

To: Ms Aphrodite Smagadi, Legal Officer – Aarhus Convention Secretariat
From: Pat Swords BE CEng FICHEM CEnv MIEMA
Re: Compliance Committee meeting on 21st September 2011
Date: 5th September 2011

Dear Ms Smagadi

I refer to your email of 4th August, and to the Commission's letter of 20 July.

As I highlighted to yourself by e-mail on the 7th August 2011, I was awaiting the return of Joseph Dalby, Barrister-at-Law, from his holidays to seek legal assistance in relation to the position adopted by the EU Commission to the Communication, both in their Response and their letter to yourselves on how to follow up of the 20th July 2011.

I note the Committee's ruling on the scope of matters to be dealt with at the Meeting on the 21st September. Firstly, may I apologise if I have inadvertently broadened the scope of the issues beyond my original Communication. I am grateful for the opportunity to present the case in front of the Compliance Committee on the 21st September, as I would also like to point out that I would simply not be afforded a similar opportunity under the circumstances which currently prevail in Ireland.

However, I would wish to respond to the Committee's letter and decision, on account of the unique issue that is before the Committee, and which is highlighted and exploited by the Commission in its submissions with regard to domestic remedies. The situation I find myself in brings in to play the fact that Ireland is the only Member State not to have ratified the Convention.

As the EU Commission stated in Point 20 of its Response:

- “By virtue of Article 216(2) TFEU, since the Union has ratified the Convention, all the Member States are bound by it”

This is in clear contrast to a recent ruling of the High Court of Ireland. In *Koln v An Bord Pleanala* [2011] IEHC 196, a *Volkmar Koln*, a small farmer brought a Judicial Review of a planning case in relation to the Environmental Impact Assessment Directive in March 2006. He relied upon the Aarhus Convention, which was rejected. Mr Justice Hedigan stated:

- “With regard to the Aarhus Convention, this Convention is not applicable as Ireland has not formally ratified it”.

The net result as a consequence of the four day hearing *Volkmar Koln* has now to carry not only his own legal costs, but also €86,000 of An Bord Pleanala's costs.

I say that this divergence is of crucial significance such that:

- It is noteworthy that the Commission's position is that the original Communication should not be regarded as manifestly unreasonable and it applied to have the Communication rendered inadmissible. Whereas I note that the Committee has NOT, in response to the Commission's application, and prior to any reply from me, found that the further document is manifestly unreasonable.

Moreover, I am concerned that the Committee has not made any similar ruling in relation to the submissions and considerable amount of material produced by the Commission in support of same under Section 1 of its submission. Some of these also relate to matters that are not before the Committee and plainly they do not pertain to the questions that the Committee posed to be answered by the Commission. Moreover, it appears that the Commission is entitled to argue that I have not exercised any domestic remedies, whereas I am not permitted to justify not doing so on the grounds that the available remedies are at variance with Pillar III of the Convention.

Whereas, having reviewed my own submission I would submit that much of my submission is relevant to how and the extent to which the Commission has failed to monitor compliance by Ireland with the Convention in respect of renewable energy. The material demonstrates that the process undertaken by the Irish authorities and the Commission leading to decisions subject to scrutiny by the Committee is less than required by the Convention.

May I refer to my original Communication and the questions that were put to me in the Committee's letter of January that indicate that a broader scope was expected.

In my original Communication I said, under the heading Nature of Alleged Non-Compliance; "that there are considerable breaches of the EU Environmental Acquis occurring in Ireland which cannot be dealt with through the Aarhus Convention Compliance Committee".

Question 1 asks:

- "Please indicate how in your view the European Commission failed to properly monitor the implementation of the Aarhus Convention in Ireland and indicate how your allegations relate to the issues raised in the sub-question listed under 2".

Crucially in my interpretation of this question the first clause in the sentence, "how ... [has] the European Commission failed to properly monitor the implementation of the Aarhus Convention in Ireland" is not strictly limited to the second clause, namely the issues raised in the sub-questions listed under Question 2. I addressed the question in good faith.

I believe I am fortified in answering those questions as I did, by Chapter VI of Decision I/7 of Committee. Respectfully I say that, a "communication" is not defined or limited to any particular form or procedure, and that the Committee has determined that it:

- "Shall consider any such communication unless it determines that the communication is:
(a) Anonymous; (b) An abuse of the right to make such communications; (c) Manifestly unreasonable; (d) Incompatible with the provisions of this decision or with the Convention".
- "Further consider communications submitted to it pursuant to this chapter and take into account all relevant written information made available to it, and may hold hearings."

Natural rules of justice apply, even in an informal procedure, and in my Submission I should be afforded a fair opportunity to present my case. I say this principle is all the more important in the present circumstances because, in its Response, the Commission alleges that I have not substantiated my allegations, and then when I do provide same in my answer, it alleges that the document is manifestly unreasonable.

As the Commission concedes in its Response, it is not unaware of a range of issues that I have raised. Moreover, it has chosen to respond to my Answer by way of letter, and I consider that if I was, as the Commission purports to do, to rely on procedural points then it is open to me to submit that the Commission has responded within the five months. However, I appreciate that there is a time limit of five months in which a Party must respond, I believe this merely means that the Commission has a further five months to respond to allegation and information not expressly included in the original Communication.

