European Platform Against Windfarms

Re: public consultation for Ireland's first Aarhus Convention National Implementation Report 2014

August 2013

1. AN ATTEMPT TO DECEIVE

We submit that the Preliminary Draft of Ireland's Aarhus Convention National Implementation Report 2014 (hereinafter "the Convention", and "the Report") is much more than a disappointment: it is an attempt to deceive the United Nations' Aarhus Convention Compliance Committee as to the application in Ireland of the principles of the Convention. This

constitutes in itself, undoubtedly, a breach of the Aarhus Convention for non-compliance with its Article 5(2), in which:

- "Each Party shall ensure that, within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible".

In European law (Directive 2003/4/EC) and the implementing National legislation (S.I. No. 133 of 2007), this obligation for transparency is defined as 'accurate, up to date and comparable'. Furthermore, the "Aarhus Convention: An Implementation Guide[1]", states:

- "The requirement for transparency in the way that public authorities make information available means that the public can clearly follow the path of environmental information, understanding its origin, the criteria that govern its collection, holding and dissemination, and how it can be obtained".

The following sections provide a selection of examples, of which there are many more, documenting the major failures in Ireland by public authorities to comply with the Articles of the Convention, which have been deliberately ignored in the Report.

2. ACCESS TO INFORMATION ON THE ENVIRONMENT

This relates to Article 4 of the Convention on access to environmental information upon request and Article 5 of the Convention on collection and dissemination of environmental information. As Professor Aine Ryall stated in her article "Beyond Aarhus Ratification: What Lies Ahead for Irish Environmental Law[2]": Ireland failed to comply with European law which required transposing of the relevant European Directive 2003/4/EC by 2005, and only after intervention by the European Court of Justice did transposition occur in 2007. In addition, this late transposition failed to include the necessary provisions of Article 5 of the Convention, which were finally transposed in 2011 after further intervention by the EU.

The Professor further stated:

[1] Second Edition of 'Aarhus Convention: An Implementation Guide': http://www.unece.org/fileadmin/DAM/env/pp/ppdm/Aarhus_Implementation_Guide_second_edition_-_text_only.pdf

[2] For publication in (2013) 20 (1) Irish Planning and Environmental Law Journal

- "The Access to Information on the Environment (AIE) Regulations have been the subject of sustained criticism from environmental NGOs, the Commissioner for Environmental Information[3] and the Author[4]. Notwithstanding a number of amendments in 2011, the AIE regulations remain defective, in particular as regards the inclusion of mandatory exceptions to the right of access. More significantly, there are serious problems with practical implementation including; the disappointing lack of public awareness of the AIE regulations and of the rights guaranteed under Directive 2003/4/EC and the Aarhus Convention; the poor handling of requests for access by certain public authorities (including unacceptable delays and failure to apply the exceptions to the right of access and public interest test correctly); and the long-running failure to provide the Commissioner with sufficient resources to ensure that appeals are dealt with in a timely fashion."

Not only did the Irish authorities fail to record these important circumstances in the Report, but they also failed to record that compliance procedures are being implemented against them in this regard by the EU Commission under the EU PILOT Nr. 4696/13/ENVI.

We would also like to point out that we find absolutely disgraceful the manner in which, repeatedly, our members are being denied access to information on the environment, e.g. to the cost-benefit analysis for the Midlands power export scheme, or to the technical details used to justify the 40% renewable electricity target. It is a blatant violation of their right to access information on environmental matters (Article 5 of the Convention). As regards the abject failure of the Irish Commissioner for Environmental Information to process their appeals, it obviously violates their right of access to justice (Article 9 of the Convention).

Furthermore, in relation to Article 5 of the Convention, we wish to highlight the contemptible failure of Ireland's public authorities to maintain and update the environmental information which is relevant to their function. For example, the Department of Communications, Energy and Natural Resources does not keep a record of verified emission savings for their wind energy programme. Worse still, false information

[3] See, most recently, Commissioner for Environmental Information Annual Report 2011 (2012) pp73-74 text available at: http://www.ocei.gov.ie/en/.

[4] Ryall, A, "Access to Environmental Information in Ireland: Implementation Challenges" (2011) 24 Journal of Environmental Law 45

was provided in their progress report to the EU on the National Renewable Energy Action Plan: the considerable inefficiencies induced on the grid by wind energy were ignored. There are many other examples, such as the statements made by Minister Ryan on RTE Primetime in relation to the financial costs of the wind energy programme[5]: they demonstrate that the Irish government has no system in place for ensuring the transparency of environmental information. And as the Commissioner for Environmental Information refuses to consider appeals in relation to Article 5, there is no effective redress or access to justice for the citizen in these issues.

3. PUBLIC PARTICIPATION IN DECISION MAKING

Public participation in decision making is a farce in Ireland. And this is recognised domestically but also internationally. For instance StatoilHydro, who have a share in the Corrib project in County Mayo, stated to the media in August 2009[6], even before An Bord Pleanala refused to give planning permission to the final km of pipeline:

- "When we look at political risks with practical consequence to project progress then Ireland unfortunately stands out as an example".

