To: Secretariat UNECE Aarhus Convention Compliance Committee
From: Pat Swords
Date: 09/04/2016
Re: Decision V/9g and your e-mail of 7th April with regard to commenting on teleconference which occurred at 52nd Compliance Committee meeting

Dear Fiona

I would like to highlight that I find your invitation to comment most appropriate given the circumstances I found, which actually prevailed, post the meeting on the 8th March. If you recall the EU delegation repeatedly stated, as to how the Member States had been written to with respect to including in their 2015 NREAP progress reports:

- *A detailed description of, and reference to, the measures and procedures in force that ensure public participation in decision-making processes, in accordance with the requirements of Article 7, and in conjunction with Article 6, paragraphs 3, 4, and 8, of the Aarhus Convention.*

During the course of the teleconference, we were reassured repeatedly that this had taken place and that the relevant replies were being assessed, with the intent to forward the conclusions to the UNECE Compliance Committee in Q 3 or Q 4 of this year. In fact it is sad to say that in reality, this is not what is actually happening. These 2015 NREAP progress reports were, under Directive 2009/28/EC, required to be submitted by the 31st December 2015. An examination of the EU Commission's own website[1] for these reports shows the presence of a significant number of progress reports, but some Member State reports are missing, presumably don't exist or are being deliberately withheld from the public. However, those which are, were available for a considerable period of time before the meeting on the 8th March, this one can deduct from the file date and the relevant dates of translation.

The Table below summarises the relevant information in these progress reports:

Member State	**Information available on public participation on the NREAPs**
United Kingdom	Zero information: Note: Non-compliance of UK NREAP has already been established, as part of the findings and recommendations of ACCC/C/2012/68 and Decision V/9n
Austria	Zero information
Netherlands	Zero information
Romania	Zero information
Latvia	Reference to their 2009 regulation on public participation on planning development. Zero information as to what occurred in relation to public participation on the 2010 NREAP.
Finland	Zero information
Luxemburg	Zero information
Slovenia	Zero information
Germany	Zero information
France	While not yet translated, it seems to be clear that there is zero information.
Italy	Provided a response. However, when compared to what it

[1] https://ec.europa.eu/energy/en/topics/renewable-energy/progress-reports

Member State	Information available on public participation on the NREAPs
	documented in Section 5.4 of their NREAP it becomes clear in that there are similarities to ACCC/C/2010/54. Namely, in that the consultation was targeted to some 50 official stakeholders, contacted by the Ministry and supplied directly with a draft NREAP. There was no active engagement with the public, as public notice was solely limited to the Ministry's website, and the responses seem to have occurred from the targeted consultation and not the public. The consultation occurred in June 2010, which is extremely short given that, the finalised NREAP, 'updated' with the outcome of the public participation, had to be adopted by the 30th June 2010.
Sweden	Responded with details of a targeted consultation, which occurred in the Spring of 2010.
Bulgaria	Responded with details of their 2013 adoption of their NREAP (NPDEVI) and associated environmental assessment and public participation. However, there was also a Bulgarian NREAP adopted on 30th June 2010 after what appeared to be a primarily targeted consultation. So how could 'options be open' for the 2013 NREAP public participation?
Denmark	Provided solely a list of the limited number of organisations which submitted at a targeted consultation and associated workshop. It was clear that there was no involvement of the general public. This can also be seen by reference to Section 5.4 of their 2010 NREAP.
Hungary	Provided solely a list of the limited number of organisations, which were involved in a targeted consultation. It was clear that there was no involvement of the general public. This can also be seen by reference to Section 5.4 of their 2010 NREAP.
Malta	Documented how it completed a Strategic Environmental Assessment in 2012, but it adopted the NREAP in June 2010. So how could 'options be open' when this environmental assessment and public participation was completed many months later?
Slovakia	Similarly a Strategic Environmental Assessment was completed in 2013 / 2014, some years after the NREAP was adopted in 2010. The 2010 NREAP clarified: • *The Action Plan is subject to comment procedure, during which the public has a right to raise comments and suggestions. Once such observations have been made, a public consultation on them can be held.* This requirement was further expanded on in the progress report in that it takes at least 500 comments received before this occurs. Given that it appears that the draft NREAP in 2010 was solely put on a Government website and not subject to other more visible 'public notice', it is not surprising that this did not occur.

None of what was provided can be classified as 'detailed information' with respect to what the EU Commission defined in their letter above. Indeed, zero information is what occurred in many cases. One can only conclude from the above that right around Europe the public were not present with an opportunity to participate in the

decision-making on the adoption of the NREAPs, despite these NREAPs having such huge impacts on many of them. There were simply no provisions made, the Directive set a completely unrealistic time frame for the assessment and adoption of a plan of this magnitude. As a result there was no opportunity to involve the public to be affected in the decision-making.

Furthermore, a key requirement of the Aarhus Convention is for *"… fully integrating environmental considerations in governmental decision-making and the consequent need for public authorities to be in possession of accurate, comprehensive and up-to-date environmental information".* As such then, as has been highlighted before, when it came to Section 5.3 of the NREAP template[2], nineteen of the Member States in their 2010 NREAPs essentially left it blank. The others provided little or no information.

5.3. Assessment of the impacts (Optional)

Table 13

Estimated costs and benefits of the renewable energy policy support measures

Measure	***Expected renewable energy use (ktoe)***	***Expected cost (in EUR) — indicate time frame***	***Expected GHG reduction by gas (t/year)***	***Expected job creation***

So how could effective public participation have taken place with the affected public, who were to have all this infrastructure amounting to hundreds of billions of Euros built around them, when there was essentially zero information on its impacts and as to its justification? Indeed, it is interesting to see from the progress reports above, as to how a number of Member States tried later to 'shoe horn' in the environmental assessments some years later, but at that stage 'options were no longer open', as there was already a NREAP adopted in June 2010 and notified to the Commission.

This then comes to the performance of the EU Delegation, who attended the teleconference on the 8th March, see below, as these were the officials, who were directly responsible for this issue and would have had, well in advance, access to those NREAP progress reports.

- Klara Talaber-Ritz (Legal Service),
- Mailys Lange, Eva Gerhards, Frank Heseler, Francesco Maria Graziani and Joao Heredia (Directorate-General ENER) and;
- Angelika Wiedner, Aarhus Team Leader, DG Environment,

[2] http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32009D0548

At no stage was it raised that such little or in many case zero information was available. Instead the impression was repeatedly given that a detailed review of information was taking place, which justified an extended period of several months, before the Compliance Committee could be informed of its outcome. Indeed, as if the many months, which have passed to date, were also justified by this detailed process and associated timeframes. While, so far the behaviour of the officials of the EU in relation to ACCC/C/2010/54 and now Decision V/9g can only be described as blatant obfuscation, their behaviour at the teleconference on the 8th March was, if not a situation of blatantly lying about the true situation, then one of deliberate deceit and dissembling. It was a shocking lack of professional standards and demonstrated clearly the utter contempt the EU Commission has for the Convention and its compliance mechanisms.

Finally, I would also like to take this opportunity to clarify the position I myself as the Communicant raised on the 8th March and indeed at the 21st Meeting of the Compliance Committee in December 2015. Namely, that during Communication ACCC/C/2006/17,[3] the following clarification was provided to the Compliance Committee by the EU as a Party to the Convention:

"*The impact on the European Community of approval of the Aarhus Convention:*

- *On the basis of the case-law of the Court of Justice of the European Communities, the decisions of which are binding on the Community and its Member States, three main aspects should be stressed.*

    - *An agreement concluded by the Council is binding on the Community's institutions and Member States[4]. It is the above Court's settled case-law that such an agreement forms* ***an integral part of the Community's legal order and the Court of Justice ensures compliance with it.***[5]

- *This rule applies not only to international agreements concluded by the Community alone but also to joint agreements,[6] in respect of the provisions which fall within the competence of the Community.*[7]

    - ***Such agreements take precedence over legal acts adopted under the EC Treaty (secondary Community law).*** *So if there was a conflict between a Directive and a Convention, such as the Aarhus Convention, all Community or Member State administrative or judicial bodies would have to apply the provision of the Convention and derogate from the*

[3] See documentation provided in response to the Committee's request made at CC-17 on 21/11/2007. http://www.unece.org/env/pp/compliance/Compliancecommittee/17TableEC.html
[4] Article 300(7) of the Treaty establishing the European Community.
[5] Judgment of 30.4.1974, Case 181/73, Haegeman, paragraph 5; judgment of 26.10.1982, Case 104/81, Kupferberg; judgment of 30.9.1987, Case 12/86, Demirel, paragraph 7. This principle was most recently confirmed in the judgment of 11 September 2007, Case C-431/05, Merck Genéricos- Productos Farmacêuticos Lda/ Merck Co. Inc, Merck Sharp & Dohme Lda, paragraph 31.
[6] Joint agreements are those concluded by the Community and all or some of its Member States with other countries and/or international organisations.
[7] Judgment of 19.3.2002 in Case C-13/00, Commission v Ireland, paragraph 14; judgment of 30.5.2006 in Case C-459/03, Commission v Ireland, paragraph 84, and judgment of 11 September 2007 in Case C-431/05 above, paragraphs 31 to 33.

secondary law provision.[8] This precedence also has the effect of requiring Community law texts to be interpreted in accordance with such agreements.

- ***In ensuring compliance with commitments arising from an agreement concluded by the Community institutions, the Member States fulfil an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement.[9]***

- *Therefore, under Article 226 EC, the Court of Justice may punish a Member State for non-compliance with an agreement concluded by the Community[10]. It has also been declared competent to hand down a preliminary ruling under Article 234 EC on the interpretation and validity[11] of Community legal acts incorporating the agreement into the Community system". [emphasis contained in original text]*

The text of Decision V/9g is clear:

- *"That the Party concerned, by not having in place a proper regulatory framework and / or clear instructions to implement Article 7 of the Convention with respect to the adoption of National Renewable Energy Action Plans (NREAPs) by its Member States on the basis of Directive 2009/28/EC, has failed to comply with Article 7 of the Convention;*

- *That the Party concerned, by not having properly monitored the implementation by Ireland of Article 7 of the Convention in the adoption of Ireland's NREAP, has also failed to comply with Article 7 of the Convention;*

- *That the Party concerned, by not having in place a proper regulatory framework and / or clear instructions to implement and proper measures to enforce Article 7 of the Convention with respect to the adoption of NREAPs by its Member States on the basis of Directive 2009/28/EC, has failed to comply also with Article 3, paragraph 1, of the Convention".*

In essence, the 'renewable energy' Directive 2009/28/EC, is flawed as it is in conflict with the Convention. As such then as highlighted previously; *"…all Community or Member State administrative or judicial bodies would have to apply the provision of the Convention and derogate from the secondary law provision".* As I raised at both the December and March meetings, the position of Decision V/9g with respect to Community law and in particular Directive 2009/28/EC, should ideally be clarified in writing, in a similar fashion as occurred on ACCC/C/20106/17; such that there is no ambiguity going forward, as to the seriousness of this matter and the need to ensure compliance. Not least, as given how these same officials in the EU Commission,

[8] Judgment of 10.9.1996 in Case C-61/94, Commission v Germany, paragraph 52; judgment of 1.4.2004 in Case C-286/02, Bellio F.lli, paragraph 33; judgment of 10.1.2006 in Case C-344/04, IATA e.a., paragraph 35, and judgment of 12.1.2006 in Case C-311/04, Algemene Scheeps Agentuur Dordrecht, paragraph 25.

[9] Settled case-law, Court's judgment of 30.9.1987 in Case 12/86, referred to above, paragraph 9; judgment of 19.3.2002 in Case C-13/00 referred to above, paragraph 15, judgment of 30.5.2006 in Case C-459/03 referred to above, paragraph 85, and judgment of 7.10.2004 in Case C-239/03, Commission v France, paragraph 26.

[10] Judgments of 10.9.1996 in Case C-61/94 and of 7.10.2004 in Case C-239/03, both referred to above.

[11] Paragraphs 27 and 39 of the judgment of 10.1.2006 in Case C-344/04, referred to above.

currently display such an obvious entitlement, to pursue a programme of such enormous magnitude and impact, despite it being in such blatant conflict with the EU's own legal framework.

If you have any further queries on these matters, please do hesitate to contact me.

Regards

Pat Swords