

To: Ms Alina Novikova, Associate Environmental Affairs Officer – Aarhus Convention Secretariat

From: Pat Swords BE CEng FICChemE CEnv MIEMA

Re: Reply of the 10th November 2011 by EU Commission

Date: 14th November 2011

Dear Ms Novikova

With regard to the Reply from the EU Commission, clearly the Commission now accept that the NREAP is a plan with regard to Article 7 of the Convention. As I highlighted in Section 7.5 of my Response to UNECE of the 21st June 2011, this NREAP has been used for development consent of wind farms in Ireland and as such this is a non-compliance with, Article 3 (2) (a) of Directive on Strategic Environmental Assessment 2001/42/EC, as no Strategic Environmental Assessment has ever been completed for the Irish renewable energy programme. However, Article 7 of the Aarhus Convention does not require a Strategic Environmental Assessment, although this is one of the ways of fulfilling its requirements.

As regard the Commission's statement that no failure has occurred by Ireland with regard to conducting public participation on the NREAP, I would point out the following.

- (a) Article 7 of the Convention on plans and programmes related to the environment requires that the necessary information be provided to the public, allowing sufficient time for informing the public, early in the decision making procedure and in an adequate, timely and effective manner. This is so that the public can prepare and participate effectively in the decision making. With regard to the NREAP, the scale of the programme and its impacts are on an enormous scale, as was documented in the evidence provided already, such that proper public participation in a transparent and fair framework was absolutely critical.
- (b) There was no environmental information in the NREAP, save for reference to the Irish planning legislation; no quantification of greenhouse gases; no quantification of costs; no quantification of alternatives, such as not implementing the plan; no quantification of the environmental impacts on population, biodiversity, landscape, etc. The "Aarhus Convention: An Implementation Guide" is clear in that "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".
- (c) With regard to the initial targeted consultation on the NREAP, as the EU Commission stated "47 different bodies which have a particular interest in the sector", as I highlighted in Section 5.3 of my Response to UNECE of the 21st June 2011, the process of selection of stakeholders for such targeted consultations in Ireland leaves a lot to be desired. So too for the NREAP, they were all nearly exclusively Government Agencies or commercial companies / associations with a vested interest in renewable energy. Not only were the Government Agencies not going to challenge the issues, but many would directly benefit from the increased administrative requirements associated with such a programme. Simply put, there were no stakeholders invited who would present a contrary view, in particular I refer to the Irish Academy of Engineering, which a search through my Response to UNECE of the 21st

June, in particular Section 5, consistently from 2006 highlighted the glaring limitations with this renewable programme to the Irish Administration.

- (d) The “Aarhus Convention: An Implementation Guide” with regard to the definition of the public states; “the active distribution of information, under Article 5, will not be sufficient if the information is distributed to a few natural and / or legal persons. And, when a public hearing or meeting is held under Article 6, paragraph 7, it is not sufficient to allow one or several organizations, selected randomly or because they are best-known to the governmental officials, to submit comments”. Clearly those selected in the targeted consultation enjoyed considerably preferential treatment than the general public, who were only given a two week window when the draft NREAP was posted on the website. A timeframe which was completely inadequate to sufficiently inform the public and enable them to prepare and participate effectively in the decision making. Particularly as there was an absence of essential environmental data on how plan this would affect the public.
- (e) Not unsurprisingly therefore there was a very high degree of commonality between the origin of those involved in the pre-consultation and the 58 responses received in the public consultation.
- (f) As I stated in my oral evidence on the 21st September, the general public in Ireland were simply unaware of this NREAP and what it entailed. It is not as if the Department of Communications, Energy and Natural Resources were not warned about the failures to engage in proper consultation, they were as the Joint Oireachtas (parliamentary) Committee on Climate Change and Energy Security stated in January 2011 in their sixth report in relation to the National Renewable Energy Action Plan¹: “We doubt that many of Ireland’s general public is even aware of the existence of the draft National Renewable Energy Action Plan, let alone any of its proposed measures. A long term, properly thought-through, committed plan to inform and engage the general public, as individuals and as communities, is essential to successful implementation”. In their Submission of the 25th June 2010 on the draft NREAP public consultation the same Committee stated²: “It is clear to us that the Department of Communications, Energy and Natural Resources has consulted through the Renewable Energy Development Group, but what is not clear is how the general public and other more broadly affected groups as listed in Appendix 6 of the NREAP were consulted”.
- (g) Put simply, this never happened. The process was limited to those ‘involved in the sector’ and did not reach out to the public to be affected by this environmental decision making. As the “Aarhus Convention: An Implementation Guide” states with regard to Article 7: “The reference to a transparent and fair framework emphasizes that the public must have opportunities to participate effectively”. Clearly providing for a very short two week period in which notice was limited solely to the website of the Department of Communications, Energy and Natural Resources, was not providing an opportunity to participate effectively. Furthermore, as already highlighted in Section 7.5 of my Response to UNECE of 21st June 2011, the

¹ Section 5.4 of: http://www.oireachtas.ie/documents/committees30thdail/j-climate_change/reports_2009/20110126.4.doc

² Section 4.3 of: http://www.oireachtas.ie/documents/committees30thdail/j-climate_change/reports_2008/20100625.doc

European Court of Justice in Case 427/07 already ruled that the obligation to make available to the public practical information amounted to an obligation to obtain a precise result, which the Member State must ensure was achieved.

