

To: Secretariat Aarhus Convention Compliance Committee
From: Pat Swords
Date: 22/15/2015
Re: Decision V/9g and your e-mail of 6th November with regard to commenting on EU's Second Progress Report
Attachment: Further correspondence with EU Commission of 9th November in relation to the NREAP

Dear Fiona

With regard to your e-mail of 6th December and offer to send any comments on the Party concerned's second progress report, I would indeed like to utilise this opportunity to raise some significant issues. First of all, if we consult the "Report of the fifth session of the Meeting of the Parties, Addendum, Decisions adopted by the Meeting of the Parties¹", then in "Decision V/9 on general issues of compliance" it is clearly stated:

- 3. Considers that the implementation of measures to bring legislation or practice of a Party into compliance with the **Convention should commence as soon as possible once specific problems with compliance have been identified**, with a view to already bringing about full compliance with the relevant provisions in the intersessional period, where possible;
- **5. Urges each Party to cooperate in a constructive manner with the Committee in connection with any review of its compliance;**

This is not happening, to date not a single effective measure has been taken by the EU Commission to achieve compliance with the Convention in relation to its renewable energy programme and in particular the adoption of the National Renewable Energy Action Plans (NREAPs). The findings and recommendations of the Compliance Committee in mid-2012 on Communication ACCC/C/2012/54 were conclusive²:

- *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.*
- *79. The template adopted on the basis of article 4, paragraph 2, of Directive 2009/28/EC determines how member States are to adopt NREAPs. The template comprises minimum requirements that member States are to comply*

¹ ECE/MP.PP/2014/2/Add.1:
http://www.unece.org/fileadmin/DAM/env/pp/mop5/Documents/Post_session_docs/ece_mp.p_p_2014_2_add.1_eng.pdf

² http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-54/Findings/ece_mp.pp_c.1_2012_12_eng.pdf

with in the preparation of their NREAPs. Among these requirements are reporting obligations related to public participation (see para. 23 above). The Committee finds that these requirements are of a very general nature and do not unequivocally point member States, including Ireland, in the direction of the requirements of the Convention when adopting plans or programmes relating to the environment based on EU law, in casu, plans related to renewable energy and, more in particular, NREAPs.

However, the EU Commission had been made aware of the legal failings in relation to public participation on the renewable programme well in advance of the NREAPs being adopted on 30th June 2010, both by the Communicant³ and the Irish State⁴, in both cases this being subject to written record by the EU Commission itself. In each occasion the same name is present, that of Antoinette Long of DG Environment, who is responsible for legal infringements in Ireland. Despite what is now a Decision of the Meeting of the Parties, which is a ruling in International Law, all of this is irrelevant with this person and her colleagues in the European Commission. As I pointed out in a recent e-mail to yourselves on the 13th October 2015⁵, on the 12th October 2015 Antoinette was writing the below in relation to the situation of the renewable energy programme in Ireland.

- *In relation to the NREAP, the Commission has no reason to believe that insufficient public participation took place prior to the adoption of this plan*

She was then requested to clarify this position, being provided with a copy of the Compliance Committee's "First progress review of the implementation of decision V/9g on compliance by the European Union with its obligations under the Convention⁶". Her position then being, as documented in the attached, is that

- *In response to your question below, both my statement in relation to the NREAP and the attached report are correct.*
- *My statement related to Ireland's original NREAP; the report relates to future actions to implement a decision of the Aarhus Compliance Committee.*

This is the consistent position of this senior official in DG Environment and her colleagues there, namely that as no legal action was taken against them at the time in relation to the NREAPs, they have full legitimacy to continue on, as is, until 2020 and the end of these NREAPs⁷ is reached.

³ See Technical Annex of Documentation submitted on 21.06.2011: Note to File0645: <http://www.unece.org/env/pp/compliance/Compliancecommittee/54TableEU.html>

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

⁵ <http://www.unece.org/environmental-policy/treaties/public-participation/aarhus-convention/envpptfwg/envppcc/envppccimplementation/fifth-meeting-of-the-parties-2014/european-union-decision-v9g.html>

⁶ Not yet posted on the UNECE website

⁷ As highlighted previously to UNECCE, there is on-going legal action in relation to the Irish NREAP in the Irish High Court, which is awaiting judgement since March 2015.

There are number of issues here, not least in relation to the legal framework of the European Union itself, starting with Article 2 of the Lisbon Treaty (TEU)⁸:

- ***The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.***

When the European Union ratified the Aarhus Convention in 2005, it not only agreed to be bound by it in terms of International Law, but it also became an integral part of Community legal order, a position, which in September 2007 was clarified with the Compliance Committee⁹ and recorded in writing. In essence:

- *The legal certainty which had to be created by the legal acts adopted so as to guarantee full application of the Convention.*

Clearly all of this, year after year, since when this issue was first raised with them in 2009, is completely irrelevant to Antoinette Long and her colleagues in the EU Commission. Plus I really fail to see anything to date, including in their Second Progress Report, which would alter that conclusion. In essence these officials see that have 'carte blanche' to implement plans and programmes of enormous scope and impact, by-passing all of their legal commitments in relation to access to information and public participation, and even when they get 'caught out' and have decisions against them in International Law, that they are under no obligation at all to do anything about rectifying the situation and ensuring compliance.

Given that this is indeed the factual situation, a starting point going forward, would be that the EU would in future be represented by suitable officials, who actually represent its legal framework and took the relevant legal framework and its commitment to environmental democracy seriously. This was clearly not the case in the previous teleconference at the March 2015 Compliance Committee meeting on Decision V/9g and the correspondence currently occurring in relation to this Decision of non-compliance.

Indeed, if we go further and examine the EU's Second Progress Report, and examine its claim:

- *The Commission services also took due notice of the "First progress review of the implementation of decision V/9g on compliance by the European Union with its obligations under the Convention" dated 13 October 2015 ("First progress review"), and would like to stress that they are committed to fully implement it, in particular its points 10 (a) - (d) and 16.*

Is this honest and valid? Where is the evidence to date? First of all to re-iterate points 10 (a) – (d) and 16:

10. In order to fulfil the requirements of the decision V/9g, the Party concerned would need to provide the Committee with evidence that:

⁸ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012M/TXT>

⁹ <http://www.unece.org/env/pp/compliance/C2006-17/Response/ECresponseAddl2007.11.21e.doc>

- (a) *It had adopted a proper regulatory framework and/or clear instructions for implementing article 7 of the Convention with respect to the adoption of NREAPs;*
- (b) *It ensures that the arrangements for public participation in its Member States are transparent and fair and that within those arrangements the necessary information is provided to the public;*
- (c) *It ensures that the requirements of article 6, paragraphs 3, 4 and 8, of the Convention are met, including reasonable time frames, allowing sufficient time for informing the public and for the public to prepare and participate effectively, **allowing for early public participation when all options are open, and ensuring that due account is taken of the outcome of the public participation;***
- (d) *It had adapted the manner in which it evaluates NREAPs accordingly.*

16. *The Committee invites the Party concerned in its second progress report due on 31 October 2015 to provide a detailed plan of action, including a timeline, as to how it proposes to address each of the recommendations set out in paragraph 3 of decision V/9g.*

It goes without saying, that the EU's renewable energy programme has enormous scope and impact, both financially and environmentally. Public participation in decision-making occurs with such plans and programme and the projects, which follow, in a tiered basis. As was clarified to the European Union already by the Compliance Committee in the findings and recommendations on Communication ACCC/C/2005/17 in relation to its obligations under Article 6, paragraphs 2 and 4, and article 9, paragraph 2, of the Convention, as adopted in April 2008¹⁰.

