Response to further information received from the Party concerned on the 16th May with regard to the implementation of decision V/9g
From the Communicant Pat Swords on 21st May 2017

Dear Fiona

I would first like to reiterate the position of my short correspondence on the 16th May, namely:

- Paragraphs 74 and 75 of the Committee's Second Progress Review of the 24th February 2017 were very clear, in particular as to what should be replied to and that the date set for reply by the Party concerned was the 1st April. The Party concerned has not answered those written questions.

- The audio-conference of the 1st March 2017 was solely to aid in clarification in this regard and not to substitute for it.

- The Party concerned has abjectly failed, not only to reply to the issues raised, but to do so in a timely manner reflecting the generous timelines provided by the Committee to do so.

With respect to the first point in the reply of the Party concerned:

I: In relation to the recommendation to adopt clear instructions in relation to the respect of Article 7 of the AC when Member States adopt NREAPs

It is important as a starting point, to refer to the Committee's clarification in their findings and recommendations on Communication ACCC/C/2010/54, as to what this National Renewable Energy Action Plan comprised of and what was required with respect to its adoption:

- *75. The Committee finds that Ireland's NREAP constitutes a plan or programme relating to the environment subject to article 7 of the Convention because it sets the framework for activities by which Ireland aims to enhance the use of renewable energy in order to reduce greenhouse gas emissions, based on Directive 2009/28/EC. This view was taken by the communicant and was also confirmed by the Party concerned during the oral hearing and in writing in response to questions by the Committee.*

- *77. The Party concerned should have in place a regulatory framework to ensure proper implementation of the Convention. The Party concerned chose not to apply the SEA Directive to the adoption of NREAPs by its member States; instead it chose to incorporate a process for public participation in Directive 2009/28/EC. While this is a choice for the Party concerned, it is the task of the Committee to examine whether the Party concerned has indeed properly implemented article 7 of the Convention. The Committee in this respect notes that a framework for implementing the Convention with respect to plans and programmes concerning the environment, including plans and programmes related to renewable energy, should have been in place since February 2005, when the EU became a Party to the Convention*

The Party concerned is now claiming "**the Commission addressed clear instructions to Ireland (and all other Member States) through letter** *in 2015*".

Furthermore, as to how: *"***such letter (s) produced the expected result** *for Ireland and for many other Member States*".

From a legal perspective, the Renewable Energy Directive 2009/28/EC by-passed the requirements of the Aarhus Convention, as it failed to ensure for the NREAPs, compliance with the public participation requirements of Article 7 with respect to the adoption of plans and programmes related to the environment. Therefore as Point 34 of the Committee's Second Progress Review clarifies:

- *…***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 secondary law provision. This precedence also has the effect of requiring Community law texts to be interpreted in accordance with such agreements.*

From the perspective of both International and Community law, the above is the only acceptable 'expected result'. Instead what has been received from the Party concerned is just more obfuscation, which has nothing to do with the NREAPs and Decision V/9g. Namely Green and While Papers in Ireland are solely connected with matters of political policy at a National level. They are neither legal acts nor a plan and programme related to the environment. Indeed, just like politicians themselves, such Green and White papers are constantly changing. Directive 2009/28/EC on the other hand is binding Community legislation, setting a binding target to be met through a detailed plan, which is the NREAP.

Personally I fail to see as I am sure others do likewise, as to how even with convoluted and twisted logic, the Party concerned can now claim that it has "*produced the expected result*". Is the Irish NREAP of 2010 with its illegal adoption, now replaced by the 'adoption' of this White Paper on Energy? If so, then this is complete news to all of us in Ireland. I could also refer to the huge amount of submissions on this Irish Green Paper, which pointed out the glaring legal failures with respect to Irish Energy Policy, for instance that highlighted at the end of this response from An Taisce (The National Trust for Ireland), which has had a prescribed role in the planning process in Ireland since its introduction in 1963. Similarly I could also highlight the EU Commission's own 'country reports', which are part of the first ever comprehensive overview of how EU environmental policies and laws are applied on the ground.[1] The country report for Ireland is clear:

- *The Commission has some concerns with respect to the transposition of the Strategic Environmental Assessment (SEA) Directive. There have been quite a number of complaints that the Directive is not properly applied in the area of energy infrastructure, particularly with respect to wind farm development. The SEA Directive provides a key opportunity for the environmental impacts of alternatives to a proposed project to be fully assessed and for the public to comment.*

One might ask as to why the citizens in Ireland did not take a legal challenge on this Energy White Paper when it was adopted, after all Article 9(3) of the Convention should apply to such issues? The answer to this is to be found in Communications ACCC/C/2014/112 and ACCC/C/2014/113, in that the Irish legislation and indeed the Irish Courts service, do not recognise the provisions of Articles 9(3) and 9(4), in

[1] http://ec.europa.eu/environment/eir/country-reports/index_en.htm

particular as it applies to issues related to plans, programmes and policies. As my own legal case in relation to the NREAP demonstrated, for the nearly four years of the High Court case, I had no cost protection[2]. Indeed, as the Committee knows, there is also an on-going referral to the European Court of Justice from the Irish High Court in relation to Article 9(3) of the Convention.[3]

Indeed, the party concerned is once again relying on the inability of Irish citizens to have effective rights to challenge such NREAPs and associated energy policy, as a ‘fig leaf’ for claiming some form of legitimacy for these NREAPs and associated energy policy documents. This is effectively the position of a bully, and I use the latter word with intent, as what has happened is a pure abuse of citizen’s rights to proper democratic procedures. The law applies to all parties, including the EU and compliance with the law can only be ensured, by acting within the law, and once again I conclude with referring to:

- *…***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 secondary law provision. This precedence also has the effect of requiring Community law texts to be interpreted in accordance with such agreements.*

II: In relation to the recommendation to the Party to adapt the manner in which it evaluates NREAPs accordingly

The Compliance Committee adopted its findings and recommendations on Communication ACCC/C/2010/54 on the on the 29th June 2012. The Commission is now stating in its reply, as to how “*at the next Renewables Concerted Action Plenary meeting in the first quarter of 2017 the Commission would ask specific questions to those Member States which did not report on Article 7 AC compliance in their 2015 progress report to verify whether the participation of the public is/was not guaranteed through an appropriate legal framework and put into practice, or whether it was only a reporting error/omission”.*

It is quite remarkable, as to how it takes effectively five years to get around to asking for this simple information. Even more amazing, in that it never was necessary to request this information, as the Committee’s second progress review on Decision V9/g documents:

- *28. With respect to paragraph 10(d) of the Committee’s first progress review, the communicant queried whether the Party concerned had to date even attempted to evaluate the NREAPs with regards to its obligations under article 7. He submitted that if it had, it would be evident that the necessary information had not been provided to the public.*

In simple terms, in order for the public to participate effectively, they should have been provided with the ‘necessary information’, which for a plan or programme of this

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[2] https://www.unece.org/fileadmin/DAM/env/pp/compliance/C2014-112_Ireland/frComm_C112_12.08.2016_att1._High_Court_Judgement_12.08.2016.pdf

[3] https://www.unece.org/fileadmin/DAM/env/pp/compliance/C2014-112_Ireland/frCommC112_18.08.2016_Additional_information_regarding_Irish_HighCourt_Referral_to_ECJ.pdf

enormous impact should have included information on costs, benefits, impacts and alternatives. No such information was provided on any of the NREAPs, as is highlighted in the Committee's second progress review:

- *27. The communicant queried why the Commission, in its Consultation Questionnaire for the "Preparation of a new renewable energy directive for the period after 2020" published on 19 November 2015, was only at the end of 2015 asking the public to "identify and ideally also quantify the direct and indirect costs and benefits such as macroeconomic effects, competitiveness effects, innovation, cost and cost reductions, environmental and health effects of the [Renewable Energy Directive]". The communicant submitted that the European Union and member States should have had this information assessed and available to justify the decision-making that lead to the adoption of the Renewable Energy Directive in April 2009 and the NREAPs in June 2010. In contrast, the NREAP's template's section 5.3 "Assessment of the impacts" was expressly stated to be an optional table in which to set out the estimated costs and benefits of the renewable energy policy support measures. In keeping with its optional nature, nineteen member States left the table blank while others inserted little or no information. The communicant submitted that the Party concerned's proposed plan of action in paragraph 15(b) above was thus completely unnecessary, because the information relating to the inadequacy of public participation was already available to them.*

Furthermore, in early 2009 when the Irish authorities contacted the EU Commission, as to whether there was an obligation to complete a Strategic Environmental Assessment (SEA) for the NREAP, no reply was received from the EU Commission until after the NREAPs had been notified to them on the 30th June 2010, which then clarified[4]:

- *"The view of the Commission services is that whether or not a NREAP requires a SEA depends on the specific content of the plan. It follows from the Directive that the specific aim of the NREAP is to pave the way as to how the Member State are planning to achieve their national mandatory targets. In case a Member State has decided not to include in its NREAP specific mandatory measures to comply with, a SEA is not required at that stage".*

So one can only conclude, again with reference to the convoluted and twisted logic of the EU Commission, that the NREAPs have no mandatory elements when matters related to public participation are concerned, but are of course mandatory plans implementing mandatory targets, when one actually cares to read the mandatory Directive.

As regards references to France, Germany, Netherlands and Hungary, in the limited timeframe available to me to reply, I can only comment on a few short issues:

In relation to France: In case *C-290/15 - D'Oultremont and Others*[5] the European Court of Justice ruled on the 27th October 2016 that:

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[4] https://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-54/Correspondence%20with%20communicant/Response_08.01.2012/frCommC54LetterIrishAd2ECreNREAP.pdf

[5] http://curia.europa.eu/juris/liste.jsf?num=C-290/15

- *Articles 2(a) and 3(2)(a) 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 must be interpreted as meaning that a regulatory order, such as that at issue in the main proceedings, containing various provisions on the installation of wind turbines which must be complied with when administrative consent is granted for the installation and operation of such installations comes within the notion of 'plans and programmes', within the meaning of that directive.*

Note: The French Government submitted as observers to this legal case and it is understood it has had an impact on current legal proceedings in France with respect to the validity of wind farm related plans and programmes there. However, I do not have precise information on this aspect given the limited timeframe to reply.

In relation to Germany, the Commission stated: *"the Federal Government consulted associations and NGOs from the fields of renewable energy and environment on the draft of the National Action Plan in July 2010. In a consultation meeting on 9 July 2010, the associations presented their remarks and comments in the Federal Environment Ministry".* The date set by Directive 2009/28/EC for notification of these NREAPs to the Commission was the 30th June 2010. In essence, one can only conclude a last minute 'window dressing' public consultation was being heard when 'options were no longer open', as the plan had at that stage been effectively finalised. Although no doubt by the twisted and convoluted logic of the EU Commission, this last minute consultation in the days before the NREAP is notified, fully complies with the Aarhus Convention's requirements of*; "early public participation, when all options are open and effective public participation can take place".*

As regards the Netherlands, then this is being dealt with already in some detail in Communication ACCC/C/215/133, the communicants there are best able to respond on these issues, while similarly with respect to Hungary, given the short timeframe available to me, I have not been able to research for more information.

III. In relation to the recommendation to adopt a proper regulatory framework to ensure public participation in line with the AC in relation to the adoption of National Renewable Energy Action Plans (NREAP) (i above).

In the findings and recommendations on Communication ACCC/C/2010/54 the Committee concluded:

- *80. A proper regulatory framework for the implementation of article 7 of the Convention would require Member States, including Ireland, to have in place proper participatory procedures in accordance with the Convention. It would also require Member States, including Ireland to report on how the arrangements for public participation made by a Member State were transparent and fair and how within those arrangements the necessary information was provided to the public. In addition, such a regulatory framework would have made reference to the requirements of article 6, paragraphs 3, 4 and 8, of the Convention, including reasonable time-frames, allowing for sufficient time for informing the public and for the public to prepare and participate effectively, allowing for participation when all options are open and how due account is taken of the outcome of the public participation.*

I could also refer to Recital (90) of Directive 2009/28/EC, which stated:

- *(90) The implementation of this Directive should reflect, where relevant, the provisions of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, in particular as implemented through Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information.*

It is after all a matter of legal fact that such references in a recital to a Directive have proven to be totally inadequate, with respect to ensuring that the necessary provisions of the Aarhus Convention were complied with, and cannot as such be considered as fulfilling the obligations of a 'proper regulatory framework to ensure public participation'. Yet the Commission is proposing to adopt this 'recital' approach with its proposed regulation on the Governance of the Energy Union and has failed to "*adopt a proper regulatory framework or clear instructions for implementing article 7, pursuant to which member States are clearly instructed to put in place arrangements to meet each of the elements of article 7 set out in paragraph 3 of decision V/9g*".[6]

IV. Conclusions

There has been no effective progress in implementing the Meeting of the Parties Decision V/9g, as no steps have been taken in that direction. If you exclude obfuscation, and the correspondence related to the same, the Party concerned has done nothing in the almost three year period and has shown no indication that there is any form of plan in place to ensure compliance. Indeed, the party concerned has clearly refused to respond in writing to the specific questions raised by the Compliance Committee in the second progress review, in particular to:

- *Explain, for each member State whose information on their implementation of article 7 was either insufficient or revealed a possible failure to carry out public participation that fully met the requirements of article 7, the specific measures it proposes to take with respect to that member State.*

As all that can be expected going forward is just more obfuscation, it is necessary to highlight the concluding paragraph of the Committee's first progress review:

- *18. The Meeting of the Parties at its sixth session may, upon consideration of a report and any recommendations of the Committee, decide upon appropriate measures to bring about full compliance with the Convention in accordance with paragraph 37 of Decision I/7. The Meeting of the Parties may, depending on the particular question before it and taking into account the cause, degree and frequency of the non-compliance, decide upon upon one or more of the following measures:*

  (a) Provide advice and facilitate assistance to the Party concerned regarding the implementation of the Convention;

  (b) Make recommendations to the Party concerned;

  (c) Request the Party concerned to submit a strategy, including a time schedule, to the Compliance Committee regarding the achievement of compliance with the Convention and to report on the implementation of this strategy;

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[6] See Point 74(a) of the Second Progress Review

(d) In cases of communications from the public, make recommendations to the Party concerned on specific measures to address the matter raised by the member of the public;

(e) Issue declarations of non-compliance;

(f) Issue cautions;

(g) Suspend, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, the special rights and privileges accorded to the Party concerned under the Convention;

(h) Take such other non-confrontational, non-judicial and consultative measures as may be appropriate.

Therefore, it is considered appropriate that the Compliance Committee should recommend that a caution should be issued.

Extract from An Taisce's Submission to Irish Green Paper on Energy[7]

- *There has been a failure by the Department, therefore, to grapple with underlying demand – and to instead pursue a range of supply-related initiatives and un-integrated targets in the absence of any credible or relevant overall measurement strategy, with sufficient oversight and empowerment to deliver. This coupled with Ireland's systemic evasion, haphazard approach, and poor adherence to the intent and underlying purpose of the Strategic Environmental Assessment Directive in its energy plans and policy specifications have provided a shaky foundation on which to proceed.*

- *This needs to be informed by a robust Strategic Environmental Assessment Process, in strict accordance with the intent and purpose envisaged by 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. This in turn will inform a hierarchy of component energy programmes and plans to deliver on that energy requirement, including both conservation and appropriate development programmes, all of which in turn need to be subject to SEA. Such an approach is necessary to comply with obligations under Articles 6 and 7 of the Aarhus Convention, whose obligations exceed those of the SEA Directive, and to re-dress the legal and informational issues consequent on the approach Ireland and the EU have separately and collectively pursued to date, and to provide a robust and non-confrontational basis on which we can move forward together.*

[7] http://www.dccae.gov.ie/en-ie/energy/consultations/Documents/19/submissions/An%20Taisce.pdf