Comments on European Union's 31st December 2014 reply on Decision V/9g
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The EU in its first Aarhus Convention National Implementation Report clarified[1]:

- *2. According to Article 300(7) of the Treaty establishing the European Community ("EC Treaty"), international agreements concluded by the European Community are binding on the institutions of the Community and on Member States. In accordance with the European Court of Justice's case-law, those agreements prevail over provisions of secondary Community legislation. The primacy of international agreements concluded by the Community over provisions of secondary Community legislation also means that such provisions must, so far as is possible, be interpreted and applied in a manner that is consistent with those agreements.*

- *3. In addition, according also to settled case-law, a provision in an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure. Such provisions constitute rules of Community law directly applicable in the internal legal order of the Member States, which can be relied on by individuals before national courts against public authorities. There is no case-law yet of the Court of Justice of the European Communities or of the Court of First Instance (hereinafter: "Community judicature") on the direct effect of any of the provisions of the Aarhus Convention.*

As the Compliance Committee knows, during Communication ACCC/C/2006/17 (European Community) the European Community drafted a note setting down in writing certain explanations given verbally. The explanations relate on the one hand to the adjustment by the European Community of Community law to make it compatible with the Aarhus Convention and to the legal certainty, which had to be created by the legal acts adopted, so as to guarantee full application of the Convention, and on the other to the applicability of the Convention to the sole Member State which has yet to ratify it, as a result of its approval by the Community[2].

This document reaffirms with reference to established case law, the impact on the European Community of approval of the Aarhus Convention, in that an agreement concluded by the Council is binding on the Community's institutions and Member States, the Aarhus Convention having being ratified by the Council in Decision 2005/370[3].

Decision V/9g of the July 2014 Meeting of the Parties endorsed the findings of the Compliance Committee in Communication ACCC/C/2010/54, namely that the European Union "*by not having in place a proper regulatory framework and / or clear*

[1] http://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_ir_2008_EC_e.pdf

[2] http://www.unece.org/env/pp/compliance/C2006-17/Response/ECresponseAddl2007.11.21e.doc

[3] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:124:0001:0003:EN:PDF

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".

If we consider Point 2 above in the EU's first National Implementation Report plus the additional clarification given below during Communication ACCC/C/2006/17:

- **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.[4] This precedence also has the effect of requiring Community law texts to be interpreted in accordance with such agreements.

Not only do we have as a result of Decision V/9g a serious compliance failure in relation to the EU's International Treaty obligations[5], but from the perspective of Community law, we have a secondary law provision, namely Directive 2009/28/EC, the EU's 20% by 2020 renewable energy programme, which is in direct conflict with primary legal order, i.e. the Aarhus Convention. Given that this secondary legislation, in which the NREAPs were adopted on the 30th June 2010, will run through to the end of 2020, we are therefore not yet even at the mid-point of the implementation of the NREAPs. It is thus worth summarising what the officials of the EU Commission have done to date with regard to ensuring compliance, not only with their legal obligations under International Law, but also Community law.

- The behaviour of the EU's legal official at 21st September 2011 Compliance Committee meeting on ACCC/C/2010/54, Mr Eric White, could only be described as belligerent and unprofessional. In his closing statements to the meeting, all he could state was that as the Communicant, I was entitled to my opinion and to air it. However, it was a view which had no value; I was clearly wasting my time and would be better off spending it on something else.

- Mr Jean Francois Brakeland, Head of Unit A-2, Compliance promotion, governance and legal issues, DG Environment, wrote to myself on the 14th May 2012 reiterating that they were closing the CHAP 2010 (00645) Complaint file, as there had been no infringement. This was despite the draft findings and recommendations on ACCC/C/2010/54 having been issued to him by yourselves in UNECE on the 4th May 2012, in which a very serious legal breach had been determined.

- One could also point out that the behaviour of this official at the Compliance Committee meeting in December 2012 on ACCC/C/2012/68 was completely bizarre. Responding to questioning of the Communicant that a renewable target was inadequate, as there had to be a defined environmental objective, such as transparently assessed emission savings and an associated damage

[4] 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.

[5] See in particular Article 31 of the Vienna Convention on the Law of Treaties: https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf

cost for the emissions which were to be avoided, all he could offer in reply was: "If we were to take instead of a 110 m high wind turbine a 110 m high metal statue of Mickey Mouse, you would not be expected to do a detailed carbon assessment on that, so why do you expect a detailed carbon assessment for the wind turbine?"

- Naturally the EU Commission ignored the findings and recommendations on ACCC/C/2012/68 as they applied to them, as they have done to date on ACCC/C/2010/54.

- With regard to the reply of Mr Robert Konrad, of the 18th December 2014[6], who is now Head of Unit D4, Compliance promotion, governance and legal issues in DG Environment, it seems that he too like his previous colleagues sees it as his prerogative to treat the compliance of the European Union with its legal obligations in relation to Directive 2009/28/EC with contempt. After all, this was the essentially the same letter which he wrote to yourselves on the 1st August 2013[7], which both yourselves in the Compliance Committee and the Meeting of the Parties in Decision V/9g stated was inadequate.

