



**European Platform Against Windfarms**

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**Communication to Aarhus Convention Compliance Committee by the European Platform Against Windfarms (EPAW)**

**I. Information on Correspondent**

The European Platform Against Windfarms (EPAW) was founded on October 4th 2008 by a small number of federations, associations and other groups from four EU countries. It now has 621 member organisations, from 24 countries. It is based in Ireland. The aim of EPAW is to defend the interests of its members which are either:

- opposing one or more wind farm proposals;
- or questioning the effectiveness of wind farms as a tool for solving the problems of man and the planet;
- or defending the flora, fauna and landscapes from damage caused by wind farms, directly or through environmental degradation such as erosion, water contamination and bush fires;
- or generally fighting against the damaging effects of wind farms on tourism, the economy, people's quality of life, the value of their properties and, increasingly often, their health;
- or a combination of the above.

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## II. Party Concerned

European Community

## III. Facts of the Communication

The background to this Communication is related to the decision reached by the Committee in relation to Summary Proceedings (ECE/MP.PP/C.1/2010/4, paragraph 45):

*At its twenty-eighth meeting, the Committee noted that it had been confronted with allegations of non-compliance concerning a Party reflecting the same legal issues upon which it had already deliberated in a previous communication relating to the same Party (but not to the same facts). In that regard, the Committee noted that, the Party concerned had already worked with the Committee to fully meet compliance. Bearing in mind that according to the Convention the compliance review mechanism was not a redress mechanism, and on the basis of the freedom awarded to the Committee by the Meeting of the Parties to “consider any [...] communications” according to paragraph 20 of the annex to decision I/7, without specifying the process, the Committee reflected upon its experience and the practical dimension of its role and decided that, in cases which were determined to be preliminarily admissible, but where the legal issues raised by the communication had already been tackled by the Committee, summary proceedings could apply as follows:*

- a) The Committee would send a letter to the communicant informing them about the process;*
- b) The Committee would notify the Party concerned, reminding it of the previous findings and recommendations and requesting it to provide information on the progress achieved on the previous recommendations;*
- c) The Committee would record the outcome of the process and its consideration in the report, focusing on the progress, if any, in the law and implementation of the Convention by the Party concerned.*

In Communication ACCC/C/2010/54 the Committee's findings<sup>1</sup> in relation to the same Party, namely the EU, were:

The Committee finds that the Party concerned:

- (a) By not having in place a proper regulatory framework and/or clear instructions to implement article 7 of the Convention with respect to the adoption of NREAPs by its member States on the basis of Directive 2009/28/EC has failed to comply with article 7 of the Convention (para. 85);*
- (b) By not having properly monitored the implementation by Ireland of article 7 of the Convention in the adoption of Ireland's NREAP has also failed to comply with article 7 of the Convention (para. 85);*
- (c) By not having in place a proper regulatory framework and/or clear instructions to implement and proper measures to enforce article 7 of the Convention with respect to*

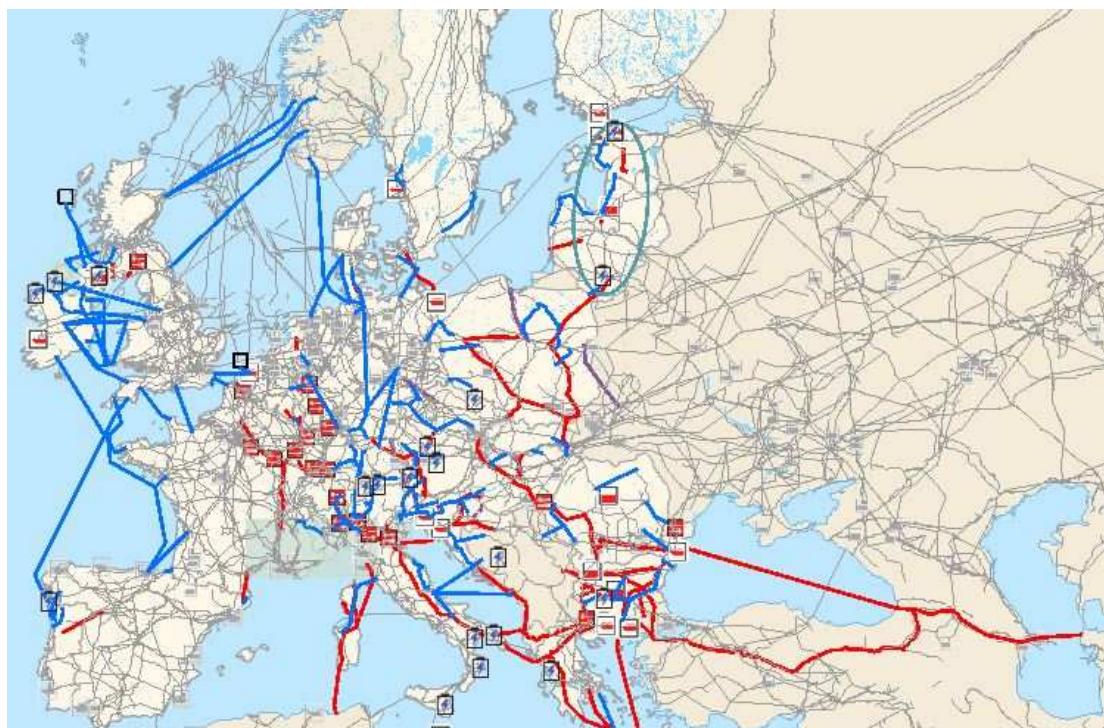
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<sup>1</sup> ECE/MP.PP/C.1/2012/12

*the adoption of NREAPs by its member States on the basis of Directive 2009/28/EC has failed to comply also with article 3, paragraph 1, of the Convention (para. 86).*

On 14 October 2013, the European Commission adopted a list of 248 key energy infrastructure projects<sup>2</sup>. These projects have been selected by twelve regional groups established by the new guidelines for trans-European energy infrastructure (TEN-E). Carrying the label "Projects of Common Interest" (PCI) they will benefit from faster and more efficient permit granting procedures and improved regulatory treatment.

They may also have access to financial support from the Connecting Europe Facility (CEF), under which a €5.85 billion budget has been allocated to trans-European energy infrastructure for the period 2014-20.



***The scale of the Projects of Common Interest can be seen in the above Figure from the EU website – the blue being High Voltage Electrical Infrastructure and red being gas networks***

To clarify the position in relation to the electricity networks above, as part of the Projects of Common Interest, the EU adopted Regulation No 347/2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009<sup>3</sup>. As it clarifies in the recital to the regulation:

- *Accelerating the refurbishment of existing energy infrastructure and the deployment of new energy infrastructure is vital to achieve the Union's energy and climate policy objectives, consisting of completing the internal market in energy, guaranteeing security of supply, in particular for gas and oil, reducing greenhouse gas emissions by 20 % (30 % if the conditions are right),*

<sup>2</sup> [http://ec.europa.eu/energy/infrastructure/pci/pci\\_en.htm](http://ec.europa.eu/energy/infrastructure/pci/pci_en.htm)

<sup>3</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:115:0039:0075:EN:PDF>

*increasing the share of renewable energy in final energy consumption to 20%<sup>(1)</sup> and achieving a 20 % increase in energy efficiency by 2020 whereby energy efficiency gains may contribute to reducing the need for construction of new infrastructures. At the same time, the Union has to prepare its infrastructure for further decarbonisation of its energy system in the longer term towards 2050. This Regulation should therefore also be able to accommodate possible future Union energy and climate policy objectives.*

*<sup>(1)</sup> Directive 2009/28/EC.*

Article 3 of the Regulation relates to the “Union List of Projects of Common Interest”, while Article 4 of the Regulation relates to “Criteria for Projects of Common Interest”. The latter further defines that; “*for electricity transmission and storage projects falling under the energy infrastructure categories set out in Annex II.1(a) to (d), the project is to contribute significantly to at least one of the following specific criteria:*

*(i) market integration, inter alia through lifting the isolation of at least one Member State and reducing energy infrastructure bottlenecks; competition and system flexibility;*

*(ii) sustainability, inter alia through the integration of renewable energy into the grid and the transmission of renewable generation to major consumption centres and storage sites;*

*(iii) security of supply, inter alia through interoperability, appropriate connections and secure and reliable system operation”.*

Annex IV of the Regulation provides further clarification with respects to the Criteria in Article 4 and specifically with respect to (ii) above in that:

*(b) Transmission of renewable energy generation to major consumption centres and storage sites shall be measured in line with the analysis made in the latest available 10-year network development plan in electricity, notably by:*

*- for electricity transmission, by estimating the amount of generation capacity from renewable energy sources (by technology, in megawatts), which is connected and transmitted due to the project, compared to the amount of planned total generation capacity from these types of renewable energy sources in the concerned Member State in 2020 according to the national renewable energy action plans as defined in Article 4 of Directive 2009/28/EC,*

*- for electricity storage, by comparing new capacity provided by the project with total existing capacity for the same storage technology in the area of analysis as defined in Annex V.10.*

There is therefore a clear connect between the Projects of Common Interest, Directive 2009/28/EC on renewable energy and the National Renewable Energy Action Plans (NREAPs), which implement this Directive, particular in the area of electricity transmission and storage. In simple terms these Projects of Common Interest in the electricity transmission and storage category are designed to support the implementation of the NREAPs.

As regards the Convention itself, this is addressed in the recital to Regulation No 347/2013:

- *The correct and coordinated implementation of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, where applicable, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed in Aarhus on 25 June 1998 (the 'Aarhus Convention'), and of the Espoo Convention on environmental impact assessment in a transboundary context (the 'Espoo Convention') should ensure the harmonisation of the main principles for the assessment of environmental effects, including in a cross-border context. Member States should coordinate their assessments for projects of common interest, and provide for joint assessments, where possible. Member States should be encouraged to exchange best practice and administrative capacity-building for permit granting processes.*

However, despite the Party being aware of the Convention, it was not complied with in respect of the obligations under Article 7 of the Convention and the point we have now reached where on 14 October 2013, the European Commission has adopted a list of 248 key energy infrastructure projects. As is stated in COM/2013/0711 final "Long term infrastructure vision for Europe and beyond":

*As a first step to the implementation of the TEN-E Guidelines, the Commission has adopted, under the delegated act procedure, the Union list of about 250 projects of common interest in electricity and gas transmission, storage and LNG, as well as in smart grids and in oil. This first list is based on the intensive work of twelve regional groups, which brought together the representatives of the Member States, national regulatory authorities, project promoters as well as the European networks of transmission system operators for electricity and gas (ENTSO-E and ENTSG), the Agency for Cooperation of Energy Regulators and the Commission.*

