

Findings and recommendations with regard to communication ACCC/C/2010/54 concerning compliance by the European Union

Adopted by the Compliance Committee on 29 June 2012¹

I. Introduction

1. On 15 October 2010, a member of the public, Mr. Pat Swords (“the communicant”), submitted a communication to the Compliance Committee alleging a failure by the European Union (EU) (hereinafter the “Party concerned”) to comply with its obligations under articles 5 and 7 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (hereinafter “the Aarhus Convention” or “the Convention”), in relation to Ireland’s renewable, especially wind, energy policy.

2. The communication alleges that public authorities in Ireland and the Party concerned failed to disseminate information concerning the Renewable Energy Feed In Tariff I programme (REFIT I) in Ireland – a programme supported by the Party concerned both by means of direct funding and by approving state aid - in a timely, accurate and sufficient manner. This information related both to the programme in general and to the carrying out of strategic environmental assessment (SEA). Therefore, according to the communication, the Party concerned failed to comply with article 5 of the Convention. The communication also alleges that Ireland in adopting its REFIT I did not comply with the EU SEA legislation (SEA Directive);² it also alleges that the Party concerned approved state aid for REFIT I without ensuring that Ireland, as an EU Member State, had complied with EU law. Therefore, the Party concerned failed to comply with article 7 of the Convention. Also, the communication alleges that the Party concerned, by providing financial assistance to Ireland for the interconnector project, one of the elements for the implementation of REFIT I, failed to comply with the Convention, because the project was not subject to environmental impact assessment, as required under EU law, and did not comply with the public participation provisions of the Convention.

3. The communication also alleges that the Party concerned did not comply with the Convention by failing to properly monitor implementation of EU law related to the Convention (specifically on access to information, dissemination of information and public participation) by Ireland (not a Party to the Convention) with respect to the National Renewable Energy Action Plan (NREAP).

4. At its thirtieth meeting (14-17 December 2010), the Committee determined on a preliminary basis that the communication was admissible.

¹ This text will be produced as an official United Nations document in due course. Meanwhile editorial or minor substantive changes (that is changes which are not part of the editorial process and aim at correcting errors in the argumentation, but have no impact on the findings and conclusions) may take place.

² 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, OJ L 197, 21.7.2001, p. 30–37.

5. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 28 January 2011. On the same date, a number of questions were sent to the communicant soliciting clarification and additional information on a number of issues in the communication.

6. At its thirty-third meeting (27-28 June 2011), the Committee agreed to discuss the content of the communication at its thirty-fourth meeting (20-23 September 2011).

7. The communicant replied to the Committee's questions on 21 June 2011. In its response, the communicant expanded the scope of the communication to include allegations of non-compliance by the Party concerned with articles 3, 4, 6 and 9, of the Convention. The Party concerned responded to the allegations of the communication on 28 June 2011. In addition, on 20 July 2011, the Party concerned sent a letter to the Committee challenging the admissibility of the communication, because of the considerably expanded scope of the allegations by the communicant in its submissions of 21 June 2011, compared to those of the original communication. The Party concerned also requested the Committee to postpone the discussion of the content of the communication, if the scope would be so broad, to allow for the Party concerned to duly respond.

8. The Committee considered the request of the Party concerned and using its electronic decision-making procedure, it decided that the discussion at the thirty-fourth meeting of the Committee would relate to the following issues:

(a) The responsibility of the Party concerned to monitor proper implementation of EU law related to the Convention by Ireland (not a Party to the Convention) with respect to the NREAP (art. 3, 4 and/or 5, 6 and/or 7 of the Convention):

- Access to/provision of information regarding the alleged non-conduct of a strategic environmental assessment for the programme;
- Collection and dissemination of information;
- Public participation.

(b) The responsibility of the Party concerned to comply with the Convention in respect of the approval of state aid for the REFIT I programme in Ireland and the approval of financial support (€ 110 million) for the interconnector project (between Ireland and the United Kingdom), a project in the context of REFIT I (art. 3 and 5):

- Approval of state aid and financing of a project in respect of which the Convention may not have been properly implemented;
- Failure to disseminate information in respect of the REFIT I and the interconnector project.

9. On 5 September 2011, the communicant provided additional information.

10. The Committee discussed the communication at its thirty-fourth meeting (20-23 September 2011), with the participation of representatives of the communicant and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communication. During the discussion, the communicant and the Party concerned provided documents and written statements to the Committee.

11. At the request of the Committee, the Party concerned submitted additional information to the Committee on 10 November 2011. The communicant was provided with the opportunity to react to this additional information and submitted its reaction on 14 November 2011.

12. Information submitted by the communicant on 10 January, 29 January and 13 March 2012, which sought to further expand the communication was not considered by the Committee.

13. The Committee prepared draft findings at its thirty-sixth meeting (27-10 March 2012), completing the draft through its electronic decision-making procedure. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and to the communicant on 4 May 2012. Both were invited to provide comments by 1 June 2012.

14. The communicant and the Party concerned provided comments on 27 and 29 May 2012, respectively.

15. At its thirty-seventh meeting (26-29 June 2012), the Committee adopted its findings and agreed that they should be published as a formal pre-session document to the Committee's thirty-ninth meeting (11-14 December 2012). It requested the secretariat to send the findings to the Party concerned and the communicant.

II. Summary of facts, evidence and issues³

A. Legal framework

The Party concerned and its Member States: competences with respect to the Aarhus Convention

16. Article 216(2) of the Treaty on the Functioning of the European Union (TFEU) provides that "Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States".

17. Upon signing the Convention, the Party concerned acknowledged the importance of covering the EU institutions, alongside national public authorities, but declared that EU institutions would apply the Convention within the framework of their existing and future rules on access to documents and other relevant rules of EU law in the field covered by the Convention.

18. Upon approving the Convention, the Party concerned confirmed its declaration made upon signature. It also declared that the legal instruments that it had already enacted to implement the Convention did not cover fully the implementation of the obligations resulting from article 9, paragraph 3, of the Convention, to the extent that they did not relate to acts and omissions of EU institutions under article 2, paragraph 2 (d), and thus Member States would be responsible for the performance of these obligations until the Party concerned in the exercise of its powers under the TEC adopted provisions of EU law covering the implementation of these obligations. The Aarhus Regulation came into effect on 28 June 2007.

State aid

19. State aid is in general prohibited under the law of the Party concerned, because it is considered as distorting competition and trade inside the EU (see also art. 108(3) TFEU). On exceptional basis, state aid may be allowed, on the basis of detailed rules, such as those

³ This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

on “horizontal objectives” (environment, research and development), regional aid, etc. The approval of exceptions rests exclusively with the Commission which has developed a detailed set of rules to assess, investigate and monitor state aid.

20. State aid for environmental protection, governed by the guidelines of the Party concerned on state aid for environmental protection,⁴ is granted on the basis of the consideration that environmental protection (especially in terms of sustainable development and the “polluter-pays” principle) needs to be integrated into the definition and implementation of competition policy. The guidelines limit the number of exceptions in order to avoid distortion of competition within the Union.

Legislative framework for the use of renewable energy sources of the Party concerned and its Member States

21. Directive 2009/28/EC on the use of renewable energy sources⁵ establishes a common framework for the production and promotion of energy from renewable sources. The Directive sets national targets and measures for the Member States (art. 3 of the Directive). In addition, every Member State has to develop a national renewable energy action plan (NREAP) which sets the share of energy from renewable sources consumed in transport and in the production of electricity and heating, for 2020. In preparing NREAPs, Member States take into consideration efficiency measures aiming at reducing final energy consumption. This means that the more consumption is reduced, the less is needed to be produced by renewables (art. 4 of the Directive).

22. Recital 90 of the preamble of the Directive mentions that the implementation of the Directive should reflect, where relevant, the provisions of the Aarhus Convention.

23. Member State’s NREAPs are to comply with the requirements set out in article 4 of Directive 2009/28/EC. These requirements have been detailed in a template adopted by the Commission.⁶ The template in its section 5.4 requires a Member State to indicate how “regional and/or local authorities and/or cities” as well as stakeholders were involved in the preparation of the plan and to “explain the public consultation carried out for the preparation” of the plan.

EU financial assistance in the field of energy

24. The European Energy Programme for Recovery (EEPR), established by the EEPR Regulation,⁷ was introduced in the context of the energy and financial crisis and aims at funding projects in three areas of the energy sector: gas and electricity infrastructures, offshore wind energy and carbon capture and storage.

⁴ Community guidelines on state aid for environmental protection, OJ C 37 of 03.02.2001, replaced by the Community guidelines of 1 April 2008 on State aid for environmental protection, OJ C 82 of 1.4.2008.

⁵ Directive 2009/28/EC of the European Parliament and of the Council on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ L 140, 5.6.2009, p. 16–62.

