To: Fiona Marshall Secretary to the Aarhus Convention Compliance Committee
From: Pat Swords EPAW
Re: Information related to ACCC/C/2013/96 since Communication was submitted
Date: 9th September 2014

Attachments:

- Attachment 1 – Response from EU in relation to 'Reasons and Considerations' for selecting the Irish Electricity Projects as Projects of Common Interest - Part 1

- Attachment 2 – Response from EU in relation to 'Reasons and Considerations' for selecting the Irish Electricity Projects as Projects of Common Interest - Part 2

- Attachment 3 – EU Ombudsman Complaint 181/2013/(JF)(RT)AN: Reply from President Barosso of 3rd June 2014

- Attachment 4 - EU Ombudsman Complaint 240/2014/SID : Reply from Commissioner Oettinger of 30th June 2014

Dear Fiona

Since the Communication ACCC/C/2013/96 was accepted for consideration over five months ago, some additional information has arisen in respect to the 'reasons and considerations on which the decision is based'. Plus from the exercise of available 'domestic remedies', namely the possibility of an 'Internal Review' and proceedings with the EU Ombudsman, the later having generated two replies from the EU Commission, signed by President Barosso and Commissioner Oettinger respectively. Both replies demonstrate systematic contempt for the obligations of a Party to the Convention. Finally, with regard to the EU Ombudsman, this office is non-compliant when it comes to the obligations under Article 9 of the Convention. These issues are described in the next sections.

Contents

1. INFORMATION ON 'REASONS AND CONSIDERATIONS'

Article 9(5) of the Aarhus Regulation 1367 of 2006 requires that:

- *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.*

This can of course be understood within the key requirement of Article 7 of the Convention and the requirements for '*a transparent and fair framework*', namely the public must have opportunities to participate effectively. As the 'Aarhus Convention: An Implementation Guide' second edition[1] clarifies:

- *Finally, Article 7 does not incorporate Article 6, paragraph 9, on the notification to the public of the decision, including reasons and considerations. While taking due account of the result of public participation might require the final plan or programme to be explained with reasons (for example, through the preparation of a "response document" as discussed in the commentary on Article 6, paragraph 9), this is more a matter of logic or of good practice than an obligation under the Convention.*

[1] http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

To date following the public participation on the Projects of Common Interest, which is the subject of the Communication, zero information was provided as to why these projects were selected. As such then a request for information on the environment was sent to the EU Commission under Regulation 1367 of 2006 in relation to the 'reasons and considerations' applicable for the selection of the renewable electricity projects in Ireland, which resulted in the two documents in Attachment 1 and 2. As can be seen in the first document, all the relevant information was removed from the two columns, which related to the "assessment result" and "reasons for doubt". In the second document everything is essentially blanked out.

Clearly Article 9(5) of the Aarhus Regulation and the Convention itself does no longer apply to the EU Commission, if indeed they ever considered it did, as will be demonstrated later. One could of course use the so called 'domestic remedies' in this respect, namely a compliant to the EU Ombudsman. However, as will be described later in what can be only described as the ridiculous 'saga', which ensues when one does so, it was decided in this circumstance, and not without considerable justification, that it was just a waste of time sending in a further complaint to the EU Ombudsman.

2. REQUEST FOR INTERNAL REVIEW

As Section VI of the Communication 'Use of Domestic Remedies' highlighted:

- *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/2012/6813[2], 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.*

This legal case in the European Court, Case T-168/13[3], reached its conclusion on the 21st January 2014. As the Curia documentation shows, the EU Commission sought and obtained an order for the proceedings to be dismissed with regard to EPAW not having standing rights in the European Court.

EPAW has standing rights in Ireland, an EU Member State. However, the position the Court adopted was below:

14 In that regard, it should be stated that, under section 37(4)(c) of the Planning and Development Act 2000, as amended, a private body or organisation satisfying the conditions set out in paragraph (d) thereof is to be entitled to appeal to An Bord Pleanála, a quasi-judicial authority, against a decision on an application for development. It follows, in that regard, from section 37(4)(d) of that act that the body or organisation at issue must satisfy the requirements relating, in particular, to the pursuit of objectives for the protection of the environment during a period of 12

[2] http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2012-68/Communication_with_Communicant/frComm15Jun2013.pdf

[3] http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=T-168/13&td=ALL

months preceding the bringing of that case before An Bord Pleanála, and, as the case may be, the additional requirements, concerning in particular possession of a specified legal personality and compliance with a constitution or rules, prescribed by the Irish Minister for the Environment, Heritage and Local Government, in accordance with section 37(4)(e) of the Planning and Development Act 2000, as amended.

15 It should further be pointed out that, as is apparent from the documents on the case-file, on 26 October 2010 no additional requirement had been prescribed by the Irish Minister for the Environment, Heritage and Local Government under section 37(4)(e) of the Planning and Development Act 2000, as amended. On that date, there was, moreover, no plan to prescribe any such additional requirements.

16 Those provisions, in so far as they come under sectoral legislation relating to planning and development, are thus confined, within the field which they cover, to granting the bodies at issue a limited and specific right to bring an action before a single body, in this case An Bord Pleanála.

17 A limited right to bring an action, such as that invoked by the applicant, before, moreover, a body the judicial nature of which has not been fully demonstrated, is, however, insufficient to establish that the applicant has general legal personality under Irish law enabling it, in the absence of any documentary proof of its existence in law, to bring an action before the European Union Courts on the basis of the fourth paragraph of Article 263 TFEU.

This is in direct variance to the position of both the Irish High Court and the Irish Supreme Court in granting full standing rights to the Sandymount Residents Association [2013]IEHC 291[4] and [2013] IESC 51[5], an unincorporated association meeting the requirements above. Indeed, as a result there has been the adoption on the 23rd July 2014 of the Irish Statutory Instrument S.I. No. 352 of 2014[6] European Union (Access to Review of Decisions for Certain Bodies or Organisations Promoting Environmental Protection) Regulations 2014, which provides access to the Courts for Judicial Reviews provided:

(a) the applicant has a sufficient interest in the matter which is the subject of the application, or

(b) the applicant—

> *(i) is a body or organisation (other than a State authority, a public authority or governmental body or agency) the aims or objectives of which relate to the promotion of environmental protection, and*
>
> *(ii) has, during the period of 12 months preceding the date of the application, pursued those aims or objectives.*

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[4] Judgement of the High Court on the 25th March 2013: http://www.courts.ie/__80256F2B00356A6B.nsf/0/B1CA8300B519C52180257B98003CA66E?Open&Highlight=0,aarhus,~language_en~

[5] Judgement of the Supreme Court of 27th November 2013: http://www.courts.ie/Judgments.nsf/bce24a8184816f1580256ef30048ca50/e57d6ca0f350359280257c31004816ef?OpenDocument

[6] http://www.environ.ie/en/Legislation/Environment/Miscellaneous/FileDownLoad,38717,en.pdf

Naturally EPAW does not consider the behaviour of the Commission and the General Court as being compatible with Article 9 of the Convention and 'a wide access to justice' and raises once again the issues first addressed by the Compliance Committee in ACCC/C/2008/28. Furthermore, in respect to the above Case T-168/13, costs were awarded by the European Court against EPAW, who has since contacted the EU Commission formally on three occasions as to resolving this matter. No reply has been received from the EU Commission, which leaves EPAW in a very undesirable financial position with regard to closing out this issue.

As regards the request for Internal Review Request, which EPAW subsequently made on the Projects of Common Interest, this was reject by the EU Commission on the 7th February 2014, as is documented on their website[7], as EPAW was not eligible as it wasn't a legal person within the content of Article 11(1a) of the Aarhus Regulation. If we consider the actual requirements under this Article of Regulation 1367 of 2006:

- *It is an independent non-profit-making legal person in accordance with a Member State's national law or practice*

EPAW had already clarified to the Commission that its address was in Ireland[8]. However, the Commission just chose to ignore the standing rights in that Member State, despite the requirements above in its own Aarhus Regulation. Neither does it remotely comply with Article 9(2) of the Convention and its obligation as a Party with respect to "*the objective of giving the public concerned wide access to justice within the scope of this Convention*".

3. EU OMBUDSMAN COMPLAINT 181/2013/(JF)(RT)AN

As Section 1.8 of the Communication on 'Complaint Process with EU Commission' documents:

- *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.*

This Complaint was lodged with the EU Ombudsman back on the 22nd January 2013, by early September 2014 over a year and a half later; it has still not been resolved. As to the role and effectiveness of the EU Ombudsman within the access to justice provisions of the Convention, this will be discussed further in a separate section of this Reply.

[7] http://ec.europa.eu/environment/aarhus/pdf/requests/20/reply.pdf

[8] http://www.epaw.org/about_us.php?lang=en

3.1 Absence of a Confirmatory Application

Attachment 3 documents the reply of the 3rd June 2014 received from President Barroso on this case. The first thing to notice is that it is about providing a so called 'friendly solution' and not about ensuring the right of access to environmental information inherent in the Convention is ensured. Then in Section 3.2 of the Commission's reply it is claimed that the applicant did not submit a confirmatory application in accordance with the relevant regulations:

- *On 22 April 2013, the complainant received partial access to the said questionnaires. DG ENER explained that it had redacted (i) personal data and (ii) certain commercially sensitive information from the questionnaires. The complainant did not submit a confirmatory application but instead decided to directly pursue this issue in the context of the present complaint before the Ombudsman.*

The Communication on ACCC/C/2013/96 documents the sequence of events related to the Commission's refusal to provide environmental information relating to these Projects of Common Interest, which began in 30th July 2012 with an initial approach for information. When this was refused it was followed up with a formal request for information under the Aarhus Regulation 1367 of 2006 on the 20th August 2012. There was a repeated refusals to provide this information despite a confirmatory information, which ultimately reached what only can be described within the context of the citizen's rights as an insulting situation, when on the 28th February 2013, the Secretary General of the Commission responded with a blank questionnaire form and a refusal to provide the environmental information connected to those forms.

In good faith a second formal request was lodged on the 5th March 2013 for the same environmental information, in this case specifying access to the filled in questionnaires. There was a failure to provide full access to these as key sections had been redacted. As a result a confirmatory application was made on the 28th April 2013; see Section 1.5 of Communication ACCC/C/2013/96. As Section 1.6 of Communication ACCC/C/2013/96 documents, a reply to this was received on the 24th May 2013 from Catherina Sikow-Magny, Head of Unit, DG Energy. Therefore, the statement above that the '*complainant did not submit a confirmatory application'* is nothing short of a bold face lie.

It is also necessary to point out that in the findings and recommendations related to Communication ACCC/C/2007/21 concerning compliance by the European Community[9] it was stated in Point 31(d):

- *"When refusing to provide environmental information, a public authority is required under the Convention (art. 4, para. 7) to provide information on access to the review procedures available in accordance with article 9. As EIB did not treat the request as concerning environmental information as such, it appears that the Bank did not provide such information to the communicant".*

There was no effort in the letter of the 28th April 2013 in response to the confirmatory application to provide details on review procedures or state the grounds for partial

[9] ECE/MP.PP/C.1/2009/2/Add.1
http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2007-21/Findings/ece.mp.pp.c.1.2009.2.add.1_as_resubmitted.pdf

refusal, i.e. the public interest test. This once more demonstrates that Commission staff, at the highest level (Head of Unit), do not in the slightest take their obligations in relation to access to information on the environment seriously or demonstrated that they have been properly trained with regard to legal compliance, note Article 8(1) of Regulation 1049 of 2001 below:

- *A confirmatory application shall be handled promptly. Within 15 working days from registration of such an application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal. In the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her, namely instituting court proceedings against the institution and / or making a complaint to the Ombudsman, under the conditions laid down in Articles 230 and 195 of the EC Treaty, respectively.*

3.2 Section 3.3 of the Commission's Reply concerning personal data

President Barroso' position was that:

- *Article 2(a) of Data Protection Regulation 45/20016 provides that 'personal data' shall mean any information relating to an identified or identifiable person […]. The Commission maintains its view that personal names, e-mail addresses and telephone numbers redacted from the questionnaires constitute personal data in the sense of Article 2(a) of Regulation 45/2001.*

This means we have now reach the situation with ourselves in Ireland, where all these massive projects are to be built, that we are somehow expected to take an enormous leap of imagination and accept that companies, which applied for access to the €5.85 billion budget and accelerated planning procedures under the "Projects of Common Interest", did not do so as legal corporate entities, but rather as private individuals with 'personal data'. Of course given that such multi-million Euro projects are now being run and presumably privately funded by these mysterious individuals, then Article 4(1) of Regulation 1049 must of course apply:

- *The institutions shall refuse access to a document where disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.*

For instance, if one cares to read the details in page 9 of the Communication on the 'mysterious' Natural HydroEnergy Scheme, which the EU Commission is promoting, and it wouldn't be the only case, where these companies are completely and utterly shady and have no proper contact point nor dialogue with the citizens in areas, where these massively obtrusive developments are to be built. So it is more than interesting to see the lengths that the Commission is going, including to the point of a formal letter from President Barrosso, to deny the people of Ireland access to as much as the contact details of these companies.

However, to clarify the obvious, the "Aarhus Convention: An Implementation Guide"[10] second edition in relation to Article 4(4)(f) of the Convention "the confidentiality of personal data" states:

- *The exception does not apply to legal persons, such as companies or organizations. It is meant to protect documents such as employee records, salary history and health records.*

The issue is so blindly obvious that the those companies are not acting as private individuals, that the only issue of relevance is as to why those in the EU Ombudsman's office have not taken action in this regard a long time ago.

3.3 Section 3.3 of the Commission's reply concerning commercially sensitive information

First of all yet again one can only remark at the complete lack of legal training or maybe it is just pure brazenness, which goes right to the top of the Commission, including President Barroso, in particular the statement that:

- *According to Regulation 1049/2001 and its implementing rules, it is the Commission who takes the final decision whether to disclose the documents in its possession.*

As part of the Article 9(1) of the Aarhus Convention and its implementing procedures in EU law, the final decision on whether to disclose the documents in the Commission's possession rests not with the Commission, but with those 'access to justice' procedures, i.e. Article 8(3) of Regulation 1049 of 2001.

Furthermore, as the Projects of Common Interest are most certainly subject to public participation procedures, the first pillar of which is access to information, the Commission should have clarified this on initiation of this programme, after all as Article 5(7) of the Convention requires each party to:

(a) Publish the facts and analyses of facts which it considers relevant and important in framing major environmental policy proposals;

(b) Publish, or otherwise make accessible, available explanatory material on its dealings with the public in matters falling within the scope of this Convention;

Instead as the Commission failed miserably to comply with its legal duties, it is now hiding behind 'company confidentiality' to prevent disclosure of key environmental information in relation to these Projects of Common Interest. For instance, on the Natural Hydro Energy Scheme we are to be denied access to; "the project cost, the cost per unit power and the energy storage cost", despite the definition of environmental information in the Aarhus Convention and implementing Regulation 1367 of 2006 being clear on:

- *cost-benefit and other economic analyses and assumptions*

One can only conclude that the Irish and UK public are expected to blindly fund what are increasingly obvious as madcap schemes, i.e. flooded valleys, wind turbines in

[10] http://www.unece.org/fileadmin/DAM/env/pp/ppdm/Aarhus_Implementation_Guide_second_edition_-_text_only.pdf

every farmer's field and thousands of kilometres of new high voltage lines, but like mushrooms are to be kept totally in the dark as to what it costs? One can also refer to the established principle and case law of cumulative impact of projects with multiple phases or interconnection or indeed the definition of environmental information in the Convention and implementing Regulation, namely:

- *measures (including administrative measures), such as policies, legislation, **plans, programmes**, environmental agreements, and activities affecting or **likely to affect** the elements and factors referred to in points (i) and (ii) as well as measures or activities designed to protect those elements.*

So in the case of Project E151 the developer had three project phases in mind, as is clear in the original questionnaire, but the third one is 'blacked out'. One can only presume that the Commission is in the position to demonstrate that the third project phase is not likely to affect the relevant 'elements and factors' although no such evidence is actually provided.

One could go on in relation to these issues, but why should one, in particular as one has rights in legislation, rights which are clearly being violated. In this regard it is necessary to highlight the fact that in the Commission's reply, it is now evident that there were two filled in questionnaires in relation to Project E151, but the second one was never provided at the time of request. A request which occurred initially on the 20Th August 2012 in respect of environmental information on these projects and then when this was not complied with again on the 5th March 2013 with respect to access to the project questionnaires related to the Irish electricity projects. So what other information is the Commission hiding?

Clearly the Commission values its relationship with the commercial companies it has engaged with on these Projects of Common Interest far greater than that of its relationship with its legal framework and citizens, which naturally results in many citizens now starting to question as to whose interest these so called 'Projects of Common Interest' are actually in. With regard to the Commission's reference to the below:

- *A special confidentiality requirement was laid down in Regulation 347/2013 on guidelines for trans-European energy infrastructure. More specifically, Annex III, point 2(2) of Regulation 347/2013 provides that "[a]ll recipients shall preserve the confidentiality of commercially sensitive information"*

Two things immediately jump out. Firstly, this regulation dates to 2013, while the public participation on the Projects of Common Interest and associated requests for environmental information dates back to the summer of 2012[11]. It is of course more than ridiculous that President Barrosso considers it his entitlement to apply legislative powers adopted in 2013 to the situation in 2012. However, it is reaching the situation where nothing really surprises anymore, when it comes to DG Energy and their plans to turn Ireland into a wind farm and pylon hedgehog and get the citizens to pay for it.

The second issue which jumps out is the 'confidentiality of commercially sensitive information', so what exactly does that mean and who decides that? As the UNECE

[11] http://ec.europa.eu/energy/infrastructure/consultations/20120620_infrastructure_plan_en.htm

Compliance Committee has already confirmed to the European Union in the findings and recommendations related to Communication ACCC/C/2007/21[12]:

- *30 (c): In paragraph 23 of its submission of 5 August 2008, the position of the Party concerned implies that the condition for environmental information to be released is that no harm to the interests concerned is identified. The Party concerned apparently bases this statement on article 4, paragraph 4 (d), of the Convention, which states that a request for information may be refused if the disclosure would adversely affect "the confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest". The Committee wishes to point out that this exemption may not be read as meaning that public authorities are only required to release environmental information where no harm to the interests concerned is identified. Such a broad interpretation of the exemption would not be in compliance with article 4, paragraph 4, of the Convention which requires interpreting exemptions in a restrictive way, taking into account the public interest served by disclosure. Thus, in situations where there is a significant public interest in disclosure of certain environmental information and a relatively small amount of harm to the interests involved, the Convention would require disclosure.*

Furthermore, as the "Aarhus Convention: An Implementation Guide" second edition confirms:

- *In its findings on communication ACCC/C/2008/30 (Republic of Moldova), the Compliance Committee referred to article 4, paragraph 4, in its finding, inter alia, that the adoption of a Government regulation "On Rent of Forestry Fund for Hunting and Recreational Activities", which set out a broad rule with regard to the confidentiality of information received from rent-holders, constituted a failure by the Party concerned to comply with article 3, paragraph 1, and article 4, paragraph 4, of the Convention.*

These findings were then endorsed by the Meeting of the Parties at its fourth session through decision IV/9d[13].

One could also point out as the EU stated in their first implementation report on the Convention to UNECE[14]:

- *According to Article 300(7) of the Treaty establishing the European Community ("EC Treaty"),* ***international agreements concluded by the European Community are binding on the institutions of the Community and on Member States. In accordance with the European Court of Justice's case-law, those agreements prevail over provisions of secondary Community legislation. The primacy of international agreements concluded by the Community over provisions of secondary Community legislation also means that such provisions must, so far as***

[12] Conclusions adopted by the Meeting of the Parties in 2008: http://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_e.pdf

[13] http://www.unece.org/fileadmin/DAM/env/pp/mop4/Documents/ece_mp_pp_2011_CRP_7_Compliance_Moldova_e.pdf

[14] http://ec.europa.eu/environment/aarhus/pdf/sec_2008_556_en.pdf

is possible, be interpreted and applied in a manner that is consistent with those agreements.

- *In addition, according also to settled case-law, a provision in an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.* ***Such provisions constitute rules of Community law directly applicable in the internal legal order of the Member States, which can be relied on by individuals before national courts against public authorities.***

So what we have is President Barroso writing to highlight that secondary legislation has been adopted by the Community in Regulation 347/2013, which is in direct conflict to the provisions mandatory in International Law through the ratification of the Aarhus Convention with UNECE. No doubt of course it doesn't bother him that members of EPAW and others are now expected to reclaim our rights by extremely expensive and long drawn out legal cases in the Courts.

3.4 Section 3.3 of the Commission's reply concerning overriding public interest in disclosure and the issue of 'environmental information' in the sense of the Aarhus Convention

It is extremely difficult to know how the great minds in the EU Commission, including President Barroso, can conclude in relation to the Aarhus Convention and its implementing Regulation 1367 of 2006 that it *"obliges the divulgation of information only when it is information on emissions*". Clearly once again they have access to developing a whole new jurisprudence to suit the occasion, such as already highlighted by miserably failing to complete the public interest test and state the grounds for partial refusal in their 'response' to the confirmatory application.

If we take the issue of "*justified in order to safeguard the commercial interests and the intellectual property of the legal entities concerned*", in addition to what has been discussed previously, the "Aarhus Convention: An Implementation Guide" second edition states:

- *The Convention does not provide specific guidance on how to balance the "public interest". One issue is whether Parties may choose to consider the public interest (a) categorically across an entire issue; (b) case by case in each decision on whether to release information; or (c) may provide some latitude for case-by-case determinations within the framework of policies or guidelines. In Case C-266/09 (Commission v. the Netherlands) the ECJ held that article 4 of Directive 2003/4/EC should be interpreted to require that the balancing exercise it prescribes between the public interest served by the disclosure of environmental information and the specific interest served by a refusal to disclose must be carried out in each individual case submitted to the competent authorities, even if the national legislature were by a general provision to determine criteria to facilitate that comparative assessment of the interests involved.*

One can also reiterate that the balancing test, which the authorities must go through to weigh the public interest served by disclosure against an interest protected under one of the exceptions in Article 4 (4) subparagraphs (a) to (h) of the Convention, was

noted by the Compliance Committee in its findings on communication ACCC/C/2007/21 (European Community). In that case the Committee rejected the position of the Party concerned that the identification of any harm to one of the protected interests would be sufficient to keep the information from being disclosed. As the Committee stated, *"in situations where there is a significant public interest in disclosure of certain environmental information and a relatively small amount of harm to the interests involved, the Convention would require disclosure."*

Two other issues now need to be highlighted, firstly safeguarding "*the Commission's decision-making process*". The Projects of Common Interest fall under Article 7 of the Aarhus Convention, which in turn is implemented by Regulation 1367 of 2006. In connection with Article 7 of the Convention, Article 5 (7)(a) applies in that "*each party shall publish the facts and analyses of facts which it considers relevant and important in framing major environmental policy proposals*". As the "Arhus Convention: An Implementation Guide" second edition confirms:

- *Paragraph 7 (a) requires Parties to publish background information underlying major environmental policy proposals. If a Party* ***considers that certain facts and analyses of facts are relevant and important in framing such proposals, it must publish them.***

- *"Facts" may be interpreted to cover factual information like water and air quality data, natural resource use statistics, etc.* ***"Analyses of facts" includes cost-benefit analyses****, EIAs and other analytical information used in framing proposals and decisions. Since article 7 provides for public participation during the preparation of policies relating to the environment, the publication of facts and analyses of facts under article 5, paragraph 7 (a), will help to ensure that the public has the relevant information it needs to make its participation in policymaking as effective as possible.*

One can only conclude from the Commission's position, that the environmental information related to cost-benefits and other economic analysis is 'not relevant or important 'to the Commission's decision making-process on these Projects of Common Interest? Therefore, as it is not relevant, we are of course not entitled to it? One could also point out, as documented in the start of this Reply, that there has been a refusal by the EU Commission under a separate access to information on the environment request to provide information on the "*reasons and considerations upon the decision is based*" in relation to the selection of the Projects of Common Interest.

So we are to be kept completely in the dark about all these massive financial costs or 'no pun intended' to be blacked out of our rights to that information? One can only recycle the words of the commission "*they prevail over the public interest in transparency in this case*". In no uncertain terms the sums of money being poured into these projects and dubious developers is simply staggering, in particular when there is no need for these massively obtrusive and financially staggering developments, as Ireland's electricity system already works fine without them, as it does each day when the wind speed is less than double the average.

The second issue that needs to be raised is the statement by the EU Commission *"the fact that the documents concern an administrative procedure, and not a legislative procedure for which wider openness is presumed to exist, only reinforces this conclusion".* So where did President Barrosso and his officials in the EU Commission get this new legal framework? Article 4 of the Convention, its jurisprudence and that of Regulation 1367 of 2006 make no distinction between environmental information related to administrative procedures or legislative

procedures. The public have rights, which must be respected, a fact which might be news to the Commission as they seem to be spending more time making up 'new laws' to suit the occasion than complying with what is clearly prescribed in International Law and Community Law.

4. EU OMBUDSMAN COMPLAINT 240/2014/SID

As Section 1.8 of the Communication on 'Complaint Process with EU Commission' documents:

- *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.*

This situation above arose as, when the irregularities on the public participation on the Projects of Common Interest were raised in the previous complaint submitted to the EU Ombudsman on the 22nd January 2013, which was accepted by the EU Ombudsman for consideration 0181/2013/(JF)RT, there was a refusal to address the issues relating to the conduct of the public participation, as according to the Ombudsman's service on the 14th February 2013, the "*complaint must be preceded by appropriate administrative approaches to the institutions, bodies, offices or agencies concerned*". So despite the fact that this had actually been done, it had to be repeated again and after a suitable interval had passed and no response had been received from the EU Commission, a second Complaint to the EU Ombudsman had to be made on the 21st July 2013. This then was later accepted as Complaint 240/2014/SID, although when it was originally opened in August 2013 it was designated Complaint 1411/2013/RT.

As regards the resulting reply from Commissioner Oettinger on the 30th June 2014, there are some extremely applicable issues of systematic non-compliance with the Convention, see Attachment 4 for this reply, which are discussed in the following section.

4.1 Plan or Programmes Related to the Environment and the Aarhus Convention

With regard to the reply received from Commissioner Oettinger, it is first necessary to highlight the claim:

- *Each PCI will have to undergo a complete permit granting process and it will have to be subject to a project-specific public consultation aimed at stakeholders likely to be directly affected by it, including landowners, citizens living in the vicinity of the project, and general public. These requirements constitute the safeguard that local communities and citizens will be involved in the implementation process and will be able to make their views heard by project promoters and national authorities. The outcome of the permit granting process, including public consultations, and of the environmental assessments will have to be taken into account by national authorities when issuing comprehensive decisions determining whether a project promoter is (or is not) to be granted an authorisation to build the PCI infrastructure.*

In the above, Commissioner Oettinger and his staff members fail to recognise the legislative structure on plans and programmes related on the environment, which they are duty bound to uphold. The Projects of Common Interest, their supporting regulation and official documentation are a 'plan or programme related to the environment'. Public participation on such plans and programmes is the first step, which has to be adhered to, before consideration can even be given to implementing any downstream projects, such as in the statement above. After all we haven't even approached the situation in law, where it has even been determined that this plan or programme on Projects of Common Interest is even suitable and legally compliant.

The Communication already established the background, as to how on the 14th October 2013, the European Commission adopted a list of 248 key energy infrastructure projects[15]. Carrying the label "Projects of Common Interest" (PCI), the aim is that they are to 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. However, is this situation, done essentially unilaterally, even remotely legal?

To clarify, 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[16]. Extensive reference is made in the recitals to accelerated permitting arrangements, while recital (42) clarifies the situation with regard to allocation of financial resources:

- *Projects of common interest in the fields of electricity, gas and carbon dioxide should be eligible to receive Union financial assistance for studies and, under certain conditions, for works as soon as such funding becomes available under the relevant Regulation on a Connecting Europe Facility in the form of grants or in the form of innovative financial instruments. This will ensure that tailor-made support can be provided to those projects of common interest which are not viable under the existing regulatory framework and market conditions.*

Indeed, there is no ambiguity in Article 1 of the Regulation on "subject matter and scope", which defines the situation clearly:

(1) This Regulation lays down guidelines for the timely development and interoperability of priority corridors and areas of trans-European energy infrastructure set out in Annex I ('energy infrastructure priority corridors and areas').

(2) In particular, this Regulation:
(a) addresses the identification of projects of common interest necessary to implement priority corridors and areas falling under the energy infrastructure categories in electricity, gas, oil, and carbon dioxide set out in Annex II ('energy infrastructure categories');

[15] http://ec.europa.eu/energy/infrastructure/pci/pci_en.htm

[16] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:115:0039:0075:EN:PDF

(b) facilitates the timely implementation of projects of common interest by streamlining, coordinating more closely, and accelerating permit granting processes and by enhancing public participation;
(c) provides rules and guidance for the cross-border allocation of costs and risk-related incentives for projects of common interest;
(d) determines the conditions for eligibility of projects of common interest for Union financial assistance.

The "Aarhus Convention: An Implementation Guide"[17] second edition, in relation to Article 7 on public participation on plans and programmes related to the environment, states:

- *The Convention does not define the terms "plans", "programmes" and "policies". These terms do have common-sense and sometimes legal meanings throughout the ECE region.*

At the Meeting of the Parties of the Aarhus Convention on the 30th June 2014, the following was adopted[18]:

- *2. Takes note of the Maastricht recommendations on promoting effective public participation in decision-making (ECE/MP.PP/2014/8) developed under the auspices of the Task Force, and invites Parties, Signatories, other interested States and stakeholders to use them as a guidance to improve implementation of the second pillar of the Convention;*

If we consider those Maastricht recommendations[19], then further clarification is provided, including the interface to Strategic Environmental Assessment (SEA) by:

154. While the Convention does not define "plans and programmes", a broad interpretation is recommended, covering any type of strategic decision:

(a) Which is regulated by legislative, regulatory or administrative provisions;
(b) Which is 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;
(c) Which provides an organized and coordinated system that:
(i) Sets, often in a binding way, the framework for certain categories of specific activities;
(ii) Is usually not sufficient for any individual activity to be undertaken without an individual permitting decision.

155. The following types of plans and programmes may be considered as "relating to the environment":
(a) Those which "may have a significant effect on the environment" and require SEA, for example, water management programmes, urban development plans, regional and local waste management plans, national energy strategies and plans;

[17] http://www.unece.org/fileadmin/DAM/env/pp/ppdm/Aarhus_Implementation_Guide_second_edition_-_text_only.pdf

[18] http://www.unece.org/fileadmin/DAM/env/pp/mop5/Documents/In-session_docs/ece.mp.pp.2014.crp.1_e.pdf

[19] http://www.unece.org/fileadmin/DAM/env/pp/mop5/Documents/Category_II_documents/ece.mp.pp.2014.8.eng_adv_edited_copy_01.pdf

(b) Those which "may have a significant effect on the environment" but do not require SEA, for example, those that do not set the framework for a development consent, like incentives programmes;
(c) Those which "may have effect on the environment" but the effect is not "significant", for example, those that determine the use of small areas;
(d) Those intended to help to protect the environment, for example, national biosafety strategies, air management plans, nature conservation plans, emergency plans for hazardous activities/installations, or anti-smog programmes;
(e) Financial plans affecting the environment.

In relation to the above, one only has to examine the nature of the projects adopted and Article 1 of the Regulation No 347/2013 to come to the utterly obvious conclusion that the Projects of Common Interest are a plan or programme related to the Environment. As such therefore Article 7 of the Aarhus Convention and its requirements in relation to public participation applies.

