

To: Ms Aphrodite Smagadi, Legal Officer – Aarhus Convention Secretariat
From: Pat Swords BE CEng FICChemE CEnv MIEMA
Re: Your e-mail of August the 4th in relation to letter of 20th July from EU Commission
Date: 7th August 2011-08-06
Attached: My letter to EU Ombudsman of 15th July in relation to the EU Commission's Response to UNECE on ACCC/C/2010/54

Dear Ms Smagadi

While I did not reply to yourselves at UNECE following publication of the Response of the EU Commission, I did respond to the EU Ombudsman as to its content, see attached. Furthermore with regard to the EU Commission's letter of the 20th July in relation to 'next steps', I really have no option, but to respond with my concerns and observations, which are set out below and in the attached Letter to the EU Ombudsman.

Firstly, it is clear to an impartial observer that in their Response and Letter of the 20th July, the EU Commission is clearly:

- Mounting a vigorous attack on my integrity and credibility as a messenger in relation to issues of non-compliance.
- Of the opinion that they do not have to address the content of the message, i.e. the extent to which serious failures are occurring and how measures are required to improve the situation, namely with regard to the Rights of the public and as to how obligations on public authorities regarding access to information, public participation and access to justice are to be met.
- Seeking to dictate the terms on which they interact with the Compliance Committee.

Firstly to clarify my role as the messenger, for more than two years, and a longer period with regard to the National Authorities, I have been in contact with the EU Commission regard maladministration in Ireland, which was related to failures with regard to the Aarhus Convention. Their position was a complete unwillingness to address the issues raised. Note others have had the same experience, such as I have highlighted in pages 86 and 165 of my Response to UNECE in relation to the Irish Environmental Consultancy, which lodged a complaint with the EU Ombudsman. Furthermore, I am aware from personal contacts with the two Waste to Energy companies with investments in Ireland, Indaver and Covanta, that both have had to contact the EU Commission with regard to the maladministration in relation to this sector in Ireland. While I was not party to those discussions, I know from personal contacts in a social setting, that with regard to one company, a similar viewpoint was expressed, i.e. a demonstrated unwillingness by the EU Commission to address the maladministration which was raised.

Therefore the issues I raised in my Communication and the Response which followed, have been well known and documented with the EU Commission. It is also clear to highlight that these failures are not just an arbitrary point of law, but that they have a real impact on the life of the Citizen. For instance, it is clear that the EU Commission have taken umbrage, as to how I highlighted the 'staggering' €30 billion in capital cost alone associated with the Irish wind energy programme and in that I did not accept their position related to; "it is generally recognised that renewable energy, and wind energy in particular, is preferable from an environmental point of

view from non-renewable energy". However, my position is clear in that it currently costs less than €2 billion per annum to generate Ireland's electricity¹. Now as part of this programme, the Irish landscape is to be scarred with over four thousand wind turbines, which will have lifespan of less than half that of the thirty years plus of a conventional power plant. This is in order to fulfil a programme, which as was pointed out in Section 5.7 of my Response, has glaringly limitations with regard to its ability to deliver fuel and emissions savings, and for which there has been no quantification of the necessary environmental considerations. Furthermore, not only have the required public participation in decision-making procedures, with regards to Articles 6 and 7 of the Convention, been by-passed in Ireland, but there have been whole scale failures with regard to Article 9. Please note the manner in which a small farmer, who took a judicial review against An Bord Pleanala, ended up recently, not only paying his own costs, but also €86,000 of costs incurred by An Bord Pleanala².

As regards the content of my Communication and Response, both are equally comprehensive. Waste was clearly highlighted in the Communication and its relationship to renewable energy. Additional information was provided with regard to the proportionality of the renewable energy programme, in particular the environmental objectives associated with climate change impacts, and the absence of Access to Justice measures in Ireland³. With regard to the EU Commission's statement in relation to private parties and Section 4.3.2 of my Response, this in fact related to a public authority and a case taken with the Commissioner for Environmental Information CEI/10/0008⁴. Such issues, as was documented in my Communication, are not an isolated case, and as over a two year period, the EU Commission refused to address the issues and I persevered in documenting them, we have reached the situation where a considerable body of evidence has been compiled. However, the important issue is the consideration of the substantive matter. As I pointed out in page 183 of my Response, if a non-transparent advertisement is published, the citizen has access to redress, which is fast efficient and free. In contrast, the necessary measures related to ensuring compliance with Articles 4 and 5 of the Convention are not in place.

