To: Ms Aphrodite Smagadi, Legal Officer – Aarhus Convention Secretariat
From: Pat Swords BE CEng FIChemE CEnv MIEMA
Re: Compliance Committee Draft Findings on Communication ACCC/C/2010/54
Date: 28th May 2012

Dear Ms Smagadi

Given the sheer scale at which this renewable energy programme is being implemented throughout the 27 Member States, the findings and the recommendations of the Compliance Committee are extremely welcome by all of us, who clearly see the enormous impacts of this programme, which has neither undergone proper technical, economic and environmental assessment nor the necessary public participation in decision-making. I would therefore just like to make a few short comments and requests for clarifications in relation to the draft findings.

In Paragraph 19 is the factual situation of the EU's declaration not actually as below, as from the UNECE website[1]?

- "In particular, the European Community also declares 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".

In Paragraph 75 the Committee has found provisionally that approvals for state aid and financial assistance do not amount to decisions under Articles 6 or 7 of the Convention. In reality the renewable energy programme in the Member States would not be progressing without the State Aid funding for preferential tariffs approved by the EU and additional financial assistance, such as direct funding arrangements and availability of credit at preferential rates from the European Investment Bank. Whilst such funding arrangements may not decisions in their own right – in that approvals are not decisions requiring participation by the public, if they are to be effective on their own they depend upon the NREAP complying with the Convention. That is to say, the approvals are administrative measures that cannot be relied upon to negate any obligation to comply with the Convention at a later stage, i.e. as a Party to the Convention the EU has to ensure that programmes in which it has a direct and decisive role in financing are compliant with the Convention. A clarification of this issue in Paragraph 75 is thus requested to reflect the above position.

In Paragraph 90 the Committee has provisionally found the information from the Communicant too unstructured to substantiate which of the allegations related to Articles 4 and 5. It is also stated in Paragraph 80 that

- "However, the Committee is not in a position to ascertain whether the technical information disseminated by the Party concerned, or the communicant for that matter, is correct".

[1] http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13&chapter=27&lang=en#EndDec

While as technical specialists we can see the not only the lack of environmental information and presence of environmental information, which is inaccurate, associated with the renewable energy programme, it is unfortunately that the Committee have only a limited time at their disposal for consideration of such issues. Furthermore, the situation is complicated in that it was Ireland, not a Party to the Convention, which was primarily responsible for its implementation. However, with regard directly to the Party concerned, in respect of Articles 4 and 5, in Section 7.5 of the Response of the Communicant of June 21st 2011 it was pointed out that:

- Due to the absence of a proper assessment of the programme, mandatory targets were assigned to Member States based on a factor relating to GDP and existing renewable energy generation.

- Section 5.3 of the NREAP template (Regulation 2009/548/EC) on assessment of impacts was optional and as such was left blank by a considerable number of Member States.

For a programme of this magnitude there clearly was a failure to posses the environmental information in relation to the impacts of this programme. Section 9 of the same Response also reinforces this point in relation to the approval process for the REFIT tariffs, in which after a four month wait for a reply to an access to information on the environment request, it turned out that the only relevant environmental information was the Note to File 0645 of the meeting I had with the Commission in December 2011.

With regard to Access to Justice, Article 9(1) in Ireland, see Paragraph 92, the allegation I had in this regard related to the fact that appeals are not dealt with in a timely manner, see Section 4.5.1 of the Response of the Communicant of June 21st 2011.

There has been no doubt that this Communication has been complex, due in no part to the situation in which Ireland, a Member State and therefore required as such to comply with Community Law, has failed to ratify the Aarhus Convention. There is therefore no direct mechanism to bring a Communication against the failings of Ireland with regard to the Community law which implements the Convention. These failings are considerable, not only are the legal mechanisms often not in place, but there is a culture of total disregard for the provisions of the Convention, such as in the manner in which there was a failure to comply with the necessary public participation procedures for the NREAP. These are clearly leading to frustrations with citizens, who are increasingly complaining that they do not have any Rights, such as when developments like wind farms are 'fast tracked' into their neighbourhoods.

A core issue is the lack of Access to Justice. The particular case of Volkmar Klohn[2], who ended up with a cost of €86,000 in legal claims from the planning authority having already been raised in the Compliance Committee meeting of the 21st September 2012. With regard to the European Court of Justice Case C-427/07, EU Commission v Ireland[3], in relation to legal costs not being prohibitively expensive, this case now appears to have been dropped by the EU Commission following a change in Irish legislation, which requires each side to carry their own costs. However, this does not change the situation in that the Irish legal system cannot be

[2] [2011] IEHC 196

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

considered as fair and equitable, there being inequality of arms between the State and the applicant, while the costs of litigation are still extremely high. Neither is it a legal system, which can be described as timely.

Despite the many failures in relation to the Convention in Ireland, the EU as a Party to the Convention has demonstrated an unwillingness to ensure it is properly implemented. Communication ACCC/C/2010/54 did clearly demonstrate failings with regard to compliance, as is documented by the Draft findings of the 4th May 2012. Furthermore, the EU Ombudsman in his decision of September 2012[4] did also forward information with regard to the Complaint Procedure CHAP (2010) 00645 back to the EU Commission for due consideration. Yet this week I received a formal letter from Jean Francois Brakeland at DG Environment ENV.A.2 dated the 14th May 2012 in which he sees "no grounds for pursuing this complaint file, as we are not in a position to establish whether there is an infringement. Therefore, the file is now closed".

One can only point out the glaring fact of over 1,600 MW of installed wind turbines in the Republic of Ireland without a single attempt at completion of the legally binding Strategic Environmental Assessment or the repeated insistence of the representatives of the European Commission during the course of Communication ACCC/C/2010/54 that they have absolute discretion on what they enforce, in a manner which under questioning was demonstrated to be clearly totally arbitrary.

These issues are clearly unsatisfactory and demonstrate the lack of commitment of the EU as a Party to take the necessary legislative, regulatory and other measures, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of the Convention. It would therefore be helpful in particular with regard to the situation in Ireland, if some guidance could be offered to future Communicants, on how the Compliance Committee would address a Communication in relation to failings in relation to compliance with the terms of the Convention in Ireland.

Regards

Pat Swords

[4] http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-54/Correspondence%20with%20communicant/frCommC54_Letter_of_Ombudsman_27Sept2011.pdf