

**Observations by the European Commission,  
on behalf of the European Union, to the  
Communication to the Aarhus Convention Compliance Committee  
concerning compliance by the European Union in connection with  
access to information and public participation in the adoption of  
a list of projects of common interest**

**(ACCC/C/2013/96)**

## **I. Introduction**

These observations refer to the letter by the Aarhus Convention Compliance Committee (ACCC) dated 25 March 2014, asking the European Union to submit to the ACCC any written explanations or statements clarifying the matter referred to in the above-mentioned Communication.

Pursuant to Article 17.1 of the Treaty on European Union (TEU), the European Commission replies to this letter on behalf of the European Union.

## **II. Background of the case**

### **1. EPAW's Communication to the ACCC**

On 28 October 2013, the Non-Governmental Organisation (NGO) "European Platform Against Windfarms" (EPAW), represented by Mr Pat Swords, introduced a Communication to the ACCC.

Under the terms of paragraph 18 of the Annex to Decision I/7 on Review of Compliance, a Communication is the means for the public to address the "Party's compliance with the Convention".

In its Communication, EPAW alleges that, in the adoption by the European Commission on 14 October 2013 of a list of 248 "Projects of Common Interest" (PCIs), by way of the so-called "PCI Regulation",<sup>1</sup> the European Union would have breached Articles 4 and 7 of the Aarhus Convention.

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<sup>1</sup> Commission Delegated Regulation (EU) No 1391/2013 of 14 October 2013 amending Regulation (EU) No 347/2013 of the European Parliament and of the Council on guidelines for trans-European energy infrastructure as regards the Union list of projects of common interest; OJ L 349 of 21.12.2013, p. 28.

To recall, Article 4 of the Aarhus Convention provides that public authorities give access to environmental information upon request. Article 7 of the Aarhus Convention foresees public participation concerning plans, programmes and policies relating to the environment.

Projects which have been included in the Union list of PCIs will benefit from accelerated and streamlined permit granting procedures, better regulatory treatment and – where appropriate – financial support under the Connecting Europe Facility. However, the inclusion of projects in the list is without prejudice to the outcome of relevant environmental assessment and permitting procedures (cf. Recitals 1 and 12 of the PCI Regulation).

EPAW criticises in particular the way in which the Union list of PCIs has been established. The Communicant considers that the public has not been duly consulted on this list and that its opinions have not been properly taken into account. Furthermore, inadequate information on the projects would have been provided.

The individual allegations by EPAW will be commented under section III.

## **2. Related action before EU institutions and bodies**

The present Communication overlaps with mechanisms for review at the level of the European Union which EPAW and other persons or NGOs have initiated on the same issue. These are:

- requests for access to documents under the "Transparency Regulation"<sup>2</sup> and the "Aarhus Regulation"<sup>3</sup>;
- complaints to the European Ombudsman pursuant to Article 228 of the Treaty on the Functioning of the European Union (TFEU); and
- a Request for internal review under Article 10 of the Aarhus Regulation.

In accordance with paragraph 23 of the Annex to Decision I/7 on Review of Compliance, the ACCC has asked the European Union to also describe any response that may have been made in the meantime. Therefore, new developments, including a reply by the European Commission to a confirmatory request for access to documents, a new complaint to the European Ombudsman and a request for internal review, are equally taken into account and relevant documents are attached to these observations for the information of the ACCC.

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<sup>2</sup> Regulation (EC) No 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents; OJ L 145, 31.5.2001, p. 43.

<sup>3</sup> Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies; OJ L 264, 25.9.2006, p. 13.

### **a) Requests to Commission services for access to documents**

The Communicant mentions several requests for access to documents and environmental information concerning the PCI Regulation which were submitted to the Commission's services by certain persons or interest groups. In particular, he refers to requests by Mr Joseph Caulfield on behalf of "Turn 180", by Mr Ray Conroy on behalf of the "Laois Wind Energy Awareness Group" and by Mr Jerry Waugh.

Two of these requests were also subject of a confirmatory application in which the Commission's Secretariat-General (SG) conducted an independent administrative review of the replies given by the Directorate-General for Energy (DG ENER) at the earlier stage.

