

To: Fiona Marshall Secretary to the Aarhus Convention Compliance Committee
From: Pat Swords EPAW
Re: ACCC/C/2013/96 and EU Commission's Reply to the Committee's Questions of 3rd January 2016
Date: 6th June 2016

Dear Fiona

On the 3rd January 2016 you provided the EU Commission with six questions, which were to be answered by on or before the 4th March 2016, while I as Communicant was to be provided until the 18th March with an opportunity to respond with comments. These questions were necessary as the EU Commission failed to represent itself properly at the Compliance Committee on 16th December 2015 and was incapable of answering any questions presented. Furthermore, these written questions were not answered until the 24th May 2016, more than twice the time period allotted. In addition, with respect to the repeated references in the EU Commission's reply to the inadmissibility of the Communication, I have once again to refer to the procedures of the Compliance Committee¹, in which:

- *If a Party contests the admissibility of the communication, it should inform the Committee as soon as possible, but no later than five months from the date the communication was forwarded.*

This requirement the EU Commission failed to comply with, providing no response in the generous five month period allotted and taking essentially an extra four months before responding. In essence, they have sought time and time and time again to delay and obstruct the compliance proceedings.

With regard to their response provided to the six questions presented, I have the following comments to make:

1. QUESTION 1

- *Please provide further and more detailed information on how business interests, the protection of personal data and the public interest in disclosure were considered in the access to information requests within the framework of this case, including with regard to the identity of the project developers and financial subsidies.*

First of all the documentation the Commission referred to in their reply, namely in Part (i) their "confirmatory reply of 30 January 2014"², was not part of the subject matter raised in the original communication. I therefore refer yourselves to Sections 1.4 and 1.5 of the Communication, which dealt specifically with a failure to provide environmental information requested and led to a formal complaints procedure with the EU Ombudsman. The result of this complaint procedure with the EU Ombudsman is to be found as submitted on the Communication webpage on the 9.09.2014, including signed correspondence from President Barroso. In Sections 3.2 to 3.4 of

¹ See page 18:

http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_GuidanceDocument.pdf

² http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2013-96/Correspondence_Party/frPartyC96_12.12.2014/Annex12_Waugh_-_2013-4873_-_EN_decision_2_.pdf

this e-mail correspondence³, the Communicant's position with respect to personal data, commercially sensitive information and overriding public interest for disclosure is explained.

2. QUESTION 2

- *2. Please indicate whether the deadlines for replying to the communicant's access to documents requests and confirmatory requests were complied with, and if not, whether the communicant was informed beforehand including with the reasons for any delay.*

Again, the Commission is confusing the issue by bring in additional documentation, which was not part of the Communication. If we refer back to the Communication the chronology of events is described in Sections 1.1 to 1.6⁴, as summarised below:

- Section 1.1: An initial informal request for information, which was refused
- Section 1.2: A formal request for information submitted on 20th August 2012, followed by a reply on the 19th October from DG Energy refusing to provide any information. This was followed by a confirmatory application on the 24th October.
- Section 1.3: After several e-mails stating that the confirmatory application could not be processed within the required 15 working days, a reply was finally received from the Secretary General on the 28th February 2013, but only to the extent that a blank questionnaire form was provided and a statement that a new request would have to be initiated to obtain the information filled in on the questionnaires.
- Section 1.4: On the 5th March 2013 a new and second formal request was made for access to the filled in questionnaires. This was replied to on the 22nd April, but considerable key information redacted.
- Section 1.5: A confirmatory application was made on the 28th April 2013 in relation to the redacted information.
- Section 1.6: Response from the Commission to the above received on 24th May 2013 with a refusal to provide any further information.

3. QUESTION 3

- *3. Is it the Party concerned's understanding that if requested information is confidential commercial information the Convention requires disclosure only if the information concerns emissions into the environment?*

As regards the Commission's reply:

³ http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2013-96/Correspondence_Communicant/fmCommC96_09.09.2014/Email_to_UNECE_09.09.2014.pdf

- *Likewise, as regards commercial interests, Article 6 of the Aarhus Regulation 1367/2006 establishes the presumption of an overriding public interest in disclosure "where the information requested relates to emissions into the environment."*

I would refer to Article 4 paragraph 4 of the Convention:

- *The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.*

There is therefore always an overriding public interest for disclosure unless it can be demonstrated that the limited restrictions are applicable, which have to be applied in a restrictive way. The EU Commission is failing to recognise this legal requirement.