- *51. The requirement for “early public participation, when all options are open” should be seen first of all within a concept of tiered decision-making, whereby at each stage of decision-making certain options are discussed and selected with the participation of the public and each consecutive stage of decision-making addresses only the issues within the option already selected at the preceding stage. Thus, according to the particular needs of a given country and the subject matter of the decision-making, Parties have a certain discretion as to which range of options is to be discussed at each stage of the decision-making. Such stages may involve various consecutive strategic decisions under article 7 of the Convention (policies, plans and programmes) and various individual decisions under article 6 of the Convention authorizing the basic parameters and location of a specific activity, its technical design, and finally its technological specifications related to specific environmental standards. Within each and every such procedure, where public participation is required, it should be provided early in the procedure when all options are open and effective public participation can take place.*

Indeed, these issues were further clarified in the Maastricht Recommendations adopted at the fifth Meeting of the Parties¹¹, which dealt extensively with ‘tiered

¹⁰http://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_10_e.pdf

¹¹http://www.unece.org/fileadmin/DAM/env/pp/mop5/Documents/Post_session_docs/ece_mp_pp_2014_2_add.2_eng.pdf

decision-making' and the requirements with respect to Article 6(4) in allowing for early public participation when all options are open. Furthermore, the European Court itself in Case C-416/10 made it clear¹²:

- *Under the Aarhus Convention, when a decision-making procedure concerning the environment is initiated, the public concerned must be able to participate in it from its beginning, that is to say, when all options are still open and effective public participation can take place. Moreover, the public must, as a rule, be able to have access, free of charge, to all information relevant to the decision-making procedure and to challenge the legality of any decision resulting from that procedure.*

As Communication ACCC/C/2014/112 documents, this simply is not happening in Ireland. There is a point blank refusal to address the justification for the NREAP and the renewable energy projects it is implementing, the impacts and mitigation measures, the alternatives including the zero option, etc. Instead planning decisions are pro forma in which the public participation is a farce, being nothing more than a 'box ticking' exercise. As regards points 10 (b) and (c) above from UNECE's first progress review, when the issue is raised with Antoinette Long and her colleagues by Irish individuals and NGOs, there is a consistent and absolute refusal to deal with it.

This then comes to Point 16 of the first progress review and the first of the recommendations in Decision V/9g, namely that the EU "adopt a proper regulatory framework and / or clear instructions for implementing article 7 of the Convention with respect to the adoption of NREAPs". Until this is completed and the existing NREAP is legally compliant, the decision making to implement the current NREAP at the project level, will simply be non-compliant with the legal framework and an abuse of the citizens' rights defined in Community law. A point which is now recognised by legal professionals in Ireland and as to how it is simply going to lead to a whirlwind of legal cases, as this renewable programme is progressed further¹³.

So to date nothing has been done in relation to the glaring legal non-compliance in the manner in which the NREAPs were adopted without public participation. In fact when one reviews the EU's Second Progress Report and the letter to the Irish Ambassador to the EU, which they included with it¹⁴, see Point 2 of their Report, what is the purpose of this other than obfuscation and time wasting? The findings and recommendations on Communication ACCC/C/2010/54 were very clear, see Point 83 as an example below, so why did the EU Commission need to write to the Irish Ambassador in October 2014 in relation to "*a detailed description of, and reference to, the measures and procedures in force that ensure public participation in the decision-making processes, in accordance with the requirements of Article 7*". This was already known and documented by an International Legal Tribunal more than three years previously. Is there some form of insinuation that the facts established then were wrong, in particular the position of the Compliance Committee below?

- *83. Nevertheless, with respect to the consultation with the public conducted by Ireland the Committee finds that it was conducted within a very short time frame, namely two weeks. Public participation under article 7 of the*

¹² <http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-01/cp130001en.pdf>

¹³ <http://www.tandfonline.com/doi/abs/10.1080/02646811.2015.1008847>

¹⁴ <https://neilvandokkum.files.wordpress.com/2015/10/letter-to-ireland-1.pdf>

Convention must meet the standards of the Convention, including article 6, paragraph 3, of the Convention, which requires reasonable time frames. A two week period is not a reasonable time frame for “the public to prepare and participate effectively”, taking into account the complexity of the plan or programme (see findings on communication ACCC/C/2006/16 (Lithuania), ECE/MP.PP/2008/5/Add.6, para. 69).

One can also ask in a wider sense with regard to Pont 10 (d) of the First Progress Review of the Implementation of Decision V9/g, namely:

- “It had adapted the manner in which it evaluates NREAPs accordingly”.