*The majority of the projects of common interest are in the field of electricity, prevalently transmission lines, fourteen storage projects and two smart grids projects. They will contribute to the better integration of the internal electricity market, enhance the preparedness of the grid to take up increasing amounts of energy from variable renewable sources and maintain system stability at the same time.*

As the first underlined section highlights, there was a total absence of public participation in reaching the stage which has now occurred, despite Article 7 of the Convention engaging Article 6(4), which is clear in that:

- *Each Party shall provide for early public participation, when all options are open and effective public participation can take place.*

If one considers the legislative implementation of Article 7 of the Convention by the Party, then this is through Regulation 1367/2006<sup>4</sup>, the 'Aarhus Regulation', which in Article 9 on Public Participation on Plans and Programmes Related to the Environment requires that:

1. *Community institutions and bodies shall provide, through appropriate practical and/or other provisions, early and effective opportunities for the public to participate during the preparation, modification or review of plans or*

<sup>4</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:264:0013:0019:EN:PDF>



*programmes relating to the environment when all options are still open. In particular, where the Commission prepares a proposal for such a plan or programme which is submitted to other Community institutions or bodies for decision, it shall provide for public participation at that preparatory stage.*

- 2. Community institutions and bodies shall identify the public affected or likely to be affected by, or having an interest in, a plan or programme of the type referred to in paragraph 1, taking into account the objectives of this Regulation.*
- 3. Community institutions and bodies shall ensure that the public referred to in paragraph 2 is informed, whether by public notices or other appropriate means, such as electronic media where available, of:*
  - (a) the draft proposal, where available;*
  - (b) the environmental information or assessment relevant to the plan or programme under preparation, where available; and*
  - (c) practical arrangements for participation, including:*
    - (i) the administrative entity from which the relevant information may be obtained,*
    - (ii) the administrative entity to which comments, opinions or questions may be submitted, and*
    - (iii) reasonable time-frames allowing sufficient time for the public to be informed and to prepare and participate effectively in the environmental decision-making process.*
- 4. A time limit of at least eight weeks shall be set for receiving comments. Where meetings or hearings are organised, prior notice of at least four weeks shall be given. Time limits may be shortened in urgent cases or where the public has already had the opportunity to comment on the plan or programme in question.*
- 5. In taking a decision on a plan or programme relating to the environment, Community institutions and bodies shall take due account of the outcome of the public participation. Community institutions and bodies shall inform the public of that plan or programme, including its text, and of the reasons and considerations upon which the decision is based, including information on public participation.*

Please Note: Article 9(4) of Regulation 1367/2006 does not directly transpose the provisions of Article 7 of the Convention, which requires that the 'necessary information' be provided to the public, as opposed to the Regulation 1367/2006 and the provision of 'environmental information where available'. As the Aarhus Convention: An Implementation Guide clarifies, the word "necessary" should be understood in the context of effective participation". Given the enormous scale and impact of these 248 projects, the 'necessary information' should have course been comprehensive, at least addressing cost, environmental impacts, environmental mitigation measures, quantification of objectives and alternatives to reach them, etc.

In the summer of 2012, the EU (DG Energy) held a public consultation on the Projects of Common Interest<sup>5</sup>. This was conducted in such a manner as to be non-compliant with the Aarhus Convention and Regulation 1367/2006 above. Firstly there was a failure, which still continues to this date, with regard to the requirement for

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<sup>5</sup>[http://ec.europa.eu/energy/infrastructure/consultations/20120620\\_infrastructure\\_plan\\_en.htm](http://ec.europa.eu/energy/infrastructure/consultations/20120620_infrastructure_plan_en.htm)

environmental information associated with these Projects of Common Interest. As the recital to the Convention clarifies:

- *Recognizing the importance of fully integrating environmental considerations in governmental decision-making and the consequent need for public authorities to be in possession of accurate, comprehensive and up-to date environmental information.*

Despite repeated requests for this environmental information and complaints in relation to the absence of this environmental information, there was a refusal to provide it – it doesn't exist, even though these 248 projects have been selected for accelerated planning procedures and financial incentives. As COM/2013/0711 Final states with regards to the next steps for these Projects of Common Interest:

- *Launch an investors' dialogue to promote investment in European infrastructures to attract the necessary financing from the global capital markets*
- *Monitor the appointment of national one-stop-shops (starting December 2013)*
- *First call under the Connecting Europe Facility in 2014*
- *Monitor the implementation of the permit granting measures*
- *Monitor closely the implementation of the Projects of Common Interest (first reporting in 2015)*

This absence of environmental information concerning the Projects of Common Interest can also be seen as a breach of the requirements of Article 7 of Regulation 1367/2006, which requires that:

- *Community institutions and bodies shall organise the environmental information which is relevant to their functions and which is held by them, with a view to its active and systematic dissemination to the public*

Such environmental information is highly relevant to the function of DG Energy if it selects and then promotes and financially supports these Projects of Common Interest.

Secondly Article 7 of the Convention requires that:

- *Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public.*
- *The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention.*

No effort was made by the EU as a Party to contact the public, who would be affected by this decision making, namely those who lived in the areas where this huge infrastructure development was to take place; they were never identified and contacted. Furthermore, as the previous Figure shows, the extent of the projects had enormous pan-European reach. Unfortunately, the language of the consultation,

which was on an obscure part of the EU website, was restricted to English, which is the native tongue of only some 65 million of the 500 million in the EU-27. Therefore the majority of the citizens in which this infrastructure was to be built were completely disenfranchised, not only by language, but also as they would not be routinely engaging with an obscure part of an enormous EU website to which nobody had made the slightest attempt to draw their attention to.

Indeed, the complete failure of the EU as a Party to the Convention, to ensure the active participation of the public to be affected by this decision making, can be seen in that fact that only 142 responses were received from the whole of the EU-27. The public to be affected by this decision making were simply uninvolved; they didn't know about it.

Thirdly, in relation to taking due account of the public participation in the final decision, this simply did not happen. The 142 submissions were never published<sup>6</sup>; there is no record of how they were evaluated. It is known that one was highly critical of the legal breaches involved in relation to the electricity projects in the Republic of Ireland, see Attachment 1 'Submission on Projects of Common Interest'. It was completely ignored; those same projects in the Republic of Ireland were selected for the next phase. As far as COM/2013/0711 final is concerned, see the previously quoted and underlined section on those who were responsible for drawing up the list, the public participation did not exist. Yet the public are expected to pay not only a high financial cost to fund these projects, but also a high environmental cost, none of which are necessary given that for many decades Europe has had a perfectly reliable, economic and functional electricity system without them. And it must be noted that no study has been made, let alone communicated to the public, as to the necessity, cost efficiency and functionality of these enormous projects of great impact on the environment.

#### **IV. Nature of Alleged Non-Compliance**

The chronology of events associated with the Projects of Common Interest is described below. This starts with the Public Consultation on the "List of projects submitted to be considered as potential Projects of Common Interest in energy infrastructure", which ran from 20/06/2012 to 04/10/2012 on the website of DG Energy<sup>7</sup>.

##### **1.1 Initial Request for Information**

On the 30<sup>th</sup> July 2012, Mr Jerry Waugh in Ireland requested from the consultation e-mail address the following:

- *"Where the detailed project information may be obtained in relation to the electricity projects in Ireland".*

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<sup>6</sup> On the Consultation website it is stated as late as end of October 2013: "Number of responses received to this consultation: Not yet available. This information will be published after the consultation closes."  
[http://ec.europa.eu/energy/infrastructure/consultations/20120620\\_infrastructure\\_plan\\_en.htm](http://ec.europa.eu/energy/infrastructure/consultations/20120620_infrastructure_plan_en.htm)

<sup>7</sup> See footnote above and associated link.



This was understandable as all that was provided on the consultation was the name of each of the projects and the Member States involved. Thomas Barrett of DG Energy Unit B1 replied on the same day:

- *The consultation list publishes online contain all the information on each project that the Commission can publicly release. More detailed technical information is controlled by the individual project promoters and we cannot release it due to commercial confidentiality. Given that each project promoter is named for each project, what I can suggest is that you contact each one and request information from them. Some have quite a lot of data already available on their website and will be better able to advise you. Unfortunately, it is not in the power of the Commission to release this data on their behalf.*

In reality, this was totally untrue. The Department of Energy, Communications and Natural Resources in Ireland had also been contacted about the provision of information on these projects; they had refused to do so replying it was a matter for the EU. Furthermore, the developers were refusing to release information on these projects. If for instance we consider the project below in relation to the Natural Hydro Energy scheme in North West Ireland, all that was provided by the EU on the consultation documentation was<sup>8</sup>:

- *Large Scale Hydro Storage facility with a daily capacity of 90 GWh (32850 GWh annually).*

Indeed the developer's website gives nothing but a few buzz words<sup>9</sup>; it doesn't even specify where this massive reservoir is to be built, not to mention its length, width or depth, just that the glacial valleys along the West of Ireland are suitable.

Even worse circumstances applied to the two projects on the EU list, see below, which turned out to involve several thousand 180 m wind turbines in the Irish Midlands for power export to the UK. The developers went and signed farmers to land agreements with secrecy clauses and never informed the local communities in the area of what was occurring<sup>10</sup>.

- *Around 40 individual onshore wind farms, totalling 3GW, collected together through and underground private network in the midlands of Ireland, connected directly to the UK national grid via two 600 kV HVDC sub-sea cables of approximately 500 km and with a capacity of 5 GW in Wales (onshore and offshore).*
- *Energy Bridge (EB) HVDC underground cable of +/- 320kV for the 1st circuit and +/- 500kV for 2 and 3, respectively, and with a total capacity of 5 GW. The length of the 3 circuits will be 290 km, 190 km and 129 km, respectively. The cable will route large amounts of renewable electricity generated in a series of interconnected Irish wind farms directly into the UK market (onshore and offshore).*

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<sup>8</sup> [http://ec.europa.eu/energy/infrastructure/pci/doc/2013\\_pci\\_projects\\_country.pdf](http://ec.europa.eu/energy/infrastructure/pci/doc/2013_pci_projects_country.pdf)

<sup>9</sup> <http://www.naturalhydroenergy.com/>

<sup>10</sup> Even the Irish politicians are now forced to admit there are problems in this area: <http://www.irishtimes.com/news/environment/wind-farm-fears-needlessly-stoked-by-developers-says-minister-1.1549571>

Furthermore, while the Irish Authorities were involved with these companies, they ignored their obligations under Article 6(5) of the Convention and failed to ensure an information flow to the public.

Mr Waugh then went back to the Consultation team pointing out that their refusal to provide information was unacceptable, particularly with regard to the ability to be able to participate in a consultation of this importance and impact. However, there was a continued refusal to provide information, justified by the below in the reply of the 23<sup>rd</sup> August 2012 by Marija Mrdeza, Policy Office, DG Energy, Unit Internal Market I, Network and Regional Initiatives:

*This current consultation includes information on the form and location of all projects. We must balance this with the need for commercial entities to have some confidentiality around planned investments, so we hope you appreciate that we cannot release sensitive technical data. If there are specific projects about which you would like to know more, the relevant project promoters may be willing to share more information.*

*In reference to the personal data of project promoters, we would like to clarify a few points. Each project has been submitted by a promoting organisation. While the public consultation contains the name of every project promoter as an organisation, we cannot give out the details of any named individuals.*

*According to regulation 45/2001, Article 6, Change of Purpose: "Without prejudice to Articles 4, 5 and 10: 1. Personal data shall only be processed for purposes other than those for which they have been collected if the change of purpose is expressly permitted by the internal rules of the Community institution or body".*

*The privacy statement for the initial submission of project information (accessible at: [http://ec.europa.eu/energy/infrastructure/consultations/doc/20120607\\_non\\_tyndp\\_projects\\_privacy\\_statement.pdf](http://ec.europa.eu/energy/infrastructure/consultations/doc/20120607_non_tyndp_projects_privacy_statement.pdf)) states that 'No personal data is transmitted to parties which are outside the recipients and the legal framework mentioned.'*

*As the privacy statement precludes sharing information with external parties, this would contravene the requirements of Regulation 45/2001.*

*Furthermore, according to regulation 45/2001 Article 8 'Transfer of personal data to recipients, other than Community institutions and bodies, subject to Directive 95/46/EC':*

*"Without prejudice to Articles 4, 5, 6 and 10, personal data shall only be transferred to recipients subject to the national law adopted for the implementation of Directive 95/46/EC,*

*(a) if the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority, or  
(b) if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced".*

*The Aarhus Convention, which the EU is a signatory to since 2005, establishes a number of rights for the public with regard to the environment. This includes information on the state of the environment and policies and measures taken by public authorities, public participation in decision making and access to justice. According to Article 1 of the Aarhus Convention "each Party shall guarantee the rights of the access to information, public participation in decision making, and access to justice in environmental matters in accordance with this Convention".*

*Nevertheless, requests may be refused to respect the confidentiality of commercial interest. A decision to refuse access must state the reasons for the refusal and indicate what forms of appeal are open to the applicant. All persons who feel their rights have not been respected must have access to a review procedure under national legislation. The European Union applies the Aarhus Convention to its own institutions and bodies.*

## **1.2 Formal Request for Information under Regulations 1367/2006 and 1049/2001 of 20<sup>th</sup> August 2012**

Due to the concern related to the developments above, Mr Joe Caulfield, who is connected with EPAW in Ireland through the Turn180 NGO<sup>11</sup>, made a formal request on the 20<sup>th</sup> August 2012 to DG Energy using the Aarhus mechanisms in Regulations 1367/2006 and 1049/2001. The reply from Philip Lowe, Director- General for Energy, of 19<sup>th</sup> October 2012 (See Attachment 2 'gesdem 1341824'), stated:

- *With regard to your request to access environmental information on certain projects, I have to inform you that the Commission does not have more detailed information in its position at this stage. This is because the purpose of the consultation is to allow stakeholder's views to be heard in an early phase before the project takes shape. The consultation already included information on the form and the location of all the projects.*

However, this was considered an unacceptable reply – DG Energy should not have engaged in promotion of projects until such time as their environmental suitability and effectiveness had been considered. Neither was there adequate information in relation to their form and location, while the public in those areas had not been informed as to what was being promoted, why it was being promoted, what would its impacts be, what were the mitigation measures, what were the costs, alleged benefits and alternatives to the same. On this basis a Confirmatory Application was made on the 24<sup>th</sup> October 2012.

## **1.3 Reply to Confirmatory Application of 28<sup>th</sup> February 2013**

It is instructive to point out that as regards the timeframes to process the initial request and the following Confirmatory Application, the EU Commission was well outside the timeframes set in both Regulations 1367/2006 and 1049/2001, i.e. of 15 working days. Similarly the timeframes set in Article 4(2) of the Convention in relation to a month were well exceeded. This had the effect of restricting not only the citizen's right to be informed, but also to participate in the relevant public participation process, which was now closed having been pursued with a total lack of availability of environmental information on the relevant projects.

This reply of the 28<sup>th</sup> February 2013 originated from Catherine Day, the Secretary-General of the European Commission (see Attachment 3 'Caulfield – final EN' and Attachment 4 'Caulfield – final annex'). In this it was stated:

*In its reply to your initial application, DG ENER pointed out that, at this stage, environmental information on these projects is really scarce in the Commission. When examining your confirmatory application was checked what kind of information is currently available with regard to these projects. It appears that, at this stage, the*

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<sup>11</sup> <http://www.epaw.org/organisation.php?lang=en&country=Ireland>

*Commission does not hold environmental information on the above mentioned projects, but has only received responses to a questionnaire with very limited information regarding expectations on sustainability.*

*Please find attached a blank project questionnaire (electricity) for your information. You will see from the questionnaire that the question coming closest to the definition of "environmental information" is on sustainability and has been included under point "f". For your information, this question is covered by a few general sentences for every project.*

*The reason why no environmental information is available at this stage is that these projects are for the moment only indicative ideas.*

Naturally this was not considered acceptable, these questionnaires, as they were filled out by the developer, were environmental information essential to the understanding of the relevant public participation and should have by right been provided within the specified timeframe at the first instance of requesting. However, we now had the completely unacceptable situation where the Secretary-General was stating:

*Should you be interested in obtaining the questionnaires referred to above, please address your request to DG ENER (ENER-ACCES-DOCUMENTS@ec.europa.eu). This would be handled as a fresh application for access, for which a consultation of the third parties concerned will be required.*

*Since there is no other environmental information in the possession of the Commission as regards these projects, I consider that your confirmatory application is devoid of purpose. Indeed, a confirmatory application is a request to review a position by which access to one or more documents has been fully or partially denied. This is obviously not the case with regard to your request.*

Clearly there was a continuing refusal to provide access to what was requested back on the 20<sup>th</sup> August and must be considered a breach by the Director-General Energy and Secretary-General of the EU Commission of Article 3(2) of the Convention:

- *Each Party shall endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters.*

#### **1.4 Second Formal Request under Regulations 1367/2006 and 1049/2001 of 5<sup>th</sup> March 2013**

On the 5<sup>th</sup> March 2013, Mr Joe Caulfield formally requested under the same Regulations 1367/2006 access to the project questionnaires related to the Irish electricity projects. On the 22<sup>nd</sup> April, again outside the specified timeframes for access to information on the environment, a reply was received from the same Philip Lowe, Director-General of Energy, clarifying:

- *"The institutions shall refuse access to a document where disclosure would undermine the protection of: commercial interests of a natural or legal person, including intellectual property", we would like to inform you, that we have excluded commercial sensitive information from some project questionnaires.*

See Attachment 5 '789936 PL to Caulfields Answer\_GESTDEM2013\_1279' and Attachment 6 'GESDEM 1279'. Note while the relevant project questionnaires were provided, which contained considerable information which fell under the criteria established under Article 2(3) of the Aarhus Convention as "Environmental Information", there were also considerable sections blacked out. For instance the estimated capital cost, financial planning and site investigations for the Natural Hydro Energy project, referred to previously in Section 1.1. Note this project involved construction of a retaining dam 1.3 km in length and up to 120 m in height, behind which would be pumped 4 km<sup>2</sup> of sea water into a flooded valley. In contrast the Hoover Dam while rising to 220 m; it is only 380 m in length, i.e. only 30% as long. This demonstrates the scale of what was actually being proposed and supported. Yet the public was being denied basic information on this project which was being supported by the EU.

## 1.5 Second Confirmatory Application of 28<sup>th</sup> April 2013

Given the continued refusal to provide the full documentation on the electricity projects for Ireland, a complaint and second Confirmatory Application was made to DG Energy on the 28<sup>th</sup> April 2013. See Attachment 7 'Reply to the EU Commission in relation to Letter of 22<sup>nd</sup> April 2013 concerning Access to Documents and SEA'. In particular it was highlighted Article 6(1) of Regulation 1367/2006:

- *"As regards the other exceptions set out in Article 4 of Regulation (EC) No 1049/2001, the grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment".*

*If we consider the "Aarhus Convention: An Implementation Guide"<sup>12</sup> in relation to Article 4(4)(d): The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed. Then the "Aarhus Convention: An Implementation Guide" states:*

- *Under the Convention, public authorities are allowed to withhold certain, limited types of commercial and industrial information from the public. For public authorities to be able to withhold information from the public on the basis of commercial confidentiality, that information must pass several tests.*
- *First, national law must expressly protect the confidentiality of that information. This means that the national law must explicitly protect the type of information in question as commercial or industrial secrets. Second, the confidentiality must protect a "legitimate economic interest."*

*At no stage have you provided in your correspondence of 22<sup>nd</sup> April 2013 the basis in Community legal order for excluding this information from public access. Indeed if we refer back previously to your letter of 19<sup>th</sup> October 2012, reference was made then to a 'privacy statement' and personal data. However, an examination of the redacted*

<sup>12</sup> <http://www.unece.org/fileadmin/DAM/env/pp/acig.pdf>

*questionnaires provided, clearly shows that the information redacted goes well beyond the scope of 'personal data'.*

## **1.6 Confirmatory Application Ignored – 24<sup>th</sup> May 2013**

On the 24<sup>th</sup> May 2013 Mr Caulfield received a response to the above from Catherina Sikow-Magny, Head of Unit, DG Energy, which stated that the project questionnaires had been provided. See Attachment 8 'Letter to Mr Caulfield save1373332 24<sup>th</sup> May 2013'.

At this stage a complaint process had been initiated with the EU Commission and the EU Ombudsman by Mr Caulfield and this is described in the next sections.

## **1.7 Request for Information by Laois Wind Energy Awareness Group**

Concerned about Electricity Project E156 (Greenwire) and the manner that it was being promoted by the EU without them being informed, in particular as it involved over a thousand 180 m high wind turbines to be built in their area for electricity export to the UK, the Laois Wind Energy Awareness Group also made a request for information on this project using the Aarhus mechanisms on the 1<sup>st</sup> April 2013. This was again replied to by Philip Lowe, Director General for Energy, on the 7<sup>th</sup> May 2013, again outside the specified timeframe, see Attachment 9 'Answer GESDEM2013 1822 M Conroy'.