⁶ Commission Decision of 30 June 2009 establishing a template for National Renewable Energy Action Plans under Directive 2009/28/EC of the European Parliament and of the Council, OJ L 182/62, 15.7.2009

⁷ Regulation (EC) No 663/2009 of the European Parliament and of the Council of 13 July 2009 establishing a programme to aid economic recovery by granting Community financial assistance to projects in the field of energy, OJ L 200, 31.7.2009, p. 31–45.

25. The Regulation requires that projects and actions financed under its terms must be carried out in accordance with EU law and take into account any relevant EU policy, in particular those relating to the environment (article 23(4))

EU law on public access to information

26. Directive 2003/4 on public access to information⁸ replaced and repealed Directive 90/313/EC on the freedom of access to information on the environment, in order to bring EU legislation in line with the Convention. The purpose of the Directive is to ensure that environmental information is systematically available and distributed to the public. Applicants for environmental information do not have to state an interest and it falls upon the Member States to ensure that public authorities make environmental information they hold available to any requester within one month (for exceptions due to the volume of the requested information, two months) and that information relating to imminent threats to human health or the environment is immediately distributed to the public likely to be affected. The Directive also requires Member States to ensure that any applicant who considers that its request for information has not been handled in accordance with the provisions of the Directive has access to a procedure of administrative reconsideration/review.

27. The Commission reviews implementation of the Directive by Member States on the basis of their reports. It then reports to the Council and the European Parliament and proposes revisions as appropriate.

EU law on public participation

28. Directive 2003/35/EC provides for public participation in respect of the drawing up of certain plans and programmes relating to the environment.⁹ In this context, the Directive primarily introduces amendments to EU legislation relating to environmental impact assessment (EIA) (see also paras. 30 et seq. below) and to integrated pollution prevention and control (IPPC).¹⁰

29. In addition to EIA and IPPC, EU legislation provides for public participation in environmental decision-making in other instruments. Relevant examples include instruments related to strategic environmental assessment and water management.¹¹

⁸ Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC OJ L 41, 14.2.2003, p. 26–32.

⁹ Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, OJ L 156, 25.06.2003, p. 17 – 25.

¹⁰ Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control OJ L 24, 29.1.2008, p. 8–29. The Directive constitutes the codified version of the Directive, further to four amendments to the original IPPC Directive (Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, OJ L 257, 10.10.1996, p. 26–40), one of which reinforced public participation in line with the Convention.

¹¹ Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy OJ L 327, 22.12.2000, p. 1–73, as amended from time to time (a consolidated version of the Directive is available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:02000L0060-20090625:EN:NOT> (last seen on 12 April 2012)).

Environmental impact assessment

30. The EIA Directive¹² was first adopted in 1985 and applies to projects, as defined in its annexes I and II. Annex I lists projects that are considered to have significant effects on the environment and the conduct of an EIA is mandatory. Annex II lists projects for which the conduct of an EIA rests on the discretion of a Member State; the latter has to determine the effects of a project on the basis of a screening procedure, taking into account the criteria of Annex III to the Directive.

31. In 2003, the Directive was amended to align its provisions on public participation with those of the Convention.¹³

Strategic environmental assessment

32. The SEA directive¹⁴ applies to a wide range of public plans and programmes, that are subject to prepared and/or adopted by an authority at the national, regional or local level and are required by legislative, regulatory or administrative provisions. Contrary to the EIA Directive, the SEA Directive does not include a list of plans and programmes. The conduct of a SEA is mandatory for plans and programmes prepared for some sectors, including energy, industry, transport, waste and water management, town and country planning or land use, and which set the framework for future development consent of projects listed in the EIA Directive. It is also mandatory for plans and programmes determined to require an assessment under the Habitats Directive. Apart from those plans and programmes for which the conduct of the SEA is mandatory, the Member States carry out a screening procedure to determine whether these are likely to have significant effects on the environment.

B. Facts

33. In May 2006, Ireland announced the Renewable Energy Feed In Tariff I programme (REFIT I), which was approved by the EU for state aid in September 2007 (State aid N 571/2006 Ireland: RES-E support programme). The programme sought to facilitate Ireland in obtaining its targets for renewable energy based on Directive 2001/77/EC.¹⁵

34. In March 2010, the EU Commission selected the Ireland/Wales interconnector (Meath-Deeside) Project ("interconnector project") for financial support (€ 110 million), under the EEP. The project was one of the elements of REFIT I and would be carried out by Eirgrid, the state-owned company for energy and operation of grid infrastructure in Ireland.