Firstly, by note Gestdem 2012/4179 of 28 February 2013 to Mr Joseph Caulfield, the Commission (SG) underlined that, at that stage, the Commission did not hold environmental information on the projects. Therefore, the confirmatory application by Mr Caulfield was considered devoid of purpose.

Secondly, by note Gestdem 2013/4873 of 30 January 2014 (after the submission of the present Communication to the ACCC on 28 October 2013) to Mr Jerry Waugh, the Commission (SG) has given access to a number of documents relating to the PCIs, with the exception of certain parts of these documents which fall under exceptions to disclosure (personal data, protection of commercial interests, protection of the decision-making process and special confidentiality requirements under Regulation 347/2013). This decision by the European Commission, in which it also explains the applicable exceptions to disclosure in detail, is attached to these observations, together with the disclosed documents (see Annex 1).

The Communicant did not challenge this decision before the General Court of the European Union.

### **b) Complaints to the European Ombudsman**

The Communicant refers to complaints to the European Ombudsman that were introduced on the same matter - insufficient public participation and information concerning the Union list of PCIs - by Mr Joseph Caulfield on behalf of "Turn 180".

The Communicant mentions in particular complaint 181/2013/(JF)(RT)(AN) of 22 January 2013 by Mr Caulfield concerning access to information and documents in the context of the public consultation carried out by the Commission with regard to the PCI Regulation, notably insufficient disclosure of the questionnaires completed by the project promoters. The Ombudsman is currently evaluating the Commission's response to her proposal for a friendly solution. A decision is expected at the end of 2014 or early 2015.<sup>4</sup>

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<sup>4</sup> In accordance with the European Ombudsman's procedures, the friendly solution proposal and the response to it remain confidential until the Ombudsman's decision is published.

The Communicant further refers to Complaint 1411/2013/RT of 21 July 2013 by Mr Caulfield in which he "reiterated the legal failings" in the PCI Regulation. This complaint concerned failure by the Commission to answer the complainant. It was closed by the Ombudsman on 16 December 2013, after the introduction of the present Communication. The Ombudsman concluded that no further investigations were necessary, because the Commission had subsequently answered the complainant, who did not respond to the Ombudsman's invitation to submit observations. The European Ombudsman's closing decision is attached to these observations (see Annex 2).

After the introduction of the present Communication to the ACCC, Mr Caulfield submitted a further complaint to the European Ombudsman (Complaint 240/2014/SID). In essence, this complaint contests the adequacy of the answer provided by the Commission in the context of the previous complaint 1411/2013/RT. The complaint and the observations by Commissioner Günther Oettinger on behalf of the European Commission are attached for the information of the ACCC (see Annex 3). The Ombudsman's investigation into this complaint is on-going.

### **c) Request for internal review under the Aarhus Regulation**

On 5 November 2013, after the introduction of the present Communication, the Communicant also submitted a request for internal review of the PCI Regulation to the Commission.<sup>5</sup> On 7 February 2014, the Commission declared it as inadmissible for failing entitlement of EPAW to introduce such a request under the terms of the Aarhus Regulation. The request for internal review and the reply by the Commission are attached to these observations (see Annex 4).

The Communicant did not challenge this decision before the General Court of the European Union.

## **III. Legal observations**

### **1. Admissibility of the Communication**

In its Preliminary Determination of Admissibility of the Communication, the ACCC declared EPAW's Communication as admissible, "*subject to review following any comments from the Party concerned*" (page 2, last paragraph).

#### **a) No exhaustion of domestic remedies**

In this regard, the European Commission notes, firstly, that the Communication covers issues for which administrative and, in particular, judicial means of redress available at the level of the European Union have not been exhausted.

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<sup>5</sup> EPAW refers to this request, which was at that time at planning stage, on p.17 of the Communication.

As far as requests for access to documents are concerned, the available means for redress are, first, to address a confirmatory application to the SG. This possibility has not been used with regard to all requests mentioned.

Against a negative reply by the Commission (SG) to a confirmatory request for access to documents, the means of redress are then to bring proceedings before the General Court of the European Union, under the conditions of Article 263 TFEU, or to file a complaint with the European Ombudsman, under the terms of Article 228 TFEU. These means of redress are always indicated in the reply, so that the requestor is fully informed about his possibilities for appeal.