Has the EU even attempted to evaluate the NREAPs to date with regard to its obligations under Article 7? The answer to this is clearly not; let’s consider Point 10 (b) of the same First Progress Review:

- (b) *It ensures that the arrangements for public participation in its Member States are transparent and fair and that within those arrangements **the necessary information** is provided to the public;*

So what information was provided to the public in these NREAPs? After all, the EU has had these NREAPs since 30th June 2010, has it not read them? Why does it need the Member States to formally report back to it on this issue now? Let’s face it; these NREAPs are not exactly brimming with what one could consider ‘the necessary information’. In this context one only has to read the Consultation Questionnaire for the “Preparation of a new renewable energy directive for the period after 2020”, which was published on the 19th November 2015¹⁵. The first question on this consultation is actually in relation to the current Renewable Energy Directive (RED) of 2009/28/EC, and states:

- *[Box: Comments. To what extent did implementation measures for the RED as well as external factors (technological development, financial crisis, security of supply concerns and related market interventions) affect the effectiveness and efficiency of achieving the objectives? **Please 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 RED.** Max 500 words]*

Why are members of the public now being asked this question at the end of 2015? It beggars belief that that neither the EU nor the Member States had this information assessed and available to justify the decision-making that lead to the adoption of this Directive in April 2009 and the subsequent NREAPs in June 2010. Even worse, they clearly don’t have it now and are not even in the position to communicate it to the public. Is this information necessary? Well clearly within the context of effective public participation in relation to a programme with massive environmental and financial impacts it is. So what was actually in the NREAPs? As has been highlighted

¹⁵ https://ec.europa.eu/energy/sites/ener/files/documents/RED%20II%20Public%20Consultation_0.pdf and <https://ec.europa.eu/energy/en/consultations/preparation-new-renewable-energy-directive-period-after-2020>

elsewhere with the Compliance Committee¹⁶, Section 5.3 of the NREAP template, see overleaf, related to impacts.

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

Nineteen of the Member States left this essentially blank, while the others left little or no information. One doesn't as a senior official in the EU, namely the Director-General of Energy, have to write to the Member States to establish that the public were not provided with the necessary information in relation to the impacts of this programme. Indeed, the reason why he and his officials, are still to this date clearly clueless about the impacts of this programme, were that these impacts were never established in the first place, either by his officials or the Member States working on his behalf. Indeed, as was documented in the Complaint to the EU Ombudsman 1892/2012/VL, when Struan Stevenson MEP in February 2012 raised the issue that nineteen of the Member States left Section 5.3 above blank, the subsequent reply by the Energy Commissioner Gunther Oettinger¹⁷ was that:

- *To avoid an excessive administrative burden on Member States, Section 5.3 is an optional reporting requirement*

Therefore if we come to Point 2 of the EU Commission's so called 'Plan' in their Second Progress Report, one can only comment, as that this is a completely unnecessary step, as that information in relation to the inadequacy of public participation is already available to them. Furthermore, it is glaring obvious that they intend to do nothing other than a glorified and unnecessary assessment exercise, that is as far as they intend to go. There is zero commitment to implementing Point 10(a) and the following points, i.e.:

10. In order to fulfil the requirements of the decision V/9g, the Party concerned would need to provide the Committee with evidence that:

¹⁶ See Answer to Question 3: http://www.unece.org/fileadmin/DAM/env/pp/compliance/Pre-admissibility_communications/Ireland_European_Platform/frComm_response_to_Committees_questions_01.12.2014.pdf

¹⁷ <http://www.epaw.org/documents/Attachment%20-%20-%20Correspondence%20between%20Struan%20Stevenson%20MEP%20and%20Energy%20Commissioner.pdf>

- (a) *It had adopted a proper regulatory framework and/or clear instructions for implementing article 7 of the Convention with respect to the adoption of NREAPs;*

Indeed, this can be seen in their Report where the EU Commission claim in relation to their glorified and unnecessary 'assessment', as to how in their view these measures fulfil their obligation "to respond to points 10 (a) - (d), in particular point (d), of the First progress review". This is of course pure and utter nonsense.

