

**To:** Ms Aphrodite Smagadi, Legal Officer – Aarhus Convention Secretariat  
**From:** Pat Swords  
**Re:** Reply of EU to Compliance Committee of 2<sup>nd</sup> August 2013  
**Date:** 23<sup>rd</sup> Aug 2013

Dear Ms Smagadi

The Committee's findings and recommendations on ACCC/C/2010/54 were clear, namely:

- "That the Party concerned adopt a proper regulatory framework and / or clear instructions for implementing Article 7 of the Convention with respect to the adoption of NREAPs. This would entail that the Party concerned ensure that the arrangements for public participation in one of its Member States are transparent and fair and that within those arrangements the necessary information is provided to the public. In addition, such a regulatory framework and/or clear instructions must ensure that the requirements of Article 6, paragraphs 3, 4 and 8, of the Convention are met, including reasonable time frames, allowing sufficient time for informing the public and for the public to prepare and participate effectively, allowing for early public participation when all options are open, and ensuring that due account is taken of the outcome of the public participation. Moreover, the Party concerned must adapt the manner in which it evaluates NREAPs, accordingly".

With regard to the EU's reply of the 2<sup>nd</sup> August in relation to notifying the Member States to respect the provisions of the Aarhus Convention on public participation should the need to submit an amended National Renewable Energy Action Plan arise, this simply does not remotely comply with recommendations above.

From the legal perspective, an amended National Renewable Energy Action Plan (NREAP) falls under Article 4(4) of Directive 2009/28/EC:

- "A Member State whose share of energy from renewable sources fell below the indicative trajectory in the immediately preceding two-year period set out in part B of Annex I, shall submit an amended national renewable energy action plan to the Commission by 30 June of the following year, setting out adequate and proportionate measures to rejoin, within a reasonable timetable, the indicative trajectory in part B of Annex I".

Firstly, there is no guarantee that any Member State will have to submit an amended 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. Indeed to quote from the "Aarhus Convention: An Implementation Guide", second edition:

- "Early" means when all options are open and effective public participation can take place. This does not prevent a public authority from taking a position or determining a preliminary opinion as to a possible decision about the proposed activity. However, the public authority must still be in the information gathering and processing stage and must be open to persuasion by members of the public to change its position or opinion. Taking steps that might have the effect of decreasing the range of available options may breach Article 6, even though no decision has been formally been made.

- “In its findings on Communication ACCC/C/2006/16 (Lithuania) the Committee held that a key issue is whether the public has had the opportunity to participate in the decision-making before the “events on the ground” have effectively eliminated alternative options. The Committee held: If the only opportunity for the public to provide input to decision-making on technological choices, which is subject to the public participation requirements of Article 6, is at a stage when there is no realistic possibility for certain technological choices to be accepted, then this would not be compatible with the Convention.”

I hope the above factors will be borne in mind when the Compliance Committee meet again in September when the reply of the EU will be reviewed.

Regards

Pat Swords