly the conclusions of the EU Ombudsman in Point 31 of his decision in "*that this Directive does not appear to require, as regards the measures to be adopted, a level of specificity that would "set the framework for future development consent of projects" and, as a result, give rise to an obligation to carry out a Strategic Environmental Assessment*", are in direct variance to both common sense and the clear guidance from the European Court. As a result one can only conclude in relation to Articles 9(2) and 9(4) of the Convention, that his office does not provide effective remedies nor is in any way fair, equitable or timely.

Decision-Making by Irish Planning Authorities

In multiple planning applications in relation to the renewable energy programme, namely wind farms and grid infrastructure, the legal non-compliances with regard to both the Aarhus Convention and the associated Strategic Environmental Assessment Directive have been brought to the attention of the competent authorities for the planning decision[10]. Repeatedly the same result has occurred:

- Such failures in relation to National and EU Policy were not a material consideration in the determination of the subject application.

- That the applicant should direct his / her attention to the Courts.

Despite this, the only justification used for the consequent approval of these projects, was the very same National and EU polices for which the legal non-compliances had occurred.

Current Proceedings in the Irish High Court

Given the above and that no other alternatives were available, it was necessary to initiate legal proceedings against the Irish State in the High Court; *Swords v Department of Communications, Energy and Natural Resources* 2012/920JR, for which leave was granted by Justice Peart on the 12th November 2012.

Following the hearing of preliminary matters brought forward by the State to quash the relevant proceedings on the initial High Court Judicial Review proceedings, by order of the President of the High Court Justice Kearns of the 16th April 2013, leave has been given to commence plenary summons proceedings in substitution for the application for Judicial Review. This was based on the fact that despite the ruling on

[10] See for instance the Inspector's Report in planning appeal PL05E.242074: http://www.pleanala.ie/casenum/242074.htm

Klohn -v- An Bord Pleanála [2011] IEHC 196[11] that "*with regard to the Aarhus Convention, this convention is not applicable as Ireland has not formally ratified it*", Justice Kearns accepted that the Convention applied in Ireland since its ratification by the EU in February 2005 and that Article 7 of the Convention was not time limited. It is also of relevance to record what can only be described as the petulance of the State, who already in evidence presented by their Senior Counsel to Justice Kearns, stated that the matters raised and the findings of the Compliance Committee were all nonsense. Furthermore, the State in written evidence to the Court stated:

- *I say and advise in so far as the applicant seeks to rely on the findings and recommendations of the Committee, Ireland was not a Party to the Committee's proceedings and was not heard, and the findings of the Committee were against the EU only".*

This is despite the fact that Ireland was officially represented at the Compliance Committee meeting on ACCC/C/2010/54 in September 2011, declined to speak when provided with the opportunity to do so and that written evidence was available from access to information on the environment requests, that the same Irish officials had prepared the written responses to the questions presented to the EU by the Compliance Committee in January 2011.

Currently a year after proceedings were initiated at the High Court the Statement of Defence from the Irish State has finally been received. In Point 4 of this it is stated:

- *The matters raised and pleaded and the reliefs claimed in the Statement of Claim relate to State policy in the field of renewable energy. The Statement of Claim requests the Court (a) to make orders relating to the provisions of the Aarhus Convention notwithstanding the fact that, whilst Ireland has ratified same, the Oireachtas has not enacted legislation making the provisions of that Convention a part of Irish domestic law in respect of the matters pleaded by the Plaintiff (save as to a right to review and the issues of cost) and (b) to make Orders related to State policy (National Renewable Energy Action Plan and Renewable Energy Feed In Tariff and the Energy Policy Framework being manifestations of the same) in the field of renewable energy that will order and direct the Oireachtas to change the policy of the State in that field so as to comply with the wishes of the Plaintiff. The claims advanced seek to contravene the separation of the powers under the Constitution and are not justiciable and should, therefore, be dismissed.*

In point 18 it is stated:

- *It is denied that the National Renewable Energy Action Plan (NREAP) is a plan or programme related to the environment for the purpose of Article 7 of the Convention. If, which it is denied, NREAP was a plan or programme, or was alternatively, a statement of policy related to the environment, for the purpose of Article 7 of the Convention, the requirements related to public participation in Article 7 were met by the public consultation process that preceded the submission of the NREAP to the Commission.*

This is followed by Point 20:

[11] http://courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/9aeef3e5e1af01d6802578a9003ca326?OpenDocument

- *The defendants deny that the public participation procedures provided for in the adoption of the NREAP were inadequate, as alleged at paragraph 21 of the Statement of Claim. Furthermore,* ***it is denied that the two week allowed was not a reasonable timeframe for the public to prepare and participate effectively in the adoption of the NREAP, as alleged.***

Clearly, the Irish State has not only contempt for the findings of the Compliance Committee on ACCC/C/2010/54, but also the previous findings in relation to ACCC/C/2006/16 (Lithuania), which were endorsed by the Meeting of the Parties in Riga in 2008, ECE/MP.PP/2008/2/Add.12 [12], with regard to 10 working days (i.e. two weeks) being inadequate with respect to public participation.

While this is highly regrettable, it also has to be understood within the context of Access to Justice and in particular Article 9(4) of the Convention in that such legal proceedings should be fair equitable, timely and not prohibitively expensive. However, no such arrangements have been made; the Irish State has refused to implement the provisions of Article 9(4) of the Convention, Directive 2003/35/EC and the ruling of the European Court in case C-427/07[13]. No costs arrangements have been made in my case; they obviously follow the event based on the discretion of the judge, while the State Solicitor in her Notice of Motion of the 13th March 2013 on the Judicial Review 2012/920JR sought an "**Order providing for the costs and expenses of this application**". Such behaviour is not only a breach of the State's obligations in relation to Access to Justice under the Aarhus Convention, but is clearly vindictive and designed to have a 'chilling effect' on any future litigants.

Conclusion

The matters above clarify the actual position in relation to the Party's compliance with the Convention and the findings and recommendations of the Compliance Committee on Communication ACCC/C/2010/54. As regards the Party's statement to the Compliance Committee that: *"the Commission has taken due note of the findings and recommendations of the ACCC concerning compliance by the European Union with provisions of the Convention in connection with the Irish National Renewable Energy Action Plan",* the reality is that both the EU and the Irish State, in their actions above, have shown utter contempt for the both the Committee's findings and recommendations and their obligations under the International Treaty they have signed and ratified with the UN.

[12] http://www.unece.org/fileadmin/DAM/env/pp/mop3/ODS/ece_mp_pp_2008_2_add_12_e_Lith.pdf

[13] See in particular Points 93, 94 and 95 of: http://curia.europa.eu/juris/document/document.jsf?text=&docid=72488&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=485649