As regards compliance with the Convention and the behaviour of these officials, it can be summarised in two words; 'not interested'. If we consider the implementation of Directive 2009/28/EC, over 100,000 MW of wind energy has been installed to date with capital investment in the EU-28 on renewables now exceeding €400 billion. There is simply nothing comparable in history for its impact on the rural communities and landscape throughout Europe and we are not even half way through the implementation of these NREAPs. For instance the Irish NREAP called for 2,907 MW of wind energy by the end of 2014 and 4,649 MW by 2020. However, significant amendments to this NREAP are being made every two years, as has been described in response to questions presented by UNECE in a pre-admissibility Communication in relation Ireland as a Party to the Convention[8]. In particular, a huge export programme to the UK, which is being developed in conjunction with the EU's Projects of Common Interest.

Indeed an Access to Information on the Environment Request, which became available this January, has revealed that on the 26th May 2010 queries were raised by the Oireachtas (parliamentary) Committee with the Irish Department of Communications, Energy and Natural Resources in relation to the NREAP.

- *Question: How can the reports to Brussels as required by the plan be used to increase the traction of the plan?*

- *Response: Reports on the plan are to be submitted to the EU every two years. This will provide an opportunity to review developments in the intervening period and amend the plan and the figures in the tables to reflect technology and other changes in the intervening periods.*

[6] http://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP5decisions/V.9g_EU/frmPartyV9g_email_18.12.2014.pdf

[7] http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-54/Correspondence%20with%20Party%20concerned/frEUC54_1Aug2013_forMOP5.pdf

[8] http://www.unece.org/fileadmin/DAM/env/pp/compliance/Pre-admissibility_communications/Ireland_European_Platform/frComm_response_to_Committee_s_questions_01.12.2014.pdf

If we consider the EU's own legislation on Strategic Environmental Assessment 2001/42/EC, Article 3 requires that:

2. Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes,

> *(a) which are prepared for agriculture, forestry, fisheries, **energy**, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC, or*
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> *(b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC.*

*3. Plans and programmes referred to in paragraph 2 which determine the use of small areas at local level and **minor modifications to plans and programmes referred to in paragraph 2** shall require an environmental assessment only where the Member States determine that they are likely to have **significant environmental effects.***

It was made clear by the EU in their first Implementation Report to UNECE that in relation to Article 7:

89. Public participation concerning plans and programmes relating to the environment prepared and adopted by Member States' authorities is ensured through the implementation and application of the following legislation:

(b) 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.

These NREAPs are being radically expanded by the EU's Commission's Projects of Common Interest, which are subject to an ongoing Communication ACCC/C/2013/96 at the Compliance Committee. The implementation of these Projects of Common Interest to support these NREAPs goes far beyond what is described above in the EU's own legislation as 'minor modifications'. Yet no Strategic Environmental Assessment has been completed for these massive cross border projects, despite the fact that the EU Commission has already allocated €647 million to these projects[9] out of a budget of €5.85 billion. Furthermore, that these projects being funded have significant environmental effects goes without saying, they are predominately very large high voltage transmission projects.

Indeed, as Communication ACCC/C/2013/96 documents, there are multiple and systematic breaches of the Convention in relation to Articles 4, 7 and 9(1). There was also a refusal by the EU Commission, namely Mr Konrad again, to reply to UNECE within the timeframe of five months set by UNECE's Decision I/7 on compliance mechanisms, namely by the 25th August 2014. It was not until the 12th December 2014, nearly four months later, that the EU replied and most of that reply was petulant and related primarily to the admissibility of the Communication rather than

[9] http://ec.europa.eu/energy/infrastructure/pci/pci_en.htm

addressing the substance of the compliance issues raised. A point which ignores the clear procedures in Decision I/7[10]:

- *The Party concerned may also submit comments with respect to the admissibility of the communication. If a Party contests the admissibility of the communication, it should inform the Committee as soon as possible, but no later than five months from the date the communication was forwarded.*

Clearly, the EU considers itself exempt from these rules as well.

One can also point out Communication ACCC/C/2008/32 and the clear inadequacies in respect of the European Union's compliance with Article 9 on Access to Justice, coupled in the manner in which the EU Commission appealed the decision of the European Court in cases T-338/08 and T-396/09[11].

The Compliance Committee's own guidance document states:

- *f) Review of a country situation*
- *The number of communications received concerning non-compliance by a Party and the nature of non-compliance may indicate that the Committee review the general compliance in the country.*

The current situation which has been reached, as evident by Mr Konrad's recent reply of December 2014, is that zero effort is being made with respect to compliance. Indeed, no progress on compliance has been made since the findings and recommendations on ACCC/C/2010/54 over two years ago and not only is there no intent to achieve progress, but the situation is deteriorating. A more in-depth active review of the compliance situation of the European Union is clearly required, such as in regards to point f) above, in particular as to why at Head of Unit level in the European Commission positions have been adopted, which are clear opposites to the International Treaty arrangements ratified by the Council and upheld by the European Court.

[10] http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_GuidanceDocument.pdf
[11] http://www.eeb.org/index.cfm/news-events/news/ngos-condemn-anti-democratic-move-by-european-commission/