- (h) As was highlighted in Section 7.3.2 of my Response to UNECE of 21st June 2011, not only has the European Environmental Bureau stated: "It has long been recognised internationally that public participation exercises in Ireland is like a charade", but it has also not proved possible without lodging an appeal to the Commissioner for Environmental Information, to obtain procedures related to the conducting of public participation exercises in Ireland. Indeed a reply to this appeal, CEI/11/0007 is still outstanding. The "Aarhus Convention: An Implementation Guide" is clear with regard to Article 7: "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 requirement to take the outcome of public participation into account further points to the need to establish a system for evaluating comments". As I pointed out in Section 7.5 of my Response to UNECE of 21st September; 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 into consideration in the final decision. This is the norm in Ireland, as a further Access to Information on the Environment Request in relation to a waste policy consultation in September 2011 has revealed, the procedure in Ireland is simply to prepare a summary of the submissions received for the Minister, who then decides as he sees fit. This explains why in consultations taken at Department level in Ireland in environmental matters, there simply is never a published document, which outlines how the relevant points raised in the submissions have been evaluated and their justification for inclusion or as the case may be, not included, in the resulting decision.

Furthermore, the Communicant notes that the EU has changed its position on the matter since the hearing of 21st September. It formerly said it was not responsible for the actions of Member States. Now it is different. Admittedly, it is not clear from the Commission's submission whether it is saying that the EU is not liable for any failure by Ireland as a matter of law or a matter of fact. But it accepts that the Convention is binding as a matter of law on all Member States including Ireland, and it also accepts that the NREAP is a "plan" for the purposes of Article 7. Therefore, the Commission's position has shifted, from no longer saying expressly and clearly that it is not responsible, to submitting that there has been no breach of the obligations by Ireland. The latter is a very significant change, made at the very end, of these proceedings, based upon material that was not opened in any material way before the Committee.

Furthermore, the Commission appears to be now submitting in the final analysis that the consultation obligations are not material to the Committee's deliberations, and that it is the substance of my complaints in relation to alternative energy in Ireland that are determinative of the issues. Whereas at the hearing of the Communication, in September, the Commission very clearly acknowledged that I was complaining of "failings in the provision of information and public participation allegedly committed by Ireland" and that this was the case it was striving to meet. Yes, I have sought to show that the decisions made by Ireland in relation to alternative energy are flawed, but only to demonstrate (a) that the Communication is valid and germane to the Convention review mechanism overseen by the Committee, and that (b) if the EU did properly monitor whether projects, which it helps to finance, are carried out

consistently with EU environmental law, including the obligations on public participation, then a wider range of solutions would be open to consideration.

Notwithstanding the foregoing, the additional submissions made do not prove the assertions made by the Commission.

I note that the Commission says that the public consultation was affected by the “the deadline of the NREAP”. Ireland was given considerable notice of the deadline, and so the true reason why only two weeks was given for public consultation on the Department of Communications, Energy and Natural Resources’ website is due to the lateness by Ireland in opening the public consultation. This is a possibility that the Commission does not entertain, which it would have been aware had it been more robust in ensuring that the Convention was enforced in Ireland.

Furthermore, beyond putting it on the website, the Irish Department carried out little more than a passive act of public consultation – i.e. it required persons interested to have first been aware that NREAP was out to public consultation. The only active acts taken by Ireland were to contact the 47 groups that had already come to their attention and to put the documents onto its website.

Beyond the opinion of the Commission, no comparison has been offered with other public consultations to show that 58 responses in a period of two weeks indicated a good level of good level of awareness. In contrast, in my experience and judging by what has been put out to consultation on the Department of Communications, Energy and Natural Resources’ website, two months (and not two weeks) would be an ordinary length of time.

I do not agree with the description the Commission gives about the accessibility of the documents on the Department of Communications, Energy and Natural Resources’ website. You do not immediately see a public consultation on this website and this would have been true of the NREAP. The document may have been standalone, but the Department of Communications, Energy and Natural Resources do not use standalone websites for its consultation processes. It uses a section on its corporate website of the Department, which has to share visual space with all the other areas of government policy. Even if the website was dedicated to Energy alone, the NREAP would have to “compete” for attention with the so many other initiatives that occur in the Energy space. But the Department of Communications, Energy and Natural Resources deals with four areas in relation to Broadcasting, Energy, Communications and Natural Resources. So one really needs to know what one is looking for in order to find it. I do not think that this is a real cause of concern in itself. But if a State is to make less effort in publicising a consultation, then it really is depending upon word of its existence being spread by word-of-mouth. The Commission acknowledges this by reference to the “email reminder” in its submission. This simply indicates that a longer period than two weeks is necessary.

In this regard, as the Commission will know well, administrative practices, which are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of a Member State's obligations under Community law. See Case C-80/92 Commission v Belgium [1994] ECR I-1019, paragraph 20, and Case C-151/94 Commission v Luxembourg [1995] ECR I-3685, paragraph 18, which the Commission relied upon in the relation to the Environmental Acquis in Case C-216/05 Commission v Ireland (See Opinion of Stix-Hackl, 22 June 2006, paragraph 52)

I say that there is a risk that if the level of consultation carried out by Ireland in the present case is regarded as acceptable, then this will become the standard for public consultation across the EU.

If I can be of further assistance to yourself on the above issues, please do not hesitate to contact me.

Regards

Pat Swords