In the case at hand, making a complaint to the European Ombudsman in specific cases cannot be regarded as exhausting the available domestic remedies, as the Communicant seems to imply (see point VI, page 16, of his Communication).

Firstly, the decisions by the European Ombudsman are not legally binding, so that it is highly questionable whether bringing a case before the European Ombudsman qualifies as "remedy" in the sense of paragraph 21 of the Annex to Decision I/7 on Review of Compliance.

Also, the European Ombudsman is an alternative non-judicial remedy that meets specific criteria and does not necessarily have the same objective as judicial proceedings. Unlike the General Court, the Ombudsman cannot annul the Institution's decision should the requestor disagree with the substance of the reply to the confirmatory request for access to documents.

It is entirely clear from EPAW's allegations in this Communication that it addresses issues on which the Ombudsman cannot make a legally binding decision, namely on an alleged breach of the Aarhus Convention and the respective implementing legislation at the level of the European Union.

For good measure, the European Commission would also like to point out that an action for damages may be brought against the European Ombudsman, based on the latter's alleged mishandling of a complaint. In order to determine whether there is non-contractual liability, the Court reviews the manner in which the Ombudsman has dealt with the complaint.<sup>6</sup>

EPAW indicates on page 16 of the Communication in relation to Ombudsman Complaint 0181/2013/(JF)(RT)(AN) that it considered the Ombudsman's view that, as regards certain issues, the complainant should make further administrative approaches to the Commission, to be "highly irregular". However, the issues concerned are currently being examined in the inquiry into Complaint 240/2014/SID, the complainant having subsequently made the administrative approaches to the Commission considered necessary by the Ombudsman.

Redress is also available with regard to requests for internal review. Indeed, proceedings before the General Court may be instituted, under the terms of Article 12 of the Aarhus Regulation.

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<sup>6</sup> Case C-234/02 P, *Lamberts v European Ombudsman*, 2004 ECR I-2803.

Therefore, mechanisms for review do exist at the level of the European Union with regard to grievances put before the ACCC and these possibilities – in particular court action – have not been used.

Under paragraph 21 of the Annex to Decision I/7 on Review of Compliance, the ACCC *"should at all relevant stages take into account any available domestic remedy unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress"*.

In the Preliminary Determination of Admissibility of this Communication, the ACCC underlines that the *"Committee's view is that this provision does not imply any strict requirement that all domestic remedies must be exhausted"* (page 1, second paragraph).

The European Commission does not share this interpretation. The terms of paragraph 21 of the Annex to Decision I/7 on Review of Compliance leave no doubt that domestic remedies are to be taken into account, unless they are unsatisfactory.

As outlined above, the remedy of proceedings before the General Court of the European Union is available against a Commission decision giving a negative reply to a confirmatory request for access to documents. The European Ombudsman can equally be brought before the General Court, through an action for damages, if the conditions for non-contractual liability are met. Proceedings before the General Court may further be instituted against requests for internal review under the Aarhus Regulation.

These court proceedings do not unreasonably prolong the remedy, and they do without any doubt provide an effective and sufficient means of redress.

The European Commission is therefore of the view that these remedies available at the level of the European Union should be "taken into account". This can be done by either suspending a compliance case when the domestic remedy has been taken and is still ongoing or, if the Communicant directly addresses the ACCC without having made use of available domestic remedies as in the case at hand, declare it as inadmissible.

The ACCC should not become a means of redress for issues where remedies internal to the European Union are available and have not been used, as in the present case. The Communicant should not be given the opportunity to circumvent the available domestic remedies. In the interest of legal clarity and procedural economy, the Communicant should not be able to choose which way to go – either by exhausting domestically available remedies or by bringing his case directly to the ACCC (no "forum shopping").

The European Commission would therefore invite the ACCC to declare the Communication as inadmissible for failing exhaustion of domestic remedies.

However, the European Commission replies on the substance of those grievances under point 2 below, on a subsidiary basis.

## **b) Grievances by other persons or NGOs**

Secondly, the European Commission notes that the present Communication also covers issues that have not been brought up, via requests for access to documents or complaints to the European Ombudsman, by the Communicant EPAW himself, but by other persons or NGOs.