4. QUESTION 4

- *4. Please clarify whether the Party concerned considers that the list of PCIs is subject to article 7 of the Convention and, if so, whether the list of PCIs is (i) a plan; (ii) a programme; or (iii) a policy within the scope of article 7. In addition, please clarify whether the list of PCIs complies with article 9 of the 'Aarhus Regulation' 1367/2006 or any other EU legislation providing for public participation.*

If we consider the relationship between the PCI Regulation 347/2013, Article 7 of the Convention and Article 9 of Regulation 1367/2006, the Communicant already addressed this in depth in Sections 4.1 to 4.3 of the documentation submitted on 9.09.2014, which was in response to the reply received from Commissioner Oettinger on this subject matter. In essence, the Projects of Common Interest are subject to; Article 7 of the Convention, Article 9 of Regulation 1367/2006 and the Kyiv Protocol on Strategic Environmental Assessment. The limited public participation on the list of Project of Common Interest was the only such public participation at a plan / programme level which was completed in a manner, which was in theory open to the public concerned.

In their Reply to the Question above, the EU Commission refer to pages 8 and 9 of their observations of 12.12.2014 and in particular their reference there to Article 3 of the PCI Regulation 347/2013 and the associated Point 5 of Annex III, namely:

- *(5) Each Group shall consult the organisations representing relevant stakeholders — and, if deemed appropriate, stakeholders directly — including producers, distribution system operators, suppliers, consumers, and organisations for environmental protection. The Group may organise hearings or consultations, where relevant for the accomplishments of its tasks.*

This has a striking similarity to the findings in ACCC/C/2010/54, in which the Party had a regulatory framework for complying with Article 7 of the Convention, in that case the Strategic Environmental Assessment Directive and in this case Article 9 of Regulation 1367/2006, but it choose not to apply that procedure. This then leaves one with the consideration as to whether the above procedure in the PCI Regulation actually complied with the provisions of Article 7 of the Convention? Again with reference to the findings on ACCC/C/2010/54 the answer is no, as "a targeted

consultation involving selected stakeholders, including NGOs, can usefully complement but not substitute for proper public participation, as required by the Convention.”

5. QUESTION 5

- *5. With respect to the European Ombudsman’s conclusion that the EU need not duplicate consultation at local level (Closing Decision in Complaint 240/2014/FOR), please explain how information and public participation duties were divided between the EU and the Member States during the process of preparing the list of PCIs.*

Tiered decision-making applied for these Projects of Common Interest, which requires public participation initially at the level of the plan / programme and later at the downstream project level. However, clearly the public participation at the plan / programme level had been by-passed and as was confirmed by the EU Commission’s response to this question, was not to be repeated at the Member State level. Therefore what actually applied was as highlighted in the Communicant’s opening statement for the December 2015 meeting:

Not only are these Projects of Common Interest to be ‘fast tracked’, i.e. given priority status to ensure rapid administrative treatment and implemented as quickly as possible, but Article 7 of the Regulation, which deals with the issues of permit granting and public participation on these Projects of Common Interest, lays it bare:

- *‘Priority status’ of projects of common interest: 1. The adoption of the Union list shall establish, for the purposes of any decisions issued in the permit granting process, the necessity of these projects from an energy policy perspective, without prejudice to the exact location, routing or technology of the project.*

So in essence, the very establishment of the list of Projects of Common Interest completely slams the door closed on any further public participation related to the zero option or other alternatives in relation to their necessity.

6. QUESTION 6

- *6. Please provide further information on the current stage of the projects on the list of PCIs, including which decisions have been taken so far and whether projects on the list of PCIs have already received some EU funding.*

The scale of funding documented in the EU Commission’s reply, both by means of direct funding and indirectly through loans from the European Investment Bank and similar is simply enormous, reflecting the scale of the projects concerned. Yet the general public in the region where these huge projects are to be implemented have never been engaged in the public participation process.