4.2 Article 9 of the Aarhus Regulation 1367 of 2006

As the Projects of Common Interest are a plan or programme related to the environment, Article 9 of the Aarhus Regulation 1367 of 2006 on Public Participation on Plans and Programmes Related to the Environment also applies. This 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 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. As demonstrated in the Communication and in relation to Complaint 0181/2013(RT)AN previously, there was a refusal to provide any environmental information during the public participation stage, despite repeated formal legal requests for the same in relation to the Irish Projects of Common Interest.

Recital (31) to Regulation No 347/2013 also clarifies:

- *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.*

The Projects of Common Interest are not only huge projects requiring billions of Euros in funding and associated with major environmental impacts, but they are also all trans-boundary in nature. So where is the environmental impact assessment in accordance with the 'Espoo Convention'? After all as the UNECE website clarifies in relation to this Convention ratified by the EU and fully in force since 1997[20]:

[20] http://www.unece.org/env/eia/eia.html

- *The Espoo (EIA) Convention sets out the obligations of Parties to assess the environmental impact of certain activities **at an early stage of planning**.*

4.3 The UNECE (Kyiv) Protocol on Strategic Environmental Assessment

One could also highlight the UNECE (Kyiv) Protocol on Strategic Environmental Assessment, which was adopted by the Espoo Convention in 2003, was ratified by the EU in November 2008 and is now in force since July 2010. Not only is this legally binding, but as the relevant UNECE website clarifies[21]:

- *Strategic environmental assessment (SEA) is undertaken much earlier in the decision-making process than project environmental impact assessment (EIA), and it is therefore seen as a key tool for sustainable development. The Protocol also provides for extensive public participation in government decision-making in numerous development sectors.*

Indeed the Kyiv Protocol is very similar to EU's own Directive on Strategic Environmental Assessment 2001/42/EC. The Kyiv Protocol in Article 4(2) defines that:

- *A strategic environmental assessment shall be carried out for plans and programmes which are prepared for agriculture, forestry, fisheries, **energy**, industry including mining, transport, regional development, waste management, water management, telecommunications, tourism, town and country planning or land use, and **which set the framework for future development consent for projects listed in annex I and any other project listed in annex II that requires an environmental impact assessment under national legislation.***

The Projects of Common Interest listed for Ireland alone includes two projects, which fall under the Annex I designation:

- *Large dams and reservoirs*

While Annex II designates:

- *Construction of overhead electrical power lines with a voltage of 220 kilovolts or more and a length of 15 kilometres or more and other projects for the transmission of electrical energy by overhead cables.*

- *Installations for the harnessing of wind power for energy production (wind farms).*

Not only are there quite a number of such Annex II projects in the Projects of Common Interest list for Ireland alone, but such projects fall under the legislative requirements of the EU's Directive on Environmental Impact Assessment 2011/92/EC[22]. So do the Projects of Common Interest set the 'framework for future development consent'? Well one might simply point out what can only be described

[21] http://www.unece.org/env/eia/sea_protocol.html

[22] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:026:0001:0021:EN:PDF

as 'the blinding obvious' with regards to repeated references in the regulation and supporting documentation to accelerated permitting granting processes, financing, etc.

However, there is also a clear position on such matters taken by the European Court, in their Judgment on Terre Wallonne ASBL v. Région Wallone [2010] ECR I-5611[23], where they were very clear on the obligation of the National Courts, when it is determined that the Strategic Environmental Assessment Directive has not been complied with:

Where a national court has before it, on the basis of its national law, an action for annulment of a national measure constituting a 'plan' or 'programme' within the meaning 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 and it finds that the 'plan' or 'programme' was adopted in breach of the obligation laid down by that directive to carry out a prior environmental assessment, that court is obliged to take all the general or particular measures provided for by its national law in order to remedy the failure to carry out such an assessment, including the possible suspension or annulment of the contested 'plan' or 'programme'.

If one considers the Opinion of Advocate General Kokott of the European Court, as delivered on 4 March 2010 in *Terre wallonne ASBL (C-105/09) and Inter-Environnement Wallonie ASBL (C-110/09) v Région wallonne*[24], in which it was necessary to consider the meaning of the terms "plan" and "programme" and the circumstances in which they set a 'framework for development consent' of projects, the Advocate General was very clear:

- *60. The term 'framework' must reflect the objective of taking into account the environmental effects of any decision laying down requirements for the future development consent of projects even as that decision is being taken.*

- *61. It is unclear, however, how strongly the requirements of plans and programmes must influence individual projects in order for those requirements to set a framework.*

- *62. During the legislative procedure the Netherlands and Austria proposed that it should be made clear that the framework must determine the location, nature or size of projects requiring environmental assessment. In other words, very specific, conclusive requirements would have been needed to trigger an environmental assessment. As this proposal was not accepted, the concept of 'framework' is not restricted to the determination of those factors.*

- *63. The view of the Czech Republic is based on a similarly narrow understanding of the setting of a framework. It calls for certain projects to be explicitly or implicitly the subject of the plan or programme*

- *64. Plans and programmes may, however, influence the development consent of individual projects in very different ways and, in so doing, prevent appropriate account from being taken of environmental effects. Consequently,*

[23] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011CJ0041:EN:NOT

[24] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CC0105:EN:NOT

the Strategic Environmental Assessment Directive is based on a very broad concept of 'framework'.

- *65. This becomes particularly clear in a criterion taken into account by the Member States when they appraise the likely significance of the environmental effects of plans or programmes in accordance with Article 3(5): they are to take account of the degree to which the plan or programme sets a framework for projects and other activities, either with regard to the location, nature, size and operating conditions or by allocating resources (first indent of point 1 of Annex II). The term 'framework' must therefore be construed flexibly. It does not require any conclusive determinations, but also covers forms of influence that leave room for some discretion.*

- *66. … The wording [of point 1 of Annex II] implies that the various characteristics may be concerned in varying intensity and, therefore, possibly not at all. This alone is consistent with the objective of making all preliminary decisions for the development consent of projects subject to an environmental assessment if they are likely to have significant effects on the environment.*

- *67. To summarise, it can therefore be said that a plan or programme sets a framework in so far as decisions are taken which influence any subsequent development consent of projects, in particular with regard to location, nature, size and operating conditions or by allocating resources."*

As regards the EU's failures under Communication ACCC/C/2010/54 to comply with the Directive on Strategic Environmental Assessment in relation to the National Renewable Energy Action Plans (NREAPs), not only did the NREAPs and the NREAP template defined by the EU Commission C(2009) 5174-1[25] "set the framework for future development consent", but so too does the Projects of Common Interest and associated Regulation No 347/2013.

4.4 The current 'Modus Operandi'

Therefore, with these Projects of Common Interest, Article 7 of the Aarhus Convention applied on plans and programmes, Article 9 of Regulation 1367 of 2006 and the Kyiv Protocol to the Epsoo Convention on Strategic Environmental Assessment. So where is the documentation and results of the mandatory public participation? After all as the Kyiv Protocol defines in Article 11 on "Decision":

1. Each Party shall ensure that when a plan or programme is adopted due account is taken of:

(a) The conclusions of the environmental report;
(b) The measures to prevent, reduce or mitigate the adverse effects identified in the environmental report; and
(c) The comments received in accordance with articles 8 to 10

It's not rocket science; you simply can't legally adopt such a plan and go into its implementation phase without first preparing the assessments and completing the public participation. Yet at the same time it is quite clear from their documentation that the EU Commission is currently in September 2014 actively pouring millions of

[25] http://ec.europa.eu/energy/renewables/doc/nreap__adoptedversion__30_june_en.pdf

Euros of public money into these so called Projects of Common Interest and their private developers[26].

It is also clear from the reply of Commissioner Oettinger that the EU Commission has no intention of complying with their obligations of environmental assessment and public participation at the plan and programme level, just ram it through and by-pass that critical step. Let the developers take responsibility for pushing through each project at the local level, aided by the regulatory framework for accelerated permitting that they in the EU Commission have brought through in a manner which is not compliant with the law.

However, this is now an adopted 'modus operandi'. After all the Commission did it with the NREAPs; they refused and are continuing to refuse to comply with the legal requirements for public participation on the NREAPs, despite the findings and recommendations on Communication ACCC/C/2010/54, which were endorsed by the Meeting of the Parties in July 2014. They now are doing the same with these Projects of Common Interest. This is not just an idle academic issue; right around Europe there is a failure at the project level when it comes to Article 6(4) of the Convention and effective public participation 'when all options are open'. The door is effectively slammed shut. Considerations raised by the public in relation to the overall renewable pogramme, which is used as the basis to justify these projects, such as the programme's effectiveness and clear alternatives to it, are simply not allowed by those public authorities 'rubber stamping' the downstream project decisions.

This is in stark contrast to the 'step by step' procedures in relation to 'when all options are open' and 'taking due account of the public participation', which were clarified in the Maastricht recommendations adopted in the July 2014 Meeting of the Parties which stated:

- *2(b). The "zero option" means the option of not proceeding with the proposed activity, plan or programme at all nor with any of its alternatives.*

- *16. In line with the Convention's requirement for the public to have an opportunity to participate when all options are open,[27] the public should have a possibility to provide comments and to have due account taken of them, together with other valid considerations required by law to be taken into account, at an early stage of decision-making when all options are open, on whether the proposed activity should go ahead at all (the so-called "zero option").[28] This recommendation has special significance if the proposed activity concerns a technology not previously applied in the country and which is considered to be of high risk and/or to have an unknown potential environmental impact. The opportunity for the public to provide input into the decision-making on whether to commence use of such a technology should*

[26] http://ec.europa.eu/energy/infrastructure/events/doc/2013/20131119_cef_infoday_questions_answers.pdf

[27] Article 6, paragraph 4 of the Convention.

[28] Compliance with regard to Lithuania, ECE/MP.PP/2008/5/Add.6, para. 74; Compliance with regard to the European Commission, ECE/MP.PP/2008/5/Add.10, para. 51; Compliance with regard to Slovakia, ECE/MP.PP/2011/11/Add.3, ECE/MP.PP/2011/11/Add.3, para. 61 and 63.

not be provided only at a stage when there is no realistic possibility not to proceed.[29]

- *19. Irrespective of how the framework for decision-making is structured, the public should have a possibility to discuss the nature of and need for the proposed activity at all (the zero option, see para.16 above). In order to satisfy the requirements of the Convention and to meet the legitimate expectations of the developer, this possibility should be provided at the earliest stage of the entire decision-making, when it is genuinely still open for the project not to proceed.*

- *78(c) Information about the decision-making in the earlier tiers should be available in order for the public to understand the justification of those earlier decisions – including the rejection of the zero option and other alternatives.*

The position of Commissioner Oettinger is clear; consideration of the 'zero option' was to be bypassed. Was there a motive for this? Every power engineer knows, none of these renewable projects are actually needed, Europe's grid has actually function fine without them for decades, so why can't we have a transparent and fair framework, which assesses why we need all of these Projects of Common Interest in the first place? It is after all our legal right.

Although it is not relevant to the legal obligations of plans and programmes related to the environment, one really must comment on the repeated mantra of the EU Commission in their reply of the 30th June 2014 in relation to "**an extensive consultation process which takes place "en amont" and it is required by EU legislation"**. If we take the adopted Projects of Common Interest list for Ireland[30], it contains the following two huge projects, Element Power and Mainstream Renewables, which have entered into the permitting process in Ireland with An Bord Pleanala[31].

- *Ireland: 1.9.1.: 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).*

- *Ireland: 1.9.4., 1.9.5., 1.9.6.: 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).*

[29] Compliance with regard to Lithuania, ECE/MP.PP/2008/5/Add.6, para 74

[30] http://ec.europa.eu/energy/infrastructure/pci/doc/2013_pci_projects_country.pdf

[31] PC0148: Offaly, Meath, Westmeath, Dublin, Carlow and Wexford / PC0169: in Westmeath, Meath, Kildare, Offaly, Laois, Kilkenny and Tipperary: http://www.pleanala.ie/

Indeed it appears that the EU Commission is already actively funding the second company with public money[32]. Article 9 of the EU Regulation 347/2013 on Projects of Common Interest relates to 'Transparency and Public Participation", and requires in paragraph 3:

- *The project promoter shall, within an indicative period of three months of the start of the permit granting process pursuant to Article 10(1)(a), draw up and submit a concept for public participation to the competent authority, following the process outlined in the manual referred to in paragraph 1 and in line with the guidelines set out in Annex VI. The competent authority shall request modifications or approve the concept for public participation within three months; in so doing, the competent authority shall take into consideration any form of public participation and consultation that took place before the start of the permit granting process, to the extent that such public participation and consultation has fulfilled the requirements of this Article.*

Access to information on the environment requests to An Bord Pleanala have proven that the above was never complied with for these two projects. So really it is getting tiring have to read the same old mantras trooped out, when they have no connection with reality, the legal framework or the rights of the citizen.

4.5 Allegation 1: Failed to Comply with Public Consultation

Article 7 of the Convention applied to the relevant consultation on the Projects of Common Interest and directly engaged Article 6(3) of the Convention:

- *The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making.*

Please note; a result is specified "*the public to prepare and participate effectively".* Furthermore, Article 6(2) requires that:

- *The public concerned shall be informed, either* ***by public notice*** *or individually as appropriate, early in an environmental decision-making procedure, and in* ***an adequate, timely and effective manner****.*

Given the scale of these massive projects around Europe, in particular in Ireland where the countryside is to be turned into a wind farm and turbine hedgehog, it would only be common sense to take at least some steps to adequately inform the people who lived in that countryside, which as the Communication documented, in particular the number of responses, simply didn't happen.

So let is review the guidance on elaborating the above legal requirements in the Aarhus Convention, as documented in the UNECE Maastricht Recommendations referred to earlier:

- *158. The public participation procedure should be developed* ***to suit not only the nature of the plan, programme*** *or, to the extent appropriate, policy*

[32] http://mainstreamrp.com/mainstream-gets-eu-funding-to-carry-out-2-8-million-seabed-survey-for-energy-bridge-export-project/

*being prepared, but also to **suit the local conditions**. What works well in one area might not work well in another.*

When one considers Commissioner Oettinger's reply and preference for having clearly a 'one size fits all' approach for each public participation exercise the Commission runs, then this is completely 'inadequate'. The programme of Projects of Common Interest is related to massive financial and environmental impacts throughout Europe, a point which the Commission clearly chooses to ignore. The Maastricht Recommendations in Points 163 to 170 are very clear on the obligations, with regard to ensuring, that those who are affected by or with an interest in the decision, are provided with an opportunity to participate. As this concludes:

- *170. Whatever modalities for public participation are employed, it should be clear to the public:*
    - *What information is available, where it can be accessed and what its sources are;*
    - *How it can submit comments;*
    - *How the comments will be handled*

None of this happened, the result specified above in Point 170 simply didn't occur and there were reasons for that. Let's be brutally honest here with respect to the position adopted by Commissioner Oettinger in his reply. How many ordinary people can be bothered to read the Commission's "Your Voice in Europe" website page, if they can even find it? How many 'hits' a day does it get or is it as is described in COM (2002)704 "*Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission*", with the power of keen observation:

- *The Commission will avoid consultation processes which could give the impression that "Brussels is only talking to Brussels", as one person put it.*

Up to the point in time that the public participation exercise on the Projects of Common Interest was being conducted, it was assumed in Ireland that the EU Commission was not so mad and out of control, that it was not going to flood Irish valleys with seawater, stick a wind turbine in nearly every farmer's field and plaster the remaining gaps in the countryside with pylons. So on that basis, given an erroneous but valid assumption, that the lunatics were not actually running the asylum, it was not considered normal practice by good Irish citizens, to actually check and investigate regularly the deeper recesses of the huge website run by the EU Commission.

As regards the Commissioner Oettinger's reply and the much vaunted 'press release', did it actually get printed in any of the Irish dailies? There is actually no record that it did[33]. After all the Commission claims it also used "*more traditional alternatives to the internet*", but then it claims a lot of things, which don't happen in reality. One can go back to the Maastricht Recommendations, where Points 65 and 66 relate to the use of public notice through radio, television, social media and local newspapers – none of this actually happened.