I would also like to make clear at this stage, what can only be described as the pure bullying, which is going on in relation to this renewable programme, in that if these renewable targets are not met, then Ireland, and by default the Irish taxpayer, will be subject to huge fines from the EU. An example of this being the statement of the Irish Minister for Energy Alex White on the 28th April 2015 in the Oireachtas (Parliament)¹⁸.

- The Deputy is correct. I would not like him to interpret anything I said as an effort to underplay **the real risk and threat posed by fines and penalties if we do not meet the renewable energy targets that have been set**. I would not like anything I said to be interpreted in that way. **Any shortfall in meeting our target would have a cost.**

As a starting point it is essential that the EU Commission be required to clarify in writing for the Compliance Committee, the position of Decision V/9g in European Law and the legal status of the current NREAPs in European Law with regard to; (i) their implementation and; (ii) and any future enforcement by the EU Commission of the targets and measures set in them. Note: This could be completed in the same manner as in September 2007, where it was documented "in relation to the applicability of the Convention to the sole Member State which has yet to ratify it (Ireland), as a result of its approval by the Community."¹⁹ This is considered an essential step, as the evidence to date is that the officials of the EU do not consider that they have to do anything at all to implement Decision V/9g.

Finally, I would like to comment briefly on the last two paragraphs of their Second Progress Report. Such phrases as "the context of the creation of a resilient and climate forward looking Energy Union" do not make sense in plain English. Indeed, that the senior officials of the EU Commission would think that what they can actually do in relation to energy and as to how it would have a measurable impact on the weather, both now and in the future, is pure delusional.

This chronic delusion is facilitated by a complete lack of critical thinking, supporting information and associated compliance with the legal framework of the Convention. As has been pointed out on Communication ACCC/C/2014/2012²⁰, the EU and its Member States do not have any information on the environmental impact of carbon emissions, while the claims made for carbon savings in the Impact Statement for the preparation of Renewable Energy Directive, as generated by the PRIMES

¹⁸ <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2015042800036>

¹⁹ <http://www.unece.org/env/pp/compliance/C2006-17/Response/ECresponseAddl2007.11.21e.doc>

²⁰ See Answer to Question 3: http://www.unece.org/fileadmin/DAM/env/pp/compliance/Pre-admissibility_communications/Ireland_European_Platform/frComm_response_to_Committees_questions_01.12.2014.pdf

programme, were clearly false²¹. However, even when these exaggerated claims for carbon savings are put in the context of global annual emission of 35 billion tonnes per annum, they only amount to 2% of the global total, while there has been no increase in global temperatures since the EU renewable energy programme was initiated in 1998. It is long overdue with regard to effective and legally compliant decision-making that EU officials complied with the general requirements of the Aarhus Convention of:

- *Recognizing the importance of 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.*

The law is there for a reason and is not subservient to belief systems, not matter how trendy or fervently held. It is also necessary to highlight the current and regretful tendency of the same EU officials to see it as their entitlement to lecture other countries, as to their compliance with the principles of the Aarhus Convention. Such as at the Fifth Meeting of the Parties in relation to compliance issues with Belarus²² and in relation to the EU's Enlargement Strategy 2015 Report on Turkey²³, where in Chapter 27 on environment, it is stated:

- *Provisions on access to information, public participation and access to justice in environmental matters established in the UN Economic Commission for Europe Aarhus Convention also have yet to be aligned with. This would in particular provide a clear framework for solving ongoing disputes on investment decisions with substantial impacts on the environment and climate change.*

It goes without saying in life that if one wants to 'talk the talk' one first has to 'walk the walk', in other words put one's own house in order and start acting as a proper modern democratic structure.

²¹ <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52006DC0848>

²² [http://www.unece.org/fileadmin/DAM/env/pp/mop5/Statements/Compliance - Belarus decision - EU MS statement 1.7.2014 FINAL.pdf](http://www.unece.org/fileadmin/DAM/env/pp/mop5/Statements/Compliance_-_Belarus_decision_-_EU_MS_statement_1.7.2014_FINAL.pdf)

²³ http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_turkey.pdf