To: EU Ombudsman (Complaint 1892/2012/VL)
From: EPAW
Re: Response of EU Commission of 4 December 2012-12-08
Date: 18 December 2012
Attachments:

(1) Question of Struan Stevenson MEP to the EU Commission (a184830)
(2) Reply of EU Commission to above Parliamentary Question (a184831)
(3) Order of the Irish High Court of 12 November 2012 on Judicial Review 2012/920JR

Dear Mr Loncarevic,

The EU Commission's reply of 4 December 2012 does not provide any new information with regard to why a critical and legally binding step in relation to environmental assessment and democratic accountability **was deliberately by-passed in Ireland**. In Attachment 3 of our Complaint to the EU Ombudsman, this matter has already been addressed, in particular in Section 4. But it is instructive to review some of these matters again in the light of the response of the EU Commission.

The Commission argues that our complaint is repetitive, and that they have addressed its points before. They cite their personal meeting with Mr Swords in December 2010 as evidence that they maintain a dialogue with EU citizens. But there was nothing meaningful to be found under these empty shells: the substance of the replies was utterly unsatisfactory. Ruling on essentially similar matters, **the Aarhus Convention Compliance Committee gave reason to Mr Swords** in their finalised findings and recommendations of August 16th [1], which to date have been ignored both by the EU Commission and Irish administration - see for example Attachments (1) and (2). As such this has led to the attached **Order of the Irish High Court** (3), which has been served on the Irish State Solicitor in relation to an upcoming Judicial Review in order to declare the renewable energy programme as ultra vires and to quash it in its present form.

No doubt as a legal expert you are aware of the implications of such matters, in particular in view of the huge costs that have been incurred to date with this renewable energy programme, and with the failure to respect the Rights of the

[1] Documentation of 16.08.2012 and 02.10.2012 on UNECE webpage of Communication ACCC/C/2010/54 as previously footnoted.

citizens. As a result, there are financial liabilities incurring in relation to failures of the **Right to Good Administration**. The EU Commission, in particular in their response to UNECE on Communication ACCC/C/2010/54 of 28 June 2011[2], has replied to Mr Swords in a petulant, highly unprofessional manner. The fact is that Mr Swords as an engineer is one of the most experienced professionals in Ireland in relation to the design of industrial facilities complying with the **Environmental Acquis**. As such, his grounds for challenging the procedural and substantive elements of the acts and omissions of the EU and Irish authorities are extremely valid and not vexatious, a point reinforced by the actions taken to date by both the UNECE Compliance Committee and the Irish High Court.

It is useful to point out that Mr Swords formally requested, from the Irish Authorities, access to the **Strategic Environmental Assessment (SEA)** of the **National Renewable Energy Action Plan (NREAP),** and to associated information. That was in September 2009. He still doesn't have this information. It doesn't exist, and it is clearly the position of the EU Commission that it will never exist.

However, being aware of his Rights under the Aarhus Convention, as one professionally engaged in the implementation of the Environmental Acquis, Mr Swords lodged a formal appeal process in relation to the failure to provide the legally required information, which resulted in **case CEI/09/0016 with the Irish Commissioner for Environmental Information**[3]. It is useful to point out the findings of this appeal, not only because they establish the absence of an SEA, but also because of this **response from the Department of Communications, Energy and Natural Resources to** Ms Dolan, the investigating officer of the Commissioner for Environmental Information:

- *"Ms Dolan asked the Department whether it held any additional information on (a) a ranking system for technology alternatives in terms of their ability to meet the criteria in the Directive and (b) options to reach the objectives in legislation.* ***The Department responded that no such information is held".***

If we consider the documentation of UNECE Communication ACCC/C/2010/54 dated 10.01.2012[4], on 10 February 2010, the Department of Communications, Energy and Natural Resources sent an e-mail to the EU Commission querying as to whether there was an obligation to do an SEA with regard to the NREAP, as this had not been mentioned or discussed at any of the meetings[5]. This most likely would have been prompted by Mr Swords' appeal CEI/09/0016 in relation to the absence of such documentation, which was on-going at that time. **All parties where therefore aware of the fact that an SEA was required, but chose deliberately to ignore the relevant legal obligation to have one done.**

In relation to Directive 2001/42/EC on SEAs, as pointed out in Section 4 of Attachment 3 of our Complaint to the EU Ombudsman, Article 3 (2) (a) of the Directive specifically requires that such a detailed assessment and public

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2 See Documentation on UNECE webpage of Communication ACCC/C/2010/54.

3 http://www.ocei.gov.ie/en/DecisionsoftheCommissioner/Name,12832,en.htm

4 See UNECE webpage on ACCC/C/2010/54 are previously footnoted.

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

participation be completed for programmes which lead to future development consents for wind farms and similar energy infrastructure regulated by Directive 85/337/EC as amended. To reinforce the position articulated in Attachment 3, the Irish NREAP is being used regularly as a basis for planning consent in Ireland. While planning consent occurs within over forty different municipal authorities, a few decisions are further appealed to the planning appeals board, ***An Bord Pleanala*****.** An examination of its website in relation to recent planning approvals clearly shows that, contrary to the allegation of the EU Commission in its reply under reference**, the NREAP is not just, in the Commission's words, "paving the way"– it is clearly "setting the framework for future development consents of projects". It is considered by the *An Bord Pleanala* (below) as "the reason and consideration for approval" [6]:**

Case Reference and Description	Reasons and Considerations for Approval Included
D237401: Approval of seven wind turbine generators in Co. Mayo.	The National Policy on the development of renewable energy including the National Renewable Energy Action Plan to deliver 40% of electricity from renewable resources by 2020.
D237469: Approval of five wind turbines in Co. Waterford.	The target of the National Renewable Energy Action Plan to deliver 40% of electricity from renewable resources by 2020.
D237656: Approval of thirty five wind turbines in Co. Donegal.	The National Renewable Energy Action Plan to deliver 40% of electricity from renewable resources by 2020.
D238982: Approval of a 2 MW wind turbine.	The target of the National Renewable Energy Action Plan to deliver 40% of electricity from renewable resources by 2020.
DVA0011: 220 kV and 110 kV transmission system upgrade in Co. Kerry.	The National Renewable Energy Action Plan 2020.
DVA0012: Additional 220 kV and 110 kV transmission system upgrade in Co. Kerry.	The National Renewable Energy Action Plan 2020.

[6] http://www.pleanala.ie/

The EU Commission is looking for straws when it asserts that a country can slice up the requirement for a Strategic Environmental Assessment of its NREAP into various SEAs to be done at a later date downstream and on a smaller scale. **It defeats the purpose,** which is to assess the impacts of all projects **cumulatively at the national level**. It also by-passes the assessment of objectives at the national level in relation to the **Principle of Proportionality**, i.e. the balancing out of positive effects against negative ones, the comparison with alternative investments, etc.

In its reply under reference the Commission cites Grid 25 SEA as proof that SEAs are being carried out in Ireland. Our first observation is that **a slice of the salami is not the whole salami.** The environmental effects of doubling the network of high tension lines to accommodate wind energy should be analysed **cumulatively** with the effects of the windfarms per se. For without the NREAP, there would be no need for Grid 25. It is a whole, and its combined negative effects must be balanced against its benefits as a whole.

But there is more: during the consultation period for Grid 25 SEA, Mr Swords made a concise submission [1] about the planned massive expansion of the Irish power distribution network at a cost of over €4 billion, to double the high voltage grid by an additional 5,000 km. In it he complained about the absence of an SEA for the NREAP, i.e. the salami slicing issue mentioned above; about non-compliance to the binding requirements regarding public participation; and about the failure to quantify the environmental objective of Grid 25, in particular the expected savings in greenhouse gasses. He also lamented the absence of an analysis of the alternatives for reaching the greening of Ireland "targets", and finally reminded the Irish authorities of the on-going recourse (or "Communication") on the subject at the UNECE Compliance Committee.

His submission prompted the following responses:

1) - *"Comments on the undertaking of environmental assessment or otherwise of other policies, plans, programmes or projects is not within the scope of this report".**

In other words: we have salami-sliced the SEA, and **there is no way the public's comments on the environmental effects of the NREAP will be considered, nor for that matter the combined effects of NREAP and Grid 25.**

And:

2) - *"**The type and extent of future renewable energy projects is unknown** and therefore it is not realistic to quantify impacts upon greenhouse gas emissions".**

* Section 2 point 2.4 of finalised SEA, regarding Submission No. 4 of Pat Swords.

[1] http://www.eirgrid.com/media/Environmental%20Main%20Report.pdf page 167

In other words, apart from a target pulled out of a hat, which will likely be increased later on by another target also pulled out of a hat, we don't know how many windfarms we really want to have in the end, and by way of consequence, **we haven't got a clue of their effects on the environment, positive or negative.** This is the way we conduct our energy policy.

Conclusion

Government policy on renewable energy is finalised before any public participation is allowed. No SEA is performed, and objectives ("targets") are drawn from a hat ("20-20-20"). When the public is invited to participate, it is not provided with meaningful information (such as SEAs or an analysis of alternative investments), it is not given enough time to submit its comments, and these are made in vain as the decisions are already made. Windfarm projects are being approved on the basis of NREAP that were imposed arbitrarily on the people in complete disregard for EU legislation transposing the Aarhus Convention, and for Directive 2001/42/EC on SEAs.
The only recourse citizens have is a justice system which notoriously fails to even approach the minimum requirements in relation to access to justice[7].

Where are the data and the assessments of the alleged benefits for environmental protection, which are supposed to justify these pharaonic financial and environmental costs? The Irish Administration doesn't have them; the EU Commission doesn't have them either. Yet there is a programme in place being used to approve and fund countless environmentally damaging projects under this 'renewable banner', so how on earth can this be transparent and in compliance with the Aarhus Convention?

The EU supposedly evolved from the resolution that **populism would no longer dominate** the governance of the European continent. Allegedly, as is stated in Article 2 of the Treaty on European Union:

- "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. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

The reality is much different: the European Commission has been forcing a programme upon its citizens from the top down, at a cost of billions of Euros to consumers and taxpayers, not to mention immensely negative environmental and economic impacts, with nothing but **populist statements** to justify it. As regards the specific situation in Ireland, the **failures in relation to compliance with the rule of law** have been well documented in CHAP (2010) 046 Complaint Case to the European Commission, in the EU Ombudsman Complaint 2587/2009/JF, in the Aarhus Convention Compliance Committee Communication ACCC/C/2010/54, in this EU Ombudsman Complaint 1892/2012/VL, and more recently in the documentation submitted to the Irish High Court on Judicial Review 2012/920JR. So the question is: **when is something going to be done to demonstrate that Article 2 of the Treaty on the European Union is a reality and not a myth?**

Yours, sincerely

Mark Duchamp
Executive Director
European Platform against Windfarms (EPAW)

[7] See the EU Commission's own compliance procedures in this regard: http://ec.europa.eu/eu_law/eulaw/decisions/dec_20120531.htm#ie