The European Commission respectfully submits that the ACCC should not accept as admissible within one and the same compliance case grievances that have been brought up at earlier instances by other persons or organisations, as this lifts the obligation from these other persons or organisations to identify themselves.

Paragraph 20 of Decision I/7 on Review of Compliance sets out the criteria for a Communication to be admissible before the ACCC. Under letter (a), the Communication must not be anonymous.

In its Preliminary Determination of Admissibility of this Communication, the ACCC notes, with regard to this first criterion, that *"the communication is not anonymous and the contact information for the communicant is provided"*.

However, no further information or contact details are provided with regard to these other NGOs or persons. EPAW's indications in the Communication remain vague in that respect.

Furthermore, the Communicant does not present any evidence that the third parties would have entrusted him to present grievances before the ACCC on their behalf.

The European Commission thus believes that the ACCC should consider this case as to fall under letter (a) of paragraph 20 of Decision I/7 on Review of Compliance and declare those grievances as inadmissible.

However, the European Commission will reply to these grievances under point 2 below on a subsidiary basis.

## **c) Compliance with EU law**

Thirdly, the European Commission observes that some of the allegations by the Communicant do not refer to compliance with the Aarhus Convention, but to compliance with acts of European Union law that implement the Convention. In particular, the Communicant submits that the public participation procedure under the PCI-Regulation would be non-compliant with the Aarhus Regulation.

Under Decision I/7 on Review of Compliance<sup>7</sup>, the ACCC is competent to assess compliance with or implementation of the provisions of the Aarhus Convention, not compliance with a Party's implementing legislation that may, by the way, also go beyond the obligations stemming from the Convention.

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<sup>7</sup> See in particular paragraph 13 (b) and (c) of the Annex to Decision I/7.

It is the EU Courts that are competent to decide on a possible breach of EU legislation by the institutions. The "benchmark" for review by the ACCC is exclusively the Aarhus Convention.

The European Commission therefore considers that allegations by the Communicant on a possible breach of the Aarhus Regulation are clearly inadmissible in the context of this Communication, and the Commission does not cover them at all in its present observations.

## 2. Observations on substance

As a preliminary remark, the European Commission would like to emphasize the multi-stage nature of the decision-making process for PCIs. When multiple steps in a procedure are involved, public participation and information rights should refer, and be tailored to, the decisions taken at each stage. For example, time-frames and information to be provided may well differ from one phase to the other. Similarly, information rights depend on the type of measure to be adopted. In this vein, the Recommendations by the Meeting of the Parties on Promoting Effective Public Participation in Decision-making in Environmental Matters, issued on 26 May 2014, suggest (p. 10) that in multi-stage procedures the competent authority may have discretion in deciding which options to address at each stage, but all the options to be considered at each stage should still be open and effective public participation should be possible.

In the case of PCIs, as will be further explained below, their inclusion in the list laid down by the PCI Regulation does not prejudice the final decision on the project. This aspect is highly relevant when assessing the implementation of participation and information rights. Moreover, the consultation process for PCIs is in line with the above-mentioned Recommendations: The approval of the list of PCIs leaves the options about the development of the PCI infrastructure open for the next phases.

### a) Failing or inadequate public participation

- **Allegation:** "[T]here was a total absence of public participation in reaching the stage which has now occurred, despite Article 7 of the Convention engaging Article 6(4), which is clear in that [... e]ach party shall provide for early public participation, when all options are open and effective public participation can take place." (see page 5 of the Communication)

The European Commission contests that the European Union is in breach of Article 7 of the Aarhus Convention for the following reasons.

The inclusion of a given project on the list is the result of an extensive consultation process which takes place "*en amont*" and is required by European Union legislation. In this context, point 5 of Annex III of Regulation (EU) No 347/2013 (the "TEN-E Regulation")<sup>8</sup> requires each regional group (see Article 3), in their composition as provided in point 1 of Annex III, to consult the organisations representing stakeholders - and if deemed appropriate

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<sup>8</sup> Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 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; OJ L 115, 25.4.2013, p.39.

stakeholders directly - including producers, distribution system operators, suppliers, consumers and organisation for environmental protection.