¹² Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (85/337/EEC), OJ L 175, 5.7.1985, p. 40-48, as amended in 1997 (through Directive 97/11/EC) to bring the Directive in line with the Espoo Convention on Environmental Impact Assessment in a Transboundary Context; in 2003 (through Directive 2003/35/EC) to bring the Directive in line with the Aarhus Convention; and in 2009 (through Directive 2009/31/EC) to amend annexes I and II to the Directive, by adding projects related to the transport, capture and storage of carbon dioxide.

¹³ See n. 8 above.

¹⁴ 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 OJ L 197, 21.7.2001, p. 30-37.

¹⁵ Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market, OJ L 283, 27.10.2001, p. 33-40.

35. In July 2010 Ireland submitted its NREAP to the Commission. The Commission's evaluation of Ireland's NREAP based on article 4, paragraph 5, of Directive 2009/28/EC¹⁶ is still pending (as per 19 March 2012).

C. Domestic remedies

36. The communicant has lodged a number of complaints to the Office of the Commissioner for Environmental Information in Ireland with respect to the failure of Irish authorities to provide requested information. Most of the decisions of the Commissioner did not result in access to the information requested on the ground that the requested information did not exist.

37. The communicant refers to a possibility to appeal to the High Court one of the decisions issued by the Commissioner for Environmental Information (CEI/09/0016) as a case against the State for failure to complete the necessary procedures, such as SEA and public participation. This, however, according to the communicant is a costly avenue, which was not pursued.

38. Four complaints are still pending.

39. On 13 October 2008 and in June 2009, the communicant submitted two papers to the Joint Oireachtas Committee on Climate Change and Energy Security highlighting the major problems with REFIT I.

40. In November 2009, the communicant contacted the Garda Bureau of Fraud Investigation relating to systematic failures of senior elected and non-elected officials to comply with the legislation on the statute books and a complaint file was opened (FB11/242.09).

41. In January 2010, the communicant lodged a complaint with the EU Ombudsman (2587/2009/JF) relating to infringements of environmental and energy legislation in Ireland. The EU Ombudsman's decision to the complaint was issued on 27 September 2011.¹⁷ The Ombudsman concluded that "No further inquiries into the complaint are justified" and closed the case.

42. In March 2010, the communicant submitted a complaint with the EU Commission, which opened a formal complaint (CHAP (2010) 00645) related to compliance with EU environmental legislation. In this regard, the Party concerned emphasises that it dealt with utmost diligence with the complaint, but despite its enquiries to the applicant/communicant, the allegations were not substantiated to find infringement with EU law and on 6 April 2011 the file was closed (see annex I to the COM response of 28 June 2011).

D. Substantive issues

General observations on the allegations

43. The initial communication (6 pages and attachments) concerns access to information and public participation:

¹⁶ http://ec.europa.eu/energy/renewables/transparency_platform/action_plan_en.htm

¹⁷ Decision of the European Ombudsman closing the inquiry into complaint 2587/2009/JF against the European Commission.

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- (a) Allegations of non-compliance with article 5 (and possibly 4) by the Party concerned with respect to environmental information with regard to Ireland's NREAP and REFIT I;
 - (b) Allegations of non-compliance with article 7 (and possibly 6) of the Convention with respect to approval of Ireland's NREAP, the approval of state aid by the Party concerned for REFIT I and the funding by the Party concerned of a related project (the interconnector).

44. The additional information provided by the communicant on 21 June 2011, includes a number of new allegations, concerning

- (a) General failure by the Party concerned to ensure implementation of the EU directives implementing the Aarhus Convention in Ireland (art. 1, 3(1), 3(3));
- (b) Failure of the Party concerned to ensure implementation of the access to justice provisions of the Convention, with regard to remedies on access to information and public participation (9(1) and 9(2)), remedies on failures to comply with environmental law (9(3)), and costs (9(4) and (5)).

45. The Party concerned by letter of 20 July 2011 contends that it did not have an opportunity to respond to the new allegations submitted by the communicant on 21 June 2011.

46. The Committee using its electronic decision-making procedure decided to frame the discussion during the thirty-fourth meeting mainly within the limits of the allegations contained in the original communication (see also para. 8 above). The substantive issues raised below have been selected on the basis of this decision of the Committee.

Admissibility

47. The Party concerned challenges the admissibility of the communication for the reasons explained in the following paragraphs.