The Laois Wind Energy Awareness Group received the same content as in Attachment 6. However, the same Group, which is an Irish member of EPAW, also complained about the manner in which the public participation on the Projects of Common Interest had been conducted in mid-2012 and to which they had not been informed, despite the scale of the project proposed for their area in the Irish Midlands. It is instructive to review the reply from the Director General for Energy, in that not only does he quantify that only 142 Submissions were received, but also that the methodology used for the public participation was COM(2002)704 "Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission". In particular the Director General for Energy stated that the applied procedure complied with the following provisions:

- *Without excluding other communication tools, open public consultations should be published on the Internet and announced at the "single access point".*

Indeed this requirement does belong to COM (2002)704, as a component of Part C 'Publication', but it is preceded by Part A 'Clear content of the Consultation Process' and Part B 'Consultation Target Groups'. Part A dealing specifically with information requirements, i.e. *"All communications relating to consultation should be clear and concise, and should include all necessary information to facilitate responses"*, while Part B couldn't be clearer; *"When defining the target group(s) in a consultation process, the Commission should ensure that relevant parties have an opportunity to express their opinions"*.

Clearly the Commission from the highest level down not only has a fundamental problem with following its own rules, not to mention legal framework in Article 9 of the Aarhus Regulation 1367/2006, but also feels it has a right to ignore these matters



when it is brought to their attention by the Citizens, who have been disenfranchised by this behaviour.

## **1.8 Complaint Process with EU Commission**

As was documented in Section 1.4, a Confirmatory Application was sent to the EU Commission on the 5<sup>th</sup> March 2013, which additionally included a complaint, see Attachment 10 'Reply to the Confirmatory Application for Access to Documents and Complaint to EU Commission'. This pointed out the position established back on the 30<sup>th</sup> July 2012 by Mr Jerry Waugh when the Commission was first contacted, namely:

- ***I would appreciate if you could advise, that in the absence of any project information, how a citizen is supposed to participate in the consultation process?***

In addition it was also pointed out the considerable legal failures which were occurring with this public participation exercise and the implementation of the renewable energy programme in Ireland in relation to the EU's obligations under the Aarhus Convention. The correspondence was then concluded with:

*Firstly I would like to point out that the filled in questionnaires, which are environmental information, should be provided as per the Regulations 1367/2006 and 1049/2001.*

*Secondly, there is already a Complaint 181/2013/(JF)RT with the EU Ombudsman in relation to the failure to comply with the provisions of Regulation 1367/2006 in providing the environmental information requested.*

*Thirdly, it proposed to lodge a second complaint with the EU Ombudsman in relation to the manner in which the consultation on Projects of Common Interest was conducted, as already highlighted in the previous sections. In accordance with the rules of the EU Ombudsman, it is first necessary to "contact the EU institution or body concerned, for example by letter, in order to obtain redress". This letter fulfils this purpose.*

While the Commission did propose a meeting in its response to the above, See Attachment 8, it refused to provide an Agenda, a description of what would be addressed and who would attend. In response to the refusal to comply with the second Confirmatory Application, see previous Section, a reply was sent to the EU Commission on the 28<sup>th</sup> April 2013. See Attachment 11 'Reply to the EU Commission in Relation to Letter of 22nd April concerning Access to Documents and SEA'. This concluded with:

*As regards the proposed meeting mentioned in your correspondence, I have already made it clear that I believe strongly in active citizenship and public participation. Despite myself previously highlight it, we are still in the position where there is no agenda, no defined objectives, no definition of who will attend, no outline of what steps will be taken following the meeting, etc. You now state you propose a meeting to clarify outstanding issues in relation to the access of documents request GESTDEM4179/2012, in particular regarding my request for environmental information for the above mentioned electricity projects. As far as I'm concerned the redacted information should be provided, a position I have already articulated in Section 1 of this reply.*

*As I have pointed out in previous correspondence on the 17<sup>th</sup> March 2013, there is growing outrage in the Irish midlands in relation to the whole manner in which this renewable programme is being forced upon the people there without them being informed, being allowed to participate in the decision-making and having access to legal procedures to challenge its provisions. Therefore I am most certainly not alone in wishing to meet with officials who represent the legal order of the European Community, and who will provide an agenda and timescale in which the dreadful abuse of law and subversion of our Rights previously documented in this reply will be addressed.*

No agenda, no objectives, no definition of who will attend, no outline of what steps will be taken following the meeting, etc, were ever provided by the EU Commission – so the meeting never took place.

## **V. Provisions of the Convention relevant for the Communication**

The Communication concerns Article 7. Please see in Section III the reference to Compliance Committee procedures for Summary Proceedings and the findings on ACCC/C/2010/54.

## **VI. Use of Domestic Remedies**

A complaint was submitted to the EU Ombudsman on the 22nd January 2013 by Mr Caulfield, acting on behalf of Turn180, in relation to both the refusal to provide access to documentation and the manner in which the EU Commission was conducting the public participation on the Projects of Common Interest, see Attachment 12 'European Ombudsman Complaint 0181-2013-JF'. It was clarified by the EU Ombudsman's office on the 14<sup>th</sup> February:

*As regards your claims that the Commission should (i) reopen the public consultation and ensure that the requested environmental information is made available to the communities affected, and (ii) stop the legislative process in relation to Projects of Common Interest until it adequately settles your above claim, I decided that they are inadmissible.*

*In this respect, please note that the Treaty on the Functioning of the European Union and the Statute of the European Ombudsman set certain conditions as to the opening of an inquiry by the Ombudsman.*

*One of these conditions is that the complaint must be preceded by the appropriate administrative approaches to the institutions, bodies, offices or agencies concerned.*

Note this was considered highly irregular given that it had already been repeatedly pointed out to the Commission that the failures to properly provide the necessary environmental information was a breach of legal parameters related to the Citizen's Rights under the Aarhus Convention.