In addition, the insertion of a given project in the list of PCIs does not prejudice the outcome of the implementation process of that project. Following Article 9 of the TEN-E Regulation and its Annex VI, 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 the 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 addition, the European Commission would like to note that although the Communicant claims a "*total absence of public participation*", he admits later in the Communication that the consultation did take place in mid-2012, though its scope was allegedly limited ("*at no stage were the public to be affected by this decision-making informed about the limited public participation on these Projects of Common Interest, which occurred in mid-2012*").

In that regard, the European Commission would like to point out that a comprehensive consultation process did take place also before the adoption of the Commission's regulation containing the projects. It consisted of the following seven events:

- 23 May 2012 to 7 June 2012: An open public consultation took place to identify infrastructure projects as potential PCIs. Information about the consultation, including an online questionnaire, was published on the "*Public consultations*" website of DG ENER;<sup>9</sup>

- 20 June 2012 to 4 October 2012: An open public consultation was held to obtain views of the public, through a detailed online questionnaire, on all infrastructure projects proposed as potential PCIs. Information about the consultation was announced on the "*Your Voice in Europe*"<sup>10</sup> and the "*Public consultations*" webpage of DG ENER.<sup>11</sup>

- 17 July 2012: the "*Information Day on the process of identifying PCIs in energy infrastructure*" took place to provide the public with detailed information on the PCIs identification process and the ongoing public consultation. Information about the meeting was published on the "*Events*" webpage of DG ENER.<sup>12</sup>

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<sup>9</sup> [http://ec.europa.eu/energy/infrastructure/consultations/20120607\\_non\\_tyndp\\_projects\\_en.htm](http://ec.europa.eu/energy/infrastructure/consultations/20120607_non_tyndp_projects_en.htm)

<sup>10</sup> [http://ec.europa.eu/yourvoice/consultations/2012/index\\_en.htm](http://ec.europa.eu/yourvoice/consultations/2012/index_en.htm)

<sup>11</sup> [http://ec.europa.eu/energy/infrastructure/consultations/20120620\\_infrastructure\\_plan\\_en.htm](http://ec.europa.eu/energy/infrastructure/consultations/20120620_infrastructure_plan_en.htm)

<sup>12</sup> [http://ec.europa.eu/energy/infrastructure/events/20120717\\_energy\\_infrastructure\\_infoday\\_en.htm](http://ec.europa.eu/energy/infrastructure/events/20120717_energy_infrastructure_infoday_en.htm)

- 18 April 2013: The European Gas Regulatory Forum (Madrid Forum) meeting was held to obtain views on the PCIs proposals in the gas sector.<sup>13</sup> Information about the meeting was published on DG ENER's website.<sup>14</sup>

- 16 May 2013: The Electricity Regulatory Forum (Florence Forum) meeting took place to obtain views on the PCIs proposals in the electricity sector.<sup>15</sup> Information about the meeting was published on DG ENER's website.<sup>16</sup>

- June 2013: The draft regional lists of PCIs were submitted to the relevant environmental stakeholders and were later discussed at a dedicated Environmental Stakeholders meeting held on 5 June 2013.<sup>17</sup> Eleven different environmental organisations (including World Wide Fund (WWF), European Environmental Bureau (EEB) and Bird-Life Europe) participated in this process. At this meeting, the environmental stakeholders requested further information about some candidate PCIs in the electricity and gas sectors. The Commission sent the requested additional information to the stakeholders and gave two additional weeks (3 to 17 July 2013) for written comments.

- 3 July 2013 to 17 July 2013: The final written public consultation took place, mainly with environmental stakeholders.

This overview demonstrates that the consultation process started at the earliest possible stage and that it was held seventeen months prior to the adoption of the PCI Regulation.

• **Allegation:** *"No effort was made by the EU as a Party to contact the public, who would be affected by this decision making, namely those who lived in the areas where this huge infrastructure development was to take place; they were never identified and contacted."* (page 7 of the Communication)

The Commission contests such an allegation by referring to the circumstance that extensive consultation is to take place according to point 5 of Annex III of the TEN-E Regulation prior to the insertion of the project in the list. Thus, given that the EU legislation provides for this consultation, it cannot be maintained, as the Communicant does, that the Commission is in breach of the Aarhus Convention.