48. In its response of 28 June 2011, the Party concerned argues that the communication is inadmissible in so far as it relates to matters outside the scope of the Convention. In particular, with respect to the:

- (a) The very high costs of the renewable energy programme pursued in Ireland;
- (b) The alleged dissemination of false information from Irish authorities;
- (c) The obligation of Irish authorities to provide environmental information upon request, when such information does not exist.

49. The Party concerned in a letter to the Committee dated 20 July 2011, also argues that while the original communication concerns its responsibility for alleged infringements by Ireland of the Convention in relation to Ireland's policy regarding renewable energy (specifically wind energy), his response of June 2011 covers matters such as Ireland's climate change legislation, waste, access to justice, etc, while in the view of the Party concerned, it appears that the communicant also calls on the Committee to examine Ireland's entire environmental policy and the involvement of the Party concerned. According to the Party concerned, the Committee should therefore reject the communication as manifestly unreasonable (annex to decision I/7 para. 20 (b)).

50. The Party concerned also refers to the fact that the claims of the communicant should be addressed to the Irish courts, while the communicant does not appear to have

made use of this forum. In the view of the Party concerned, the Committee should take this into account when deciding on the admissibility of the communication (annex to decision I/7 para. 17).

51. Finally, the Party concerned claims that the allegations of the communicant relating to breach of article 5 of the Convention are not supported by corroborating information, as required by decision I/7 (para. 19). This should also be taken into consideration by the Committee when deciding on the admissibility of the communication.

Applicability of the Convention to Ireland

52. The Party concerned argues that the extent of its competences and liabilities is spelled out in the Declaration made by the then European Community upon ratification of the Convention: the international responsibility of the EU under the Convention for acts and omissions of Ireland is commensurate with the EU competence, namely with whether they relate to matters for which it is responsible under the Convention.

53. In the view of the Party concerned, the communicant has in general failed to prove this. In general, the Party concerned claims that it has done the outmost so far in pursuing alleged or actual breaches of the relevant directives by Ireland.

54. The Party concerned draws attention to the infringement proceedings initiated by the Commission in accordance with articles 258 and 260 of the TFEU, which enable it to ensure the application of EU law by the Member States. Accordingly, the Party concerned gives a short account of cases which have risen concerns of non-compliance by Ireland with EU law relating to access to documents, EIA and SEA, and submits that the it has been highly vigilant with regard to Ireland's implementation of EU environmental law, including provisions within the scope of the Convention, and that in any event, Ireland was not found in non-compliance with the three EU Directives (on access to documents, EIA and SEA).

Access to information

55. The communication alleges that public bodies in Ireland failed to provide key information on REFIT I on request, and routinely engaged in dissemination of false information on the environment in relation to this programme.

56. The communicant also alleges that it has repeatedly requested information from the Irish authorities, which never addressed his requests. In support of his allegations, the communicant refers to requests it made to Ireland's Development Authority, Eirgrid and the University College of Dublin, without receiving a response. He brought the failure of the Irish authorities to provide the requested information, to the attention of the Commissioner for Environmental Information, who decided in favour of the authorities, because the information did not exist. His requests related to: request for the SEA in relation to the renewable energy programme, request for a Cost Benefit Analysis in relation to the renewable energy programme, request for information regarding the economic impacts of the wind energy programme, its costs, subsidies required for job creation and industrial grants, etc.

57. The Party concerned disagrees with the communicant: according to the Party concerned, Irish authorities published information about the benefits of the renewable energy programme. Whether the communicant believes or not that this information is correct is irrelevant. In the view of the Party concerned, the allegation that Irish authorities disseminated false information is "both lacking in the requisite clarity and wholly unsubstantiated". In addition, "it is not obvious that the EU would have any power to take action against a Member State which broadcasts or publishes information about the advantages of renewable energy".

58. In addition, the Party concerned contends that nothing in the Convention requires Parties to prepare the information requested by the communicant from the Irish authorities. Had this information existed, it would qualify as environmental information under article 2, paragraph 3 (b), of the Convention but since this information did not exist, it could not be provided.

Public participation

State aid

59. The communication alleges that the Party concerned has failed to comply with the Convention because the Commission approved state aid for Ireland's REFIT I to support electricity sourced from renewable energy, while Ireland had failed to respect the SEA and EIA Directives by, amongst other things, not subjecting its NREAP to an SEA.

60. The Party concerned claims that the aid scheme was approved upon assessment of relevant provisions applicable at the time, and that none of the Aarhus-related EU directives was infringed. Had this been the case, the Commission would have initiated infringement proceedings pursuant to article 258 TFEU.