As regards the Commission's innuendo in its reply that notices on its website or links to some obscure notice on the website of the Department in Ireland are 'public notices' within the meaning of the Article 6(2) of the Aarhus Convention and Article

[33] A web search for "Projects of Common Interest" in the two largest Irish dailies draws a blank.

9(3) of the Aarhus Regulation 1367 of 2006, then how many hits per day do those relevant links get from the public in Ireland, not to mention the rest of Europe? None of this was actually quantified in the reply from Commissioner Oettinger or as an output from the 'so called' investigation by the EU Ombudsman. After all there is already relevant case law in the European Court on the issue of publishing information on the rights of the public on the internet, where in case C-427-07[34] "*Commission of the European Communities v Ireland":*

- *96. As regards the fifth argument, it must be borne in mind that one of the underlying principles of Directive 2003/35 is to promote access to justice in environmental matters, along the lines of the Århus Convention on access to information, public participation in decision-making and access to justice in environmental matters.*

- *97. In that regard,* ***the obligation to make available to the public practical information*** *on access to administrative and judicial review procedures laid down in the sixth paragraph of Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and in the sixth paragraph of Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35, amounts to an obligation to obtain a precise result which the Member States must ensure is achieved.*

- *98.* ***In the absence of any specific statutory or regulatory provision concerning information on the rights thus offered to the public, the mere availability, through publications or on the internet****, of rules concerning access to administrative and judicial review procedures and the possibility of access to court decisions* ***cannot be regarded as ensuring, in a sufficiently clear and precise manner, that the public concerned is in a position to be aware of its rights*** *on access to justice in environmental matters.*

As regards the reference to the stakeholder's Meeting in Brussels by Commissioner Oettinger, one can only wonder that the EU Commission now expects the Irish public, to take time off work and fly over at their own expense to attend such meetings in Brussels, and find out what the EU Commission are actually planning to plaster their countryside with. Of course one should be entirely grateful to such an institution that "*the participation in the Information Day was free of charge"*. No doubt the Commission is fully convinced that the next edition of the Maastricht Recommendations will reflect these measures as being of worthy of high praise.

As regards 'Identifying the Public', one can only comment with wonder again as to how the EU Commission can generate its own legal framework to suit the occasion:

- *"****Identification of any specific target groups*** *in Ireland and/or in other EU Member States for the purpose or carrying out the consultation on the PCI Regulation* ***was not considered necessary***."

After all as Article 7 of the Convention documents:

- ***The public which may participate shall be identified by the relevant public authority****, taking into account the objectives of this Convention.*

[34] http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d5693719c11d4549378abbfd2b901e666d.e34KaxiLc3qMb40Rch0SaxuNch50?text=&docid=72488&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=154818

One could also refer to the transposition of the above in Article 9(2) of the Aarhus Regulation 1367 of 2006:

- ***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.*

It is also necessary to comment on the repeated references to "*minority views in Ireland*", which both the EU Ombudsman's office and the officials in the EU Commission seem to now consider they have an entitlement to using; no doubt related to their worthy endeavours in "*identifying the public affected or likely to be affected*". As a recent Communication to the Compliance Committee, in relation to Ireland as a Party and the implementation of the Renewable Energy Programme there, documents in more detail. County Westmeath is one of the twenty six counties in Ireland and is located in the midlands area. The major export wind energy projects selected as Projects of Common Interest and already referred to previously as Element Power and Mainstream Renewables were to be built in this County. The Draft Westmeath County Development Plan 2014-2020[35] was prepared and made available for public participation in early 2013. A total of 895 submissions were received in relation to the Draft Plan during this period. This must be seen as a very active public participation given that the adult population in the County is only about 50,000.

The local authority public representatives (County Councillors) then resolved that the Draft Development Plan be amended, voting unanimously to adopt three amendments, which would restrict industrial scale wind energy projects. As these were considered to constitute a material alteration of the Draft Development Plan, additional public participation on the proposed material alterations occurred in late 2013. Quite remarkably given the adult population of County Westmeath referred to previously, 3,500 submissions were received in this second public participation and as the County Manager's report summarised:

- *The submissions set out concerns of individuals and organisations across the county and beyond in relation to Industrial Scale Wind Energy development. Most of the submissions express support for the amendments. These submissions in general express sincerely held opinions, concerns and in some instances fears of individuals and communities in relation to the potential for impacts of Industrial Scale Wind Energy Projects on human health and quality of life, environment, heritage, ecology, landscape, visual and recreational amenities. Many submissions refer to the attractiveness of the county as a location of distinctive visual character and high quality environment with considerable potential for development of the tourism sector.*

In conclusion, these are certainly not 'minority views' and there is an ever increasing anger among the population in rural Ireland, as to how they are being treated. Effectively, none of them knew about the public participation on the Projects of Common Interest, as they weren't informed.

[35] http://www.westmeathcoco.ie/en/ourservices/planning/westmeathcountydevelopmentplanreview/draftcountydevelopmentplan2014-2020/

4.6 Allegation 2: Language of Consultation Restricted to English

If we refer back to the Maastricht Recommendations in Point 63 on methods for notifying the public:

- *(c) Language issues should be addressed, as appropriate, for example by providing translations if the public concerned do not speak the language of the documentation or by enabling representative organizations to relay the notification to their communities in their own language or a widely recognized regional lingua franca (e.g., English for the EU region, Russian for the countries of Eastern Europe, the Caucasus and Central Asia);*

In the Commissioner Oettinger's reply it is stated:

- *The Commission is aware of the importance of providing the public (stakeholders and citizens) with information in their national languages, and it cannot agree with the allegation that it restricted the "language of its website on the public consultation to English only" and thus that it "disenfranchised" many EU citizens. As explained above, the information about public consultation on the PCI Regulation was published on the "Your voice in Europe website" that is the single access point for all public consultations launched by the EC. The information on that website is available in 23 EU languages.*

As to the actual reality, it is simple, one can go into the *"Your voice in Europe website"* in German, "Ihre Stimme in Europa[36]". One then goes into the section on "Konsultationen nach Politikbereichen[37]" (consultations according to policy area). One then goes into "Energie[38]" (Energy) and what does one find?

15.11.2012 - 07.02.2013: Angemessenheit der Erzeugung, Kapazitätsmechanismen und der Binnenmarkt für Strom

14.09.2012 - 07.12.2012: Durchführung eines Daten- und Transaktionsmelderahmens für Energiegroßhandelsmärkte

21/06/2012 - 04/10/2012: List of projects submitted to be considered as potential Projects of Common Interest in energy infrastructure

21/06/2012 - 05/09/2012: Intelligent Energy – Europe III in Horizon 2020

23/05/2012 - 07/06/2012: Request for information about non TYNDP projects for identification as potential Projects of Common Interest (PCI)

One can see the detail oneself on the webpage, but it is clear that there is a lot written in the English language rather than in the German language. Indeed when one clicks on the all-important consultation "List of Projects to be submitted as potential Projects of Common Interest in energy infrastructure" what does one get[39]? Basically it is:

[36] http://ec.europa.eu/yourvoice/index_de.htm

[37] http://ec.europa.eu/yourvoice/consultations/links/index_de.htm

[38] http://ec.europa.eu/energy/consultations/index_de.htm

[39] http://ec.europa.eu/energy/infrastructure/consultations/20120620_infrastructure_plan_de.htm

- *"Die gesuchten Informationen stehen in folgender Sprache/folgenden Sprachen zur Verfügung: English"* (the sought after information is available in the following language / languages: English).

One really does have to question the professional integrity of Commissioner Oettinger and his staff in the EU Commission and what they actually put down in writing and then sign – the evidence above is that they lied in their reply. Furthermore, there are in Germany and Austria alone nearly 100 million citizens who speak the most widespread native tongue in the European Union, which is German.

- Do they all speak English fluently?
- Was there a legal obligation to communication this programme of enormous Projects of Common Interest with them?

The answer to the first is clearly no. The answer to the second is clearly yes. However, the EU Officials from Commissioner Oettinger down couldn't care less.