It is common knowledge that multinational companies have repeatedly highlighted the lack of transparency and non-compliances with EU legislation associated with the Irish planning process. Indeed the Mahon report demonstrated the extent of corruption associated with the planning process, which is directly related to the refusal to implement a transparent and fair process, as is required by the Convention and the relevant implementing EU legislation in the Directive on Environmental Impact Assessment[7]. It is little wonder that the wind energy programme is proceeding in a manner which makes a farce of public participation. Since June 2010 we have had a National Renewable Energy Action Plan to deliver by 2020 wind energy to the tune of 7,145 MW (more than three thousand turbines) with the associated doubling of the high voltage grid by more than 5,000 kilometres. At no stage was it worked out how this

[5] See appeal CEI/11/003 to the Commissioner for Environmental Information: http://www.ocei.gov.ie/en/Decisions/Decisions-of-the-Commissioner/Mr-Pat-Swords-and-the-Department-of-Communications-Energy-and-Natural-Resources.html

[6] http://www.iae.ie/site_media/pressroom/documents/2010/Mar/04/Joint_Oireachtas_Climate_Change_Report_-_March_2010.pdf

[7] Directive 85/337/EEC (as amended) now codified as 2011/92/EC

would be integrated within the existing environment, in particular Ireland's scattered rural community. The very obvious landscape impacts and unacceptable noise impacts were simply never addressed.

In Communication ACCC/C/2010/54[8] the Aarhus Convention Compliance Committee has already ruled that the EU and Ireland were in breach of Article 7 of the Convention in that the necessary public participation on the National Renewable Energy Action Plans was simply by-passed. The Committee's recommendations were clear; such public participation has to be completed in relation to the Adoption of the National Renewable Energy Action Plans. In a similar fashion, the Strategic Environmental Assessment required under Directive 2001/42/EC and S.I. No. 435 of 2004 was never completed. This is not only a failure of Community and National law, but also in respect to the Convention, as the EU made it clear in its first Aarhus report to UNECE that Article 7 of the Convention would be implemented through the Directive on Strategic Environmental Assessment. Despite this, the Irish government wrote the Report as if these circumstances, and in particular the findings and recommendations of the Compliance Committee, did not exist.

At the project level, wind farms fall under both the Directive on Environmental Impact Assessment and Article 6 of the Convention. However, these are ignored in the continuing approval of these developments. When the legal failures above are pointed out in planning submissions, the planning authorities simply act as if they did not exist, or state that the person making the appeal should go to Court. There is here a refusal to 'take due account of the public participation' in the final decision. In addition, there is a refusal to comply with Article 3 of the Directive on Environmental Impact Assessment, Sections 171 and 172 of the Planning and Development Acts (2000 to 2011), and to complete an assessment of the climate change impacts of the projects, which are the sole benefits these are supposed to offer, and which form the 'reasons and considerations' of the decision. Instead, what can only be described as pub talk is used: "The proposed development will contribute to limiting CO_2 emissions"; no other information or quantification is given.

4. ACCESS TO JUSTICE

As mentioned earlier there are huge delays in processing appeals to the Commissioner for Environmental Information, which is a failure under

[8] http://www.unece.org/env/pp/compliance/Compliancecommittee/54TableEU.html

Article 9(1) and 9(4) of the Convention to ensure that such appeals are timely. However, this is not even mentioned in the Report.

In addition, other more fundamental failures are occurring in relation to the requirements of Article 9(4) with regard to access to justice procedures that are 'fair, equitable, timely and not prohibitively expensive'. In July 2009 the European Court of Justice ruled in case C-427/07 inter alia that Ireland had failed to transpose the obligation to ensure that the costs in cases involving the Environmental Impact Assessment Directive and the Integrated Pollution Prevention and Control, were 'not prohibitively expensive'. More specifically, the European Court of Justice determined that a judicial discretion to depart from the general rule that costs follow the event (i.e. the 'loser pays' principle) did not constitute adequate transposition of the obligation that the costs involved in judicial review procedures must not be 'prohibitively expensive'.

However, the special costs regime introduced following this European ruling pursuant to the Planning and Development Acts Section 50B, while it did establish a general rule that each of the parties to the proceedings bears its own costs, subject to certain exceptions, did not in any manner ensure that costs would not be 'prohibitively expensive'. Simply put a person contemplating judicial review proceedings cannot be certain at the outset as to how the court will ultimately exercise its discretion as to liability for costs. Despite the clear direction given by the European Court of Justice in the Edwards (Case C-260-11) in April 2013[9], the Irish High Court is still refusing to make practical arrangements for litigants in relation to 'not prohibitively expensive' in advance of Court proceedings, as is required by this ruling.

As was highlighted by Professor Aine Ryall in the article referred to previously: "A letter of formal notice was issued to Ireland in June 2012[10] questioning both the transposition and implementation of the access to justice obligation as regards, inter alia: the scope of judicial review proceedings; the provisions of practical information on access to justice; the requirement that review procedures be timely; the cost burdens and cost-related barriers to access to the Irish courts; and the recognition of environmental NGOs".

[9] http://www.bailii.org/eu/cases/EUECJ/2013/C26011.html

[10] http://ec.europa.eu/eu_law/eulaw/decisions/dec_20120531.htm#ie

In addition, in relation to Swords v Department of Communications, Energy and Natural Resources (2012/920JR), where the ruling of the Aarhus Convention Compliance Committee in Communication ACCC/C/2010/54 was brought before the Courts, the behaviour of the Chief State Solicitor Eileen Creedon in counter suing for costs can only be seen as; (a) vindictive and; (b) a breach of the Convention's obligation for parties to assist the public in seeking access to justice in environmental matters. This is not an isolated case; time and again, members of EPAW have denounced the legal failings of the wind energy programme. Despite this, there has been a refusal to comply with the legal framework in the planning process, and due to prohibitive costs, these members are being denied their rights to challenge such matters in the Courts.

The failure of the Report to document the above issues can only be seen as a deliberate attempt to deceive.