It was therefore necessary to further document matters and this was followed by a second complaint to the EU Ombudsman on the 21<sup>st</sup> July 2013, designated later as Complaint 1441/2013/RT, see Attachment 13 'Complaint EU Ombudsman 21-7-2013 Projects of Common Interest'. This second complaint reiterated the legal failings which were occurring, not only in respect of the public participation on the Projects of Common Interest, but also in relation to the renewable energy programme as it was being progressed in Ireland.

As of end October 2013, neither of these two complaints has been resolved by the EU Ombudsman, which is a position EPAW finds as unacceptable in the context of access to justice, which is fair, equitable, timely and not prohibitively expensive.

As regards the current position on the 14<sup>th</sup> October 2013, where the European Commission adopted a list of 248 key energy infrastructure projects, EPAW is considering utilising the mechanisms of Article 10 of Regulation 1367/2006 in relation to a request for Internal Review of Administrative Acts. However, as the Committee is aware the definition of 'administrative acts' in this Aarhus Regulation is extremely restrictive, see below, and not in compliance with Article 9(3) of the Convention. While current legal challenges and appeals are occurring in this regard in the European Court, including a case by EPAW highlighted previously to the Committee in Communication ACCC/C/2012/68<sup>13</sup>, there has been no progress since then as the European Court is awaiting the outcome of the Commission's appeal to its previous rulings in Cases T-338/08 and T-396/09.

- *'Administrative act' means any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects.*

## **VII. Confidentiality**

There is no requirement to keep any of the material confidential.

## **VIII. Attachments**

The following pdfs are provided as Attachments to this Communication:

- Attachment 1 'Submission on Projects of Common Interest'
- Attachment 2 'gesdem 1341824'
- Attachment 3 'Caulfield – final EN'
- Attachment 4 'Caulfield – final annex'
- Attachment 5 '789936 PL to Caulfields Answer\_GESTDEM2013\_1279'
- Attachment 6 'GESDEM 1279'
- Attachment 7 'Reply to the EU Commission in relation to Letter of 22nd April 2013 concerning Access to Documents and SEA'
- Attachment 8 'Letter to Mr Caulfield save1373332 24th May 2013'
- Attachment 9 'Answer GESDEM2013 1822 M Conroy'
- Attachment 10 'Reply to the Confirmatory Application for Access to Documents and Complaint to EU Commission'
- Attachment 11 'Reply to the EU Commission in Relation to Letter of 22nd April concerning Access to Documents and SEA'
- Attachment 12 'European Ombudsman Complaint 0181-2013-JF'
- Attachment 13 'Complaint EU Ombudsman 21-7-2013 Projects of Common Interest'

## **IX. Summary**

On the 14th October 2013, the European Commission adopted a list of 248 key energy infrastructure projects, the majority of which are transnational electricity projects, which will benefit from faster and more efficient permit granting procedures

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<sup>13</sup> [http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2012-68/Communication\\_with\\_Communicant/frComm15Jun2013.pdf](http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2012-68/Communication_with_Communicant/frComm15Jun2013.pdf)

and improved regulatory treatment. They may also have access to financial support from a €5.85 billion budget that has been allocated to trans-European energy infrastructure for the period 2014-20.

The function of these projects is to support the implementation of Directive 2009/28/EC on renewable energy and its implementation at Member State level through the National Renewable Energy Action Plans (NREAPs). The findings on Communication ACCC/C/2010/54 in relation to the EU as a Party to the Convention were that it had failed to implement Article 7 of the Convention with regard to the adoption of the NREAPs. In relation to the Projects of Common Interest, which support the implementation of the NREAPs, the EU again failed to comply with Article 7 in the manner in which it adopted these 248 key energy infrastructure projects.

At no stage were the public to be affected by this decision-making informed about the limited public participation on these Projects of Common Interest, which occurred in mid-2012, i.e. the public were not identified in compliance with Article 7 of the Convention. There was a complete absence of the 'necessary information' with regard to the requirement of effective participation and the language of the public participation exercise was restricted to English, which would only have been understood by a minority of those affected by the decision-making. Despite repeated requests for environmental information on the projects listed for public participation, it was refused. It later turned out that it effectively didn't exist, which is a breach of the obligation inherent in the Convention to fully integrate "environmental considerations in governmental decision-making and the consequent need for public authorities to be in possession of accurate, comprehensive and up-to-date environmental information".

The fact that only 142 Submissions were ever received on this public participation exercise demonstrates how ineffective it was in reaching the public to be affected by the enormous scale of Pan-European projects, which are now to be provided with accelerated regulatory approval. Neither were these Submissions taken account of in the final decision, the supporting documentation released by the EU Commission, COM/2013/0711 final, documenting that the list of Projects of Common Interest was drawn up by a combination of the authorities and the project promoters, the public to be affected by this decision-making having been effectively shut out from the decision-making.

Given the Committee's existing procedures for Summary Proceedings and the fact that this is a repeat failure of the EU as a Party to comply with Article 7 of the Convention with regard to how it adopts the provisions related to the NREAPs and Directive 2009/28/EC, it is requested that this Communication be dealt with under those procedures for Summary Proceedings and the existing findings on Communication ACCC/C/2010/54.

## **X. Signature**

28-10-2013

A handwritten signature in blue ink, appearing to read 'Mark D...' with a stylized flourish at the end.

Mark Duchamp  
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