Cognisant of the scheduling difficulties the Committee is under, my proposal would be therefore:

- As the Committee directs, deal with the two areas identified by the Committee on the 21st September;
- If so required, amend my original Communication to add in my submission of June 2011 or treat it as a separate Communication under the same reference.
- In any event, give the Commission a further five months to respond to same.
- For the Committee to schedule a further meeting once the Response has been filed.

Furthermore there are a number of legal issues, which have arisen since this Communication was submitted, in particular associated with the position taken by the EU, which require clarification going forward.

Firstly the EU Commission's position in relation to myself and domestic remedies needs to be clarified, i.e. Points 18, 54, and 57 of their Response to UNECE. As the EU Commissions stated in Point 20:

- "By virtue of Article 216(2) TFEU, since the Union has ratified the Convention, all the Member States are bound by it".

However, Ireland has not implemented Convention and in particular the necessary provisions in relation to access to justice. In my own circumstances the position I found myself in relation to taking a Judicial Review of the Corrib pipeline case is provided in detail in Section 4.5.2 of my Response to UNECE. This is not an isolated case. As previously mentioned, in a recent decision of the High Court this May, [2011] IEHC 196, Mr Justice Hedigan stated:

- "With regard to the Aarhus Convention, this Convention is not applicable as Ireland has not formally ratified it".

The net result as a consequence of the four day hearing Volkmar Koln has now to carry not only his own legal costs, but also €86,000 of An Bord Pleanála's costs.

The EU Commission's point is therefore improper and at variance with the situation which prevails with regard to the Convention in Ireland. Furthermore, in relation to challenging acts and omissions of the EU Commission itself, I have to point out not only that I am still awaiting a response from the EU Ombudsman in relation to a case which commenced in October 2009, but that I do not have effective access to the European Courts to challenge such issues.

As I highlighted in my Response to UNECE, such as in Section 4.6, the EU Commission's role in enforcement of the principles of the Aarhus Convention in Ireland has been extremely ineffective to date. Clearly from their Response they are not going to adopt any measures to improve the current situation. As I highlighted in Section 3.4.3 of my Response:

- "Indeed the EU Commission is clear in its Communication on implementing European Community Environmental Law COM(2008) 773, on the role the Aarhus Convention plays in the better and more consistent enforcement of Community environmental law. In this respect the Commission made it clear it should be easier to bring cases before a national judge to enable problems to be resolved closer to citizens. As the document clarifies; "It should also reduce the need for Commission intervention".

There are therefore major concerns in the manner in which the EU Commission sees its role in relation to the Convention. One can certainly deduce from the above they see it as a measure to reduce their work load. In addition, the situation in Ireland and the content raised during the course of this Communication, demonstrate that they see no obligations on themselves, with regard to ensuring public authorities carry out their functions with due regard to the terms of the Convention. Points 51 to 54 of the EU Commission's response demonstrate what they see as their absolute discretion with regard to enforcement action. Point 56 their position with regard to bad application of Union law, such as the principles of the Convention. This is clearly at variance with regard to their responsibilities as a Party of the Convention.

The position of Ireland and the EU with regard to the Convention are, as I raised in my previous letter of the 7th August, both unique and leading to confusion. However, what this Communication and the supporting documentation which lead to its development, demonstrates with full clarity, is the complete intransigence of the EU Commission in relation to its responsibilities for ensuring that the principles of the Convention are applied in Ireland in matters subject to Community legal order. While I fully accept that the time available to the Compliance Committee is limited, the EU Commission has adequate resources to deal with the issues raised in my Response and if necessary could have requested additional time. Instead its position is one of outright hostility. Furthermore the role of the EU Ombudsman in ensuring compliance of EU institutions with the provisions of the Convention has also proven to be ineffective.

Given these circumstances, while welcoming the opportunity to present the details outlined in the Agenda for the meeting on the 21st September, there are still likely to be major unresolved issues with regards to the EU's responsibilities in relation to the Convention and in particular, the situation of compliance of Irish Public Authorities with its terms. I would therefore welcome clarification from the Compliance Committee, with regards to the terms under which they would accept a further Communication(s) from myself or other interested parties in Ireland, noting in particular the claim of the EU Commission in Point 20 below:

- “The extent of the Union’s competences and liabilities is spelt out in the Declaration made by the Community on ratification (2005 OJ L124/3). The international responsibility of the Union under the Convention for the acts and omissions of Ireland is commensurate with this competence. To succeed in his claim against the Union in respect of these acts and omissions, Mr Swords would need to establish that these acts and omissions relate to matters for which the Union is responsible under the Aarhus Convention”.

Note: In relation to my Response to UNECE and the Response of the EU Commission to UNECE, there are clearly major differences of opinion in relation what is seen as acts and omissions for which the Union is responsible under the Aarhus Convention, hence the request for clarification above.

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

Regards

Pat Swords