Ireland's renewable energy plan

61. The communicant alleges that the Party concerned failed to comply with the Convention, because it failed to ensure that Ireland in adopting its NREAP under article 4 of Directive 2009/28, complied with the EU SEA and EIA Directives.

62. The Party concerned disagrees with the allegations. It contends that the adoption of the plan was in accordance with EU legislation and nothing in the Convention precludes the promotion of wind energy. Most importantly, according to EU legislation (specifically Directive 2009/28/EC) these energy plans are attributable to the States and not to the Commission. The latter may issue a recommendation, but does not approve the plans. The Commission recommendation is issued after the Commission evaluates whether the measures envisaged in the plan can ensure that the share of energy from renewable sources equals or exceeds the share shown in the indicative trajectory set out in the Directive.

63. According to the Party concerned, prior to its adoption, the NREAP was subject to a consultation procedure, involving county and city managers as well as other regional and local bodies, while a consultation procedure with the wider public was carried out from 11 to 25 June 2010, during which 58 submissions were received from various stakeholders. This, according to the Party concerned, was in full compliance with article 7 of the Convention.

64. According to the Party concerned, Ireland's NREAP falls outside the scope of article 6 of the Convention.

65. Information about Ireland's NREAP and other relevant information is available on the transparency platform administered by DG Energy. In this respect, the Party concerned disagrees with any allegations of non-compliance with article 5 of the Convention.

66. For all these reasons, the Party concerned argues that when establishing its NREAP, Ireland was not in breach with any of the provisions of the Convention and that the Party concerned cannot be found in non-compliance with the Convention, by reason of any involvement in Ireland's NREAP.

Interconnector between Ireland and the UK

67. The communicant alleges that the Party concerned failed to comply with the Convention, because it provided financial support (€10 million) for the construction of the

interconnector, despite Ireland's failure to comply with the Directive on access to information, the SEA and the EIA Directives.

68. In the view of the Party concerned these allegations are unfounded for the following reasons.

69. In approving funding for the interconnector, the Party concerned took into account EU law and policy relating to the environment (as required by the EEP Regulation, art. 23(4)). In doing so, the Commission found that the project because of its features did not fall within the scope of the EIA Directive. Therefore, the Party concerned argues that since the EU has chosen not to apply its EIA Directive to this type of project, the project falls outside the scope of article 6, paragraph 1(b), of the Convention. In addition, the interconnector project falls outside the scope of article 6, paragraph 1(a) of the Convention, since it is not listed in annex I to the Convention. This entails the public participation provisions of article 6 are not applicable to the interconnector, according to the Party concerned.

70. The Party concerned also adds that it would not be reasonable for the communicant to argue that the interconnector would transmit electricity produced by windfarms, which were built in breach of the EIA Directive, and that therefore the Party concerned would be in non-compliance with the Convention (see also annex II to the Party's response of 28 July 2011). The Party concerned confirms that the Commission has not identified any systematic failure to comply with the EIA Directive in relation to wind farms in Ireland and that EIA's were carried out, where mandatory by law.

III. Consideration and evaluation by the Committee

General Considerations

71. The EU signed the Aarhus Convention on 25 June 1998 and approved it through Council Decision 2005/370/EC of 17 February 2005.¹⁸ The EU is a Party to the Convention since 17 May 2005.

72. Ireland, a Member State of the EU, is not a Party to the Convention.

73. It should be noted that the communication includes a number of allegations, such as the costs of the implementation of the energy policy in question, which are not covered by the Convention. In addition, in its response of 21 June 2011, the communicant included a number of new/expanded allegations, compared to its initial allegations concerning non-compliance with articles 5 and 7 of the Convention. After the hearing held on 21 September 2011, the Committee decided to further limit its consideration of the communication and concentrate on the main allegation involving the current legal system in place in the Party concerned and thus decided to focus its considerations on the NREAP adopted by Ireland on the basis of Regulation 2009/28/EC. It first considers the relevance of article 7 of the Convention and thereafter articles 4, 5 and 9 in relation to the NREAP adopted by Ireland on the basis of Regulation 2009/28/EC.

74. Prior to engaging in these considerations and without examining the legal nature of REFIT I, the Committee finds that in this case the decisions taken by the Party concerned to approve state aid for REFIT I and to approve financial assistance for the interconnector, on their own, do not amount to decisions under articles 6 or 7 of the Convention. Therefore, the

¹⁸ OJ L 124 of 17.5.2005, p. 1.