To ensure transparency of the public participation process and to involve all interested stakeholders and members of the public, the open public consultation carried out in 2012 was announced, as required by the EC's Communication on minimum standards on consultation,<sup>18</sup>

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<sup>13</sup> National regulatory authorities, Member State governments, transmission system operators (TSO), gas suppliers and traders, consumers, network users, and gas exchanges

<sup>14</sup> [http://ec.europa.eu/energy/gas\\_electricity/gas/forum\\_gas\\_madrid\\_en.htm](http://ec.europa.eu/energy/gas_electricity/gas/forum_gas_madrid_en.htm)

<sup>15</sup> National regulatory authorities, Member State governments, TSOs, electricity traders, consumers, network users and power exchanges

<sup>16</sup> [http://ec.europa.eu/energy/gas\\_electricity/electricity/forum\\_electricity\\_florence\\_en.htm](http://ec.europa.eu/energy/gas_electricity/electricity/forum_electricity_florence_en.htm)

<sup>17</sup> [http://ec.europa.eu/energy/events/20130529\\_stakeholder\\_regional\\_pci\\_lists\\_en.htm](http://ec.europa.eu/energy/events/20130529_stakeholder_regional_pci_lists_en.htm)

<sup>18</sup> COM(2002)704 – 11.12.2002,  
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0704:FIN:en:PDF>

on the 'Your Voice in Europe' website<sup>19</sup> that is the single access point for all public consultations launched by the European Commission.<sup>20</sup>

All upcoming events have been communicated to stakeholders and to members of the public through the "Events" and "News; What's new in Energy Policy" webpages of DG ENER that are followed by stakeholders and members of the public interested in energy policy.

Furthermore, access to the consultation process was open and it was not subject to any limitations based on location, performed activities or any other stakeholders' characteristics. For example, (i) the target group for the open public consultation (held between 20 June and 4 October 2012)<sup>21</sup> was defined broadly and included: "Public authorities, Member States authorities, private organisations, industry associations, SMEs, citizens, consumer organisations, trade unions, NGOs, environmental organisations, Notified Bodies, Consultancies, Workers Employers' federations, other relevant stakeholders and citizens."; (ii) the participation in the Information Day<sup>22</sup> was free of charge, there were no predefined-participants and the registration was carried out on a first come, first served basis.

The European Commission would also like to underline that the inclusion of a given infrastructure project on the Union list of PCIs that is laid down by the PCI Regulation does not prejudice the outcome of the implementation process of that project.

Pursuant to Article 9 of the "TEN-E Regulation" <sup>23</sup> and its Annex VI, 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 members of the public likely to be directly affected by it, including landowners and citizens living in the vicinity of the project.

In this context, for each PCI, a project promoter has to (i) draw up a concept for public participation to be accepted by the competent authority, (ii) run at least one public consultation (aimed among others at landowners and citizens), (iii) prepare a report summarising the results of the public consultation, (iv) submit the report to the competent authority, and (v) establish a website with information about the PCI and public consultation planning.

Requirements of Article 9 and Annex VI to the TEN-E Regulation constitute the safeguard that citizens will be involved in the implementation process of the PCIs and will be able to make their views heard by project promoters and national authorities well before the latter take decisions determining whether project promoters are (or are not) to be granted authorisations to build the PCI infrastructure.

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<sup>19</sup> [http://ec.europa.eu/yourvoice/consultations/links/index\\_en.htm](http://ec.europa.eu/yourvoice/consultations/links/index_en.htm)

<sup>20</sup> The European Commission has already outlined its general policy on consultation and the minimum standards it applies in its reply of 11 February 2013 to a request for information by the ACCC in Case ACCC/C/2012/68 in relation to the implementation of the renewable energy programme in Scotland. The European Commission would like to refer to these observations also in relation to the present case.

<sup>21</sup> [http://ec.europa.eu/energy/infrastructure/consultations/20120620\\_infrastructure\\_plan\\_en.htm](http://ec.europa.eu/energy/infrastructure/consultations/20120620_infrastructure_plan_en.htm)

<sup>22</sup> [http://ec.europa.eu/energy/infrastructure/events/20120717\\_energy\\_infrastructure\\_infoday\\_en.htm](http://ec.europa.eu/energy/infrastructure/events/20120717_energy_infrastructure_infoday_en.htm)

<sup>23</sup> Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 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; OJ L 115, 25.4.2013, p.39

• **Allegation:** *"Furthermore, as the previous Figure shows, the extent of the projects had enormous pan-European reach. Unfortunately, the language of the consultation, which was on an obscure part of the EU website, was restricted to English, which is the native tongue of only some 65 million of the 500 million in the EU-27. Therefore the majority of the citizens in which this infrastructure was to be built were completely disenfranchised, not only by language, but also as they would not be routinely engaging with an obscure part of an enormous EU website to which nobody had made the slightest attempt to draw their attention to."* (see pages 7 and 8 of the Communication)

The European Commission would first like to underline that for each PCI, a project promoter will have to carry out a project-specific permit granting process. This process will be carried out in the national language(s), so that all information disclosed to stakeholders and members of the public will also be available in the national language(s). Consequently, before any decisive decision will be taken by national authorities with regard to any PCI, local communities and citizens living in close vicinity of the project will receive information about that project and will be able to communicate their views on that project in their national languages.

In addition, as the ACCC has already held in an earlier case (ACCC/C/2010/46, United Kingdom), where language requirements relevant for effective public participation were at stake, while the principle of non-discrimination on the basis of citizenship, nationality or domicile was explicit in Article 3, paragraph 9, of the Convention, the provision was silent on matters of discrimination on the basis of language.

The Convention does not therefore set any language requirements for public participation to be effective.

As a consequence, the European Commission does not consider that the sole use of English in the consultation on the PCI Regulation has created any impediment to the correct implementation of the public participation provisions of the Aarhus Convention.

• **Allegation:** *"[T]he fact that only 142 Submissions were ever received on this public participation exercise demonstrates how ineffective it was in reaching the public to be affected by the enormous scale of Pan-European projects, which are now to be provided with accelerated regulatory approval. Neither were these Submissions taken account of in the final decision [...]."* (see p. 18 of the Communication)

The European Commission has encouraged the public to provide comments on the PCIs proposed by project promoters and to suggest new proposals for PCIs.<sup>24</sup> Views of the public have been duly taken into account. All 142 responses received in the open consultation were considered by the Regional Groups when assessing the proposals for PCIs. Stakeholders' comments were also considered by the European Commission in an internal inter-service consultation process on the draft PCIs Regulation.<sup>25</sup> Finally, a summary of the public

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<sup>24</sup> [http://ec.europa.eu/energy/infrastructure/consultations/20120607\\_non\\_tyndp\\_projects\\_en.htm](http://ec.europa.eu/energy/infrastructure/consultations/20120607_non_tyndp_projects_en.htm)

<sup>25</sup> For example: (a) due to environmental concerns over an initially planned location of the PCI onshore LNG terminal in the Northern Adriatic (IT) in Zaule, the location has not been specified in the final list

consultation process was included in an explanatory memorandum accompanying the PCI Regulation.<sup>26</sup>

## **b) Failing or inadequate disclosure of documents and information**

• **Allegation:** "*Firstly there was a failure, which still continues to this date, with regard to the requirement for environmental information associated with these Projects of Common Interest. [...] Despite repeated requests for this environmental information and complaints in relation to the absence of this environmental information, there was a refusal to provide it – it doesn't exist, even though these 248 projects have been selected for accelerated planning procedures and financial incentives.*" (see pages 6 and 7 of the Communication)

As a preliminary remark under this claim, the European Commission would like to note that it has *actively disclosed* environmental information (cf. Article 5 of the Aarhus Convention) in the course of preparing the PCI Regulation, already at the stage of the open public consultation held between 20 June and 4 October 2012.

The European Commission published on its website<sup>27</sup> and on the '*Your voice in Europe*' website<sup>28</sup> the lists of all PCIs candidates (in the sectors electricity<sup>29</sup>, gas<sup>30</sup> and oil<sup>31</sup>) which contained the following details: countries concerned, name, description, planned year of completion, project promoter(s) and reference number in the "Ten Year Network Development Plan".