In short the ratification of the Convention by the EU in February 2005 has, with regard to the Rights bestowed on Citizens resident in Ireland and obligations imposed on public authorities, been nothing but a hollow paper exercise. In this regard I have to highlight points 51 to 54 of the EU Commission's Response in relation to their absolute discretion with regard to infringement proceedings.

With regard to the initial section of Part IV of my Communication, I would like to stress two points. Firstly, I am a specialist in industrial development and regulatory compliance relating to environmental protection, I am not a specialist environmental lawyer. Secondly, the position with respect to Ireland and the Aarhus Convention has and will continue to cause confusion. When I spoke with UNECE prior to submitting my Communication, the points which arose were that they were clearly concerned as

¹ See Section 7.3.5 of the Response

² **[2011] IEHC 196: Please note in particular Section 5.3 in relation to the position of the Aarhus Convention in Ireland and that (Section 3.1) leave was granted for a Judicial Review in March 2006, over a year after the EU ratified the Convention:**
<http://courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/9aeef3e5e1af01d6802578a9003ca326?OpenDocument>

³ See in particular Annex 3 of my communication in relation to the EU Ombudsman

⁴ <http://www.ocei.gov.ie/en/DecisionsoftheCommissioner/Name,12418,en.htm>

to the situation in Ireland, about which they had been contacted on a number of occasions by Irish parties. However, as Ireland had not ratified the Convention they were not in a position to accept a Communication in relation to Ireland. My position was that as failures, which had occurred in Ireland, were being compounded by the EU approving and financing major developments in renewable energy, which had not complied with the necessary provisions of the Convention, therefore there was clear liability in this case with regard to the EU. It was on this basis I submitted my Communication.

As a result of the Communication proceeding and the level of detail required in relation to responding to UNECE's letter of the 28th January 2011, I realised I needed to engage specialist legal help. The Section 4.2 of my Response is therefore critical in this regard. I simply was not aware prior to that point, of the extent of liability of the EU as a Party to the Convention, with regard to failures of Ireland in relation to the provisions of the Convention. It is to put it mildly, a complex issue. However, it is one to which the legal experts in the EU would have been aware with regard to their ratification of the Convention and, in particular, I would also point out the clarification, which the Compliance Committee already sought, in Communication ACCC/C/2006/17, with regard to the position of the Aarhus Convention on Community Legal Order in Ireland.

I am therefore now of the opinion that I may have erred somewhat in Part IV of my Communication. The breaches of the Environmental Acquis in Ireland, as they apply to the terms of the Convention, with regard to the conclusions above, can clearly be brought to the Compliance Committee with regard to the failures of the EU as the Party to the Convention. Regardless of how the Compliance Committee decide to proceed with the matters addressed by the EU Commission in their letter of 20th July, clarification is necessary for Members of the Public with regard to accepting Communications, with regard to the EU as a Party to the Convention, and matters of compliance which occur in Ireland.

With regard to the statement of the EU Commission in their Letter, that they had been unofficially informed that the Committee had planned to call the Communicant and the Commission to a meeting in September, this is the first point at which I was aware of this. I would firstly like to point out that I and others requested a meeting with the EU Commission in August 2010 to discuss the situation in Ireland; this is clearly documented in my Communication. Furthermore the outcome of that meeting, which occurred on the 3rd December, is documented in my Response. The EU Commission clearly did not want to address the issues concerned and there was no follow up. Secondly, in their Response and Letter, the EU Commission has unfortunately taken a disparaging and derogatory stance towards me. I would point out that under the circumstances, if I was expected to respond to matters raised by the EU Commission at a meeting in September, I would, given their current hostile and adversarial approach to me, have to engage at my expense in legal consul.

I hope this clarifies the issues from my perspective as the Communicant and if you require further information please do not hesitate to contact me.

Regards

Pat Swords