5. ARTICLE 9 OF THE CONVENTION AND THE ROLE OF THE EU OMBUDSMAN

As Communication ACCC/C/2008/28 and the above section of this reply in relation to EPAW's request for Internal Review documents, access to the European Court doesn't exist for the ordinary European Citizen. The Aarhus Regulation 1367 of 2006 and associated Regulation 1049 of 2001 on access to information provide the right to proceedings in the European Court or making a complaint to the EU Ombudsman. In reality for the ordinary citizen or citizen's group, the EU Ombudsman is the only circumstance which applies, and it is thus necessary to critically review the actual performance of this office with regards to the requirements of Article 9 of the Convention.

If we consider the first part of the Convention's provisions on Access to Justice, namely those in Article 9(1) related to appeals on refusals to provide access to information, two key requirements exist, namely that

- *Access to an **expeditious** procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.*

- *Final decisions under this paragraph 1 shall be **binding** on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.*

With regard to 'expeditious', as was documented already Complaint 181/2013/(JF)RT with the EU Ombudsman was lodged with the EU Ombudsman on the 22nd January 2013, by early September 2014 over a year and a half later; it has still not been resolved. An examination of the EU Ombudsman's website shows that such timeframes are indeed the norm, this is not in the least bit surprising; the procedure was deliberately designed not to be expeditious. As the EU Ombudsman's own guide[40] on complaints clarifies:

[40] file:///C:/Users/sworp/Downloads/guidetocomplaints2011_en.pdf

- *The first step in a written inquiry is to forward the complaint to the institution concerned and request an opinion, **normally within three calendar months**. The EU institutions are required to supply the Ombudsman with any information he requests from them and to give him access to the files concerned. He may also inspect documents and interview officials and other servants, although this latter possibility is rarely used.*

The experience of EPAW members on a number of complaints, such as the one above, is that after the three month period, a letter is received from the EU Ombudsman stating that the institution, namely the Commission, hasn't yet responded and there will be a further delay. Both parties clearly being completely happy with this now established 'working arrangement'. However, in Communication ACCC/C/2004/1[41] the Compliance Committee already pointed out:

- *The Convention, in its Article 9, paragraph 1, requires the Parties to ensure that any procedure for appealing failure to access information is expeditious. However, as the time and number of determinations with regard to jurisdiction in this case demonstrate, there appears to be lack of regulations providing clear guidance to the judiciary as to the meaning of an expeditious procedure in cases related to access to information.*

Even when after several months pass and it is established that there is a breach of legal due process related to access to information, we then go into a complete 'song and dance routine' which the EU Ombudsman's describes officially as:

- *If there does seem to be a problem and the case is not settled by the institution, the Ombudsman tries, where possible, to achieve a **friendly solution**, which satisfies both the institution and the complainant. If the attempt at conciliation fails, the Ombudsman can issue recommendations to solve the case. If the institution does not accept the proposed recommendations, he can make a special report to the European Parliament. The Ombudsman's decisions are not legally binding but the rate of compliance with his findings is consistently high.*

As the "Aarhus Convention: An Implementation Guide" second edition clarifies:

- *Who carries out the review? Article 9, paragraph 1, specifies that the review procedure must be before a court of law or another "independent and impartial body established by law". "Independent and impartial" bodies do not have to be courts, but must be at least quasi-judicial, with safeguards to guarantee due process, independent of influence by any branch of government and unconnected to any private entity.*

- *The reviewing body must also be competent to make decisions that are binding on the public authority holding the requested information. **Thus, advisory findings or non-binding suggestions by the reviewing body are not sufficient.** This is essential in determining whether an ombudsman institution suffices to meet the criteria in Article 9, paragraph 1, of the Convention.*

[41] http://www.unece.org/fileadmin/DAM/env/documents/2005/pp/c.1/ece.mp.pp.c1.2005.2.Add.1.e.pdf as endorsed at the Meeting of the Parties in at its second session through decision II/5a

Timely and effective remedies are essential for access to environmental information, not least with respect to a citizen being able to access critical information in order to prepare an effective legal recourse. However, the EU Ombudsman's procedures are clearly designed for delivery of the opposite, to stall and obstruct the citizen from achieving that objective, with the ultimate objective comprising utter nonsense about 'friendly solutions'. This is in stark contrast to situations relating to an infringement of rights and the obligation to provide binding decisions.

If we consider the greater requirements of Article 9 and "*access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment"*. As documented previously access to the European Court doesn't effectively exist, which just leaves the EU Ombudsman. Does this meet the necessary requirement in Article 9(4) in relation to 'timely' and 'effective remedies'?

The second Complaint referred to in this reply, namely 240/2014/SID shows no sign of being resolved yet. However, following the decision by the Compliance Committee on ACCC/C/2010/54, EPAW submitted a complaint with the EU Ombudsman as to the National Renewable Energy Action Plan (NREAP) having been found to be non-compliant with the terms of the Convention and the complete failure to complete a Strategic Environmental Assessment for the same renewable energy programme[42]. In the EU Ombudsman's decision of the 30th September 2013 on case 1892/2012/VL[43], a procedure which took a year, it was stated with regard to the Strategic Environmental Assessment (SEA):

- *As a preliminary point, the Ombudsman recalls that the only body competent to provide a binding interpretation of EU law is the Court of Justice of the European Union. At this point in time, no such interpretation with respect to the issue in question appears to have yet been made by the Court of Justice.*

- *The Ombudsman notes that Article 3(2)(a) of Directive 2001/42/EC, invoked by the complainant, requires that an SEA be carried out for energy plans or programmes "which set the framework for future development consent of projects*".

- *It is indeed true that Directive 2009/28/EC requires Member States to include in their NREAPs adequate measures to be taken to achieve national overall targets. Nevertheless, the issue as to how specific these measures have to be would seem to be a matter of interpretation of Directive 2009/28/EC. In any event, the Ombudsman notes that this Directive does not appear to require, as regards the measures to be adopted, a level of specificity that would "set the framework for future development consent of projects" and, as a result, give rise to an obligation to carry out an SEA.*

As was documented before in the section on the Kyiv Protocol, in *Terre wallonne ASBL (C-105/09) and Inter-Environnement Wallonie ASBL (C-110/09) v Région wallonne*[44], where it was necessary to consider the meaning of the terms "plan" and "programme" and the circumstances in which they set a 'framework for future development consent of projects', the European Court already has established

[42] http://www.epaw.org/legal.php?lang=en&article=c4

[43] http://www.ombudsman.europa.eu/de/cases/decision.faces/de/51946/html.bookmark

[44] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CC0105:EN:NOT

jurisprudence in this regard. The EU Ombudsman instead found it 'convenient' to ignore it. This wasn't the only thing, which was ignored:

- *With regard to Case ACCC/C/2010/54, the Aarhus Compliance Committee issued its findings to the Commission on 16 August 2012. On 31 August 2012, the Commission informed the complainant that it had commenced to reflect on how to address these findings. The Aarhus Compliance Committee, on 15 July 2013, asked the European Union for information to its follow-up, which is still to be assessed further. Therefore, given that the Aarhus Compliance Committee currently continues dealing with this matter, an inquiry into how the Commission has complied with the Aarhus Compliance Committee's findings would, at this stage, be premature.*

A ruling of non-compliance with the Convention, which is part of Community Legal Order is maladministration. However, the EU Ombudsman decided to do nothing about it and leave it instead to UNECE and the Communicant / Irish Public to enforce Community Law. It's not just that effective remedies don't exist, but that the case is not even properly investigated. In addition to the failure to identify the relevant jurisprudence of the European Court, there was an additional claim above that the 'complainant had been informed on how to address these findings'. As the Communicant on ACCC/C/2010/54, I can only state that this is a complete lie, no such contact with me has ever occurred as to how to address these findings. Indeed, as the Compliance Committee are fully aware, the findings and recommendations are not being addressed.

Plámás is an Irish (gaelic) noun and verb used in Hiberno-English; it means empty flattery, to sweet talk, etc. The function of the EU Ombudsman is simply to put on a long choreographed 'show', with letters signed by senior Commissioners, etc and give the appearance to the 'natives' that something is and will actually be done about it. In reality noting will be done, there are no structures or procedures in place to deliver the necessary rights of the citizens enshrined in law; the EU Ombudsman's office is nothing but an expensive bunch of time wasters.