At the stage of establishing the PCIs lists, DG ENER did not hold detailed information, such as precise location, routing and technology of the projects and their impact on the environment. Such information will become available only at a permit granting stage and it is to be disclosed to the public during the project-specific public consultation that is to be carried out for each PCI.

Contact details of the European Commission's service in charge of PCIs (including a postal address and an e-mail address) and names of project promoters in charge of potential PCIs have been published on the website since June 2012.<sup>32</sup> Therefore, members of the public interested in a given project have had a possibility of requesting additional information from project promoters or the European Commission.

Regarding the disclosure of environmental information to the public *on request* (that is laid down in Article 4 of the Aarhus Convention), the European Commission has treated requests for access to documents and information received since 2012 from EPAW and other persons

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and it is to be determined at the later stage by Italy and Slovenia. (b) Following DG Environment's proposal that the candidate PCI hydro-pumped storage in Austria – Molln was situated in an area that should be proposed as a site of Community interest under Article 4(1) of the Habitats Directive, the project was removed from the Union list of PCIs.

<sup>26</sup> [http://ec.europa.eu/energy/infrastructure/pci/doc/com\\_2013\\_6766\\_en.pdf](http://ec.europa.eu/energy/infrastructure/pci/doc/com_2013_6766_en.pdf)

<sup>27</sup> [http://ec.europa.eu/energy/infrastructure/consultations/20120620\\_infrastructure\\_plan\\_en.htm](http://ec.europa.eu/energy/infrastructure/consultations/20120620_infrastructure_plan_en.htm)

<sup>28</sup> [http://ec.europa.eu/yourvoice/consultations/index\\_en.htm](http://ec.europa.eu/yourvoice/consultations/index_en.htm)

<sup>29</sup> [http://ec.europa.eu/energy/infrastructure/consultations/doc/pci\\_list\\_electricity.pdf](http://ec.europa.eu/energy/infrastructure/consultations/doc/pci_list_electricity.pdf)

<sup>30</sup> [http://ec.europa.eu/energy/infrastructure/consultations/doc/pci\\_list\\_gas.pdf](http://ec.europa.eu/energy/infrastructure/consultations/doc/pci_list_gas.pdf)

<sup>31</sup> [http://ec.europa.eu/energy/infrastructure/consultations/doc/pci\\_list\\_oil.pdf](http://ec.europa.eu/energy/infrastructure/consultations/doc/pci_list_oil.pdf)

<sup>32</sup> [http://ec.europa.eu/energy/infrastructure/consultations/20120620\\_infrastructure\\_plan\\_en.htm](http://ec.europa.eu/energy/infrastructure/consultations/20120620_infrastructure_plan_en.htm)

or organisations according to the provisions of the Transparency Regulation and the Aarhus Regulation, which transpose Article 4 of the Convention.

The Communicant received in particular the requested project questionnaires. The Commission has also decided, after consulting the relevant project promoters, to disclose to EPAW further information, including certain commercial information that was redacted in the first communications to EPAW.

The European Commission has not disclosed, however, personal data and commercially sensitive information (such as estimated capital costs or financial planning) which are exempted from disclosure to third parties, also under the terms of the Aarhus Convention.

The European Commission thus considers that it has correctly disclosed all information concerning the EU list of PCIs, in line with Article 4 of the Aarhus Convention.

#### **IV. CONCLUSION**

In view of the above considerations, the European Commission requests the ACCC to dismiss the Communication as inadmissible, or, on a subsidiary basis, to reject it as unfounded.

## **LIST OF ANNEXES**

- 1) Answer by the European Commission of 30 January 2014 to the confirmatory application for documents by Mr Jerry Waugh, Gestdem 2013/4873
- 2) Closing decision by the European Ombudsman of 16 December 2013 on complaint 1411/2013/RT
- 3) Complaint 240/2014/SID to the European Ombudsman of 2 February 2014 and comments by the European Commission of 30 June 2014
- 4) Request for internal review by EPAW of 5 November 2013 and reply by the European Commission of 7 February 2014