Committee decides to focus on NREAP, and to deal with allegations concerning articles 4, 5 and 9 of the Convention only.

Ireland's NREAP

Plan or programme: Article 7 of the Convention

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. It follows from article 7 of the Convention that when an NREAP is prepared by a Party to the Convention, the requirements for public participation set out in article 6, paragraphs 3, 4 and 8, of the Convention apply, albeit that in the context of article 7 of the Convention "[t]he public which may participate shall be identified be the relevant public authority, taking into account the objectives of the Convention."

76. In the present case the 'relevant public authority' which is to identify the public that may participate, according to article 7 of the Convention, is to be understood as referring not to the Party concerned, but to the public authorities of Ireland, which is not a Party to the Convention. The question, however, remains what obligations rest on the Party concerned. The Committee finds that in this respect two issues arise. First, whether the legal framework of the Party concerned is compatible with the Convention. Second, whether the Party concerned has fulfilled its responsibility to monitor that its Member States, including Ireland, in implementing EU law properly meet the obligations resting on them by virtue of the EU being a party to the Convention.

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 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.

78. The Committee finds that the Party concerned, through article 4 of Directive 2009/28/EC and the template grounded in that article, and taking into account recital 90 of the Preamble of Directive 2009/28/EC, has in place a legal framework for implementing article 7 of the Convention. The Party concerned, moreover, by way of the Commission's role in evaluating NREAPs and the fact that the Commission may issue a recommendation to a Member State, provides a system for monitoring whether Member States, including Ireland, properly implement article 7 of the Convention in developing NREAPs. The Committee first assesses the template and then how the Party concerned fulfilled its monitoring role.

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 with in the preparation of their NREAPs. Among these requirements are reporting obligations related to public participation (see para. 23). 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, more in particular, NREAPs.

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.

81. In assessing how the Party concerned monitored implementation by Ireland of article 7 of the Convention, the Committee notes that the Party concerned neither in its written statements nor in its oral presentations provided evidence that it evaluated Ireland's NREAPs in the light of the requirements of article 7 of the Convention. The Party concerned instead submits that in this case Ireland, even if not a party to the Convention, complied with the requirements of article 7 of the Convention by holding both a targeted consultation and a consultation with the wider public, the latter for the duration of a period of two weeks.

82. The communicant submits that the targeted consultation was only open to entities that supported government policy and that the public was not adequately informed of the public consultation. The Committee takes these allegations to entail that the communicant claims that the targeted consultation was conducted without adequately "taking into account the objectives of this Convention", as required by article 7 of the Convention and that the public consultation was not conducted in conformity with article 6, paragraph 3, of the Convention. However, the Committee was provided with insufficient information by the communicant and the Party concerned to assess whether the targeted consultation conducted by Ireland was conducted without adequately "taking into account the objectives of this Convention", as required by article 7 of the Convention.

83. Nevertheless, with respect to the consultation with the public conducted by Ireland the Committee finds that it was conducted within a very short timeframe, namely two weeks. Public participation under article 7 of the 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, ECE/MP.PP/2008/5/Add.6 para. 69). The manner in which the public was informed of the fact that public consultation was going to take place remains unclear; neither the Party concerned nor the communicant provided clarity on the matter. The Committee furthermore points out that a targeted consultation involving selected stakeholders, including NGOs, can usefully complement but not substitute for proper public participation, as required by the Convention.

84. Proper monitoring by the Party concerned of the compatibility of Ireland's NREAP with article 7 of the Convention would have entailed that the Party concerned evaluate Ireland's NREAP in terms of the elements mentioned in paragraph 80 above. The Party concerned thus should have ascertained whether the targeted consultation and the public participation engaged in when Ireland adopted its NREAP met the standards of article 7 of the Convention, including whether reasonable time-frames were employed and whether the public consultation was properly announced in Ireland. The Party concerned cannot deploy

its obligation to monitor the implementation of article 7 of the Convention in the development of Ireland's NREAP by relying on complaints received from the public, as it suggested it does during the public hearings conducted by the Committee.

85. Based on the above considerations the Committee finds that the Party concerned does not have in place a proper regulatory framework and/or other instructions to ensure implementation of article 7 of the Convention by its Member States, including Ireland, with respect to the adoption of NREAPs. The Committee also finds that the Party concerned in practice by way of its monitoring responsibility failed to ensure proper implementation of article 7 of the Convention by Ireland, with respect to the adoption of its NREAP. The Committee thus finds that the Party concerned in both these respects is in non-compliance with article 7 of the Convention.

Article 3, paragraph 1

86. Article 3, paragraph 1, of the Convention requires a Party to the Convention to "take the necessary legislative, regulatory or other measures, including measures to achieve compatibility between the provisions implementing the [...] public participation [...] provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention."

87. Taking into account the distinctive structure of the Party concerned and the allocation of responsibilities between the EU and its Member States, the only way for the Party concerned to implement article 7 by means other than legislative measures, would be to provide a clear regulatory framework and/or clear instructions to the Member States on how to ensure public participation with respect to NREAPs, to be enforced through appropriate measures by the Party concerned. Based on the considerations regarding the lack of an appropriate regulatory framework or evidence of other measures to ensure that public participation takes place in accordance with the Convention, the Committee finds that the Party concerned is also in non-compliance with article 3, paragraph 1, of the Convention, in relation to the adoption of NREAPs by Member States on the basis of Directive 2009/28/EC.

Access to information: Articles 4 and 5 of the Convention

88. The communicant alleges that Ireland and the Party concerned did not provide access to requested information related to Ireland's NREAP as required by article 4 of the Convention. The communicant also alleges that Ireland and the Party concerned disseminated insufficient or incorrect information about Ireland's NREAP contrary to article 5 of the Convention.

89. The Committee notes that to the extent that information is available to the Party concerned that information seems to be readily available to the public, especially through its websites. However, the Committee is not in a position to ascertain whether the technical information disseminated by the Party concerned, or the communicant for that matter, is correct.

90. As the Committee held in its findings on communication ACCC/C/20089/37 concerning compliance by Belarus (ECE/MP.PP/2011/11/Add.2, para. 69), the Party concerned is obliged to ensure that each public authority possesses the environmental information which is relevant to its functions. The Committee considers that given that the Party concerned does not have in place a proper regulatory framework for the implementation of article 7 of the Convention with respect to NREAPs, it might well not have possessed the relevant environmental information. However, the Committee considers that the communicant, due to the unstructured manner of the information provided, has

insufficiently substantiated which of the allegations related to article 4 or article 5 of the Convention are attributable to the Party concerned

91. The Committee thus does not find the Party concerned to be in non-compliance with article 4 or article 5 of the Convention.

Access to Justice: article 9, paragraph 1, of the Convention

92. The communicant alleges that access to justice was deficient in Ireland and as provided by the Party concerned in relation to its requests for information in relation to Ireland's NREAP, and thus contrary to article 9, paragraph 1, of the Convention.

93. The Committee notes that the communicant had access to administrative procedures provided by the Party concerned and finds that in these procedures the requests for information, given the information available to the Party concerned at the time of the request, were adequately considered.

94. The Committee, given the legal system in place in the Party concerned, finds that the communicant has not substantiated how allegations of deficiencies regarding access to justice in Ireland are attributable to the Party concerned.

95. The Committee therefore does not find the Party concerned to be in non-compliance with article 9, paragraph 1, of the Convention.

IV. Conclusions and recommendations

96. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

97. The Committee finds that the Party concerned

a. 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 NREAPs by Member States on the basis of Directive 2009/28/EC has failed to comply with article 7 of the Convention (para. 85);

b. by not having properly monitored the implementation by Ireland of article 7 of the Convention in the adoption of Ireland's NREAP also has failed to comply with article 7 of the Convention (para. 85);

c. 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 Member States on the basis of Directive 2009/28/EC has failed to comply also with article 3, paragraph 1, of the Convention (para. 86);

B. Recommendations

98. The Committee pursuant to paragraph 36 (b) of the annex to decision I/7 and noting the agreement of the Party concerned that the Committee take the measures requested in paragraph 37 (b) of the annex to decision I/7, recommends that the Party concerned adopt a proper regulatory framework and/or clear instructions for implementing article 7 of the Convention with respect to the adoption of NREAPs. This would entail that the Party

concerned ensure that the arrangements for public participation in a Member State are transparent and fair and that within those arrangements the necessary information is provided to the public. In addition, such a regulatory framework and/or clear instructions must ensure that the requirements of article 6, paragraphs 3, 4 and 8, of the Convention are met, including reasonable time-frames, allowing for 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. Moreover, the Party concerned must adapt the manner in which it evaluates NREAPs, accordingly.

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