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DIRECTORATE-GENERAL ENVIRONMENT
Directorate A - Legal Affairs and Cohesion
ENV.A.2 - Compliance promotion, governance and legal issues
Head of Unit

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Aphrodite Smagadi
Secretary to the Aarhus Convention
Compliance Committee
United Nations Economic
Commission for Europe
Palais des Nations, Room 348
1211 GENEVA 10
SWITZERLAND

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Dear Ms Smagadi,

Subject: **Communication to the Aarhus Convention Compliance Committee concerning compliance by the United Kingdom and the European Union with provisions of the Convention in relation to the implementation of the renewable energy programme in Scotland (ACCC/C/2012/68)**

I. Introduction

I refer to your letter dated 8 January 2013 asking the European Union to "*provide information on how the requirement of article 6, paragraph 8, was addressed in the consultations leading to the adoption of the Communication on "Renewable Energy: a major player in the European Energy market" (COM(2012)271) on 6 June 2012*". The European Commission replies to your letter on behalf of the European Union.

II. Article 6(8) of the Convention and its Application to the Present Case

As already mentioned at the Committee meeting, the European Commission is of the view that the disciplines of Article 6(8) do not apply to policy documents such as the Commission Communication COM(2012)271 of 6 June 2012 on "Renewable Energy: a major player in the European energy market" (hereafter "the Renewable Energy Communication").

It is undisputed that the Renewable Energy Communication is not a permitting decision within the meaning of Article 6(1) (a) or (b) of the Aarhus Convention.

The only provision under which the disciplines of Article 6(8) of the Aarhus Convention would apply with respect to the Renewable Energy Communication is therefore Article 7,

second sentence, which applies by "renvoi" those disciplines to "*plans and programmes relating to the environment*".

The Aarhus Convention does not provide for a definition of "*plan and programme*". But it would seem logical to interpret it in harmony with the definition of "*plans and programmes*" contained in Article 2(5) of the UNECE Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context ("the SEA Protocol"). Indeed, the Protocol is a subsequent agreement for a large number of the Parties, including the European Union. According to that provision,

5. "*Plans and programmes*" means plans and programmes and any modifications to them that are:

(a) Required by legislative, regulatory or administrative provisions; and

(b) Subject to preparation and/or adoption by an authority or prepared by an authority for adoption, through a formal procedure, by a parliament or a government.

Another important contextual element for the interpretation of Article 7 of the Aarhus Convention is Article 4(2) of the SEA Protocol, which requires the carrying out of a strategic environmental assessment, i.e. the legal instrument by which public participation is ensured, for "*plans and programmes [...] which set the framework for future development consent for projects that requires an environmental impact assessment under national legislation*".

An analysis of the findings of the Compliance Committee reveals that indeed, not every policy document is a "plan or programme" for the purpose of Article 7 of the Aarhus Convention. In *Armenia ACCC/C/2004/8*, the designation of land for a particular type of commercial activity was at stake. The Vilnius County Waste Management Plan was identified as a "plan" in *Lithuania ACCC/C/2006/16*. This approach seems consistent with the SEA Protocol.

In that light, the Renewable Energy Communication is clearly not a "plan or programme", as it is not required by legislative, regulatory or administrative provisions and more importantly because it does not have the binding programmatic nature of plans and programmes. There is absolutely no link whatsoever between the Renewable Energy Communication and the development consents of e.g. individual windfarms.

Indeed, the Renewable Energy Communication is simply a political document, of a non-legally binding nature, announcing the views of one EU institution as expressed to the two other institutions, i.e. the European Parliament and the Council, and the two advisory bodies, i.e. the European Economic and Social Committee and the Committee of the Regions. The two institutions are totally free to endorse, modify, or even disregard such policy statements. It is therefore not even the policy of a Party, but only the views of one institution. It is a general policy document, which is not addressed to any specific individual stakeholder.

In the view of the European Commission, the Renewable Energy Communication would therefore qualify as a "*policy relating to the environment*", subject only to the best endeavours clause in the last sentence of Article 7 of the Aarhus Convention. It is also

useful to recall that while the SEA Protocol does not offer a definition of “policies and legislation”, the Simplified Resource Manual to Support Application of the Protocol on Strategic Environmental Assessment policies states that policies *"are generally considered to be strategic proposals at a higher or more general level than plans and programmes."*

III. The Commission's Policy on Consultation

While this goes beyond the scope of the question from the Compliance committee, the European Commission would like to take this opportunity to provide some information on its public participation process concerning policies.

Since 2002, the Commission has put in place a reinforced culture of consultation and dialogue, by setting minimum standards for consultation of interested parties (COM(2002)704 of 11 December 2002). Indeed, the "public consultations" item appears on the very first page of the European commission website at http://ec.europa.eu/index_en.htm, with a link to the "Your Voice in Europe" interactive tool.

The four general principles for consultation are

- (1) Participation : the Commission must consult as widely as possible on major policy initiatives. This applies, in particular, in the context of legislative proposals.
- (2) Openness and accountability : not only must the Commission's consultation processes be transparent, but also interested parties must themselves operate in a transparent way. It must be apparent which interests they represent and how inclusive that representation is.
- (3) Effectiveness : To be effective, consultation must start as early as possible. Interested parties should be involved in the development of a policy at a stage where they can still have an impact on the policy. A prerequisite for effectiveness is respect of the principle of proportionality. The consultation must be proportionate to the impact of the proposal.
- (4) Coherence : The Commission's consultation processes must be operated in a consistent and transparent way. Ways to ensure coherence are monitoring, reporting and dissemination of best practice.

The five minimum standards of the European Commission for consulting the public are

- (1) All communications relating to consultations should be clear and concise, and should include all necessary information to facilitate responses;
- (2) When defining the target group(s) in a consultation process, the Commission should ensure that relevant parties have an opportunity to express their opinions;
- (3) The Commission should ensure adequate awareness-raising publicity and adapt its communication channels to meet the needs of all target audiences. Without excluding other communication tools, open public consultations should be published on the Internet and announced at the “single access point” (this is the Your Voice in Europe site referred above);

(4) The Commission should provide sufficient time for planning and responses to invitations and written contributions. The Commission should strive to allow at least 8 weeks for reception of responses to written public consultations and 20 working days notice for meetings; the 8-week time period has been increased to 12 weeks for the public consultations starting in 2012 (COM(2010)543 of 8 October 2010);

(5) Receipt of contributions should be acknowledged. Results of open public consultation should be displayed on websites linked to the single access point on the Internet.

Concerning this last minimum standard, the Commission has indicated that contributions will be analysed carefully to see whether, and to what extent, the views expressed can be accommodated in the policy proposals. Contributions to open public consultations will be made public on the single access point. Results of other forms of consultation should, as far as possible, also be subject to public scrutiny on the single access point on the Internet.

Further, the Commission services provide adequate feedback to responding parties and to the public at large. To this end, explanatory memoranda accompanying legislative proposals by the Commission or Commission communications following a consultation process will include the results of these consultations and an explanation as to how these were conducted and how the results were taken into account in the proposal. In addition, the results of consultations carried out in the Impact Assessment process will be summarised in the related reports (the impact assessment is a necessary requirement for tabling legislative proposals). It should be recalled that the European Union counts 500 million inhabitants, so individual responses to comments are not really an option in that context.

Finally, the internal instructions to the Commission services on how to organise public consultations specifically contain the following reference to the Aarhus Convention :

"If your consultation either directly concerns the environment or includes an environmental aspect, please be aware that it may be subject to the European Parliament and the Council Regulation (EC) n°1367/2006 on the application of the provisions of the Aarhus Convention to Community institutions and bodies.

Art 9 of the Regulation stipulates that Community institutions and bodies "shall provide early and effective opportunities for the public to participate during the preparation, modification or review of plans and programmes relating to the environment when all options are still open".

If you have any questions, please contact DG ENV, which is the lead service on Aarhus. To find more about the Aarhus convention, visit <http://ec.europa.eu/environment/aarhus>".

The public consultation on the Renewable Energy Strategy took place between 6 December 2011 and 7 February 2012, before the drafting and the adoption of the Communication on Renewable Energy, and a stakeholder's conference took place on 24 February 2012. All the documents relevant to the public consultation are to be found at http://ec.europa.eu/energy/renewables/consultations/20120207_renewable_energy_strategy_en.htm.

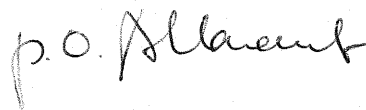
The attention of the Compliance Committee is drawn to the fact that some 400 contributions were received (all available on the public website). According to Commission policy, a 10-page summary of the consultation has been made public (http://ec.europa.eu/energy/renewables/consultations/20120207_renewable_energy_strategy_en.htm).

The results of the consultation process were also taken into account in the Impact assessment report which accompanies the Communication on Renewable Energy (document SWD(2012)149 of 6 June 2012).

IV. Final Remark

Finally, the European Commission would like inform the Compliance Committee that its reply to the request for internal review submitted by EPAW and the communicant has been sent and is now available on the Commission public registry of the Internal review requests at <http://ec.europa.eu/environment/aarhus/requests.htm>, request No 13.

Yours sincerely,



Jean-François Brakeland

Cc : Ms Barbara Anning (DEFRA), Ms. Christine Metcalfe

Ms A. Wiedner, Ms. J. Laureckaite-Larsen (DG ENV), Mr. P. Oliver (LS), Ms. A. Georgescu (DG ENER), delegation Geneva

