

To: Secretariat Aarhus Convention Compliance Committee
From: Pat Swords, Neil Van Dokkum and David Malone
Date: 2/01/2016
Re: Update on ACCC/C/2014/112 January 2nd 2016
Attachment: Decision of the Commissioner for Environmental Information on CEI/13/0015

Dear Fiona

As yourselves in the Secretariat have informed us, the Party has responded, following the five month period, to the issues raised in the Communication. In addition, just prior to the holiday period, a number of issues arose, as discussed here. First of all judgement was due to be delivered on ‘*Swords - v - Minister for Communications Energy and Natural Resources*’ on the 16th December 2015. This did not occur, as Justice Keane had not yet prepared the written judgement and adjourned the matter until the 4th March 2016, almost a year since final arguments and the conclusion of the court hearing on the 12th March 2015.

Within the context of Article 9(4) of the Convention and its reference to ‘timely’, I would also point out that in 2004 the European Court of Human Rights in their judgement on ‘*McMullan -v- Ireland*’ 42297/98¹ found Ireland to be in violation of Article 6.1 of the European Convention on Human Rights: “*In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] tribunal ...*”, and we quote:

- “39. *In this regard, the Court observes that a number of specific and lengthy delays in the proceedings are attributable to the domestic authorities: a period of more than one year between the last day of the High Court hearings and the delivery of its judgment (23 June 1992-13 July 1993); a period of almost two years between the applicant’s confirmation that all appeal documents had been filed and the first hearing date for the appeal (25 July 1995-21 March 1997); and a period of six months for the Supreme Court to re-constitute and fix a hearing date for the relevant appeal (11 June-16 December 1997). No explanation for these specific delays has been offered by the Government.*
- 40. *In such circumstances, and having regard to the criteria laid down in its case-law, the Court finds that the proceedings in the present case were not dealt with within a “reasonable time”, as required by Article 6 § 1 of the Convention and that there has therefore been a violation of that provision.”*

Secondly, as the attached document shows², a decision concerning an appeal against an initial refusal of information was finally obtained on the 11th December 2015 from the Commissioner of Environmental Information on CEI/13/0005 in relation to access to a Cost-Benefit Analysis for Ireland Exporting Renewable Electricity. This appeal had been made in July 2013, nearly two and a half years previously. Before returning to the matter of time delay later, it is worth clarifying that this is the last of the outstanding appeals to the Commissioner for Environmental Information raised in Communication ACCC/C/2014/112. It is also worth raising the substance of the

¹[http://hudoc.echr.coe.int/eng#{"fulltext":\["42297/98"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-61961"\]}](http://hudoc.echr.coe.int/eng#{)

²See also: <http://www.ocei.gov.ie/en/Decisions/Decisions-List/Mr-Andrew-Duncan-and-Sustainable-Energy-Authority-of-Ireland-CEI-13-0005.html>

decision, in which access to the relevant cost benefit study was refused, as the “*Study, in itself, is not capable of having environmental effects*”. This is of course rather bizarre in that it was concluded that the Study “*does not appear to have yet been used within the framework of a measure or activity affecting or likely to affect relevant elements or factors. If it were to be used within such a framework in the future, the information it contains could potentially constitute environmental information of this type*”.

To clarify the situation, a Memorandum of Understanding had been signed between the Irish and UK Governments in relation to the export of renewable energy from Ireland and these export provisions had been included in the 2014 second progress report of the Irish Republic on its National Renewable Energy Action Plan (NREAP) to the EU Commission³. As the December 2015 response of the Party clarifies:

- “6.7 *The Communicants draw attention to the Memorandum of Understanding (MOU) signed between the Governments of Ireland and the United Kingdom on 24th January 2013. It is not clear from the communication whether specific complaint is made in relation to this MOU. For clarity, it should be noted that a non-statutory public consultation was carried out in late 2013 via the Department of Communications Energy and Natural resources website with a view to framing a Renewable Energy Export Policy and Development Framework in respect of which some 1,400 submissions were received.*”

This cost benefit analysis study was part of the decision-making on the above and on that basis it was sought. As the ‘Aarhus Convention: An Implementation Guide’ (second edition) states:

- “*Purpose of the access to information pillar: Under the Convention, access to environmental information ensures that members of the public are able to know and understand what is happening in the environment around them. It also ensures that the public is able to participate in an informed manner.*”

Therefore, as previously stated, the decision of the Commissioner for Environmental Information can only be considered as bizarre, as under these circumstances, only when the decision making is concluded and a decision is reached to proceed, only then do confirmed environmental effects occur and only then does the Study become environmental information. In essence, the public is shut out of the environmental information during the actual decision-making process itself. This appears to be an interpretation, which not only defies ‘common sense’ and ‘natural justice’, but also the ‘case law’ of the Compliance Committee, which is also referenced in the ‘Aarhus Convention: An Implementation Guide’:

- *Information requested from Kazatomprom, in particular the **feasibility study of the draft amendments, falls under the definition of article 2, paragraph 3 (b), of the Convention.** (Kazakhstan ACCC/C/2004/1; ECE/MP.PP/C.1/2005/2/Add.1, 11 March 2005, para.18)*

³ See answer to Question 2:

http://www.unece.org/fileadmin/DAM/env/pp/compliance/Communications/Ireland_European_Platform/frComm_response_to_Committee_s_questions_01.12.2014.pdf

Furthermore, if we consider the Communicants' response of 1st December 2014 to Question 3 presented by the Committee⁴, then this discusses the decision of the Commissioner for Environmental Information in CEI/12/0005⁵, in which one of the Communicants and others were denied access to information related to a climate change consultation, as there was an evident "*misuse of the right of access*", in that the information could be used to challenge the validity of the resulting policy. In other words, the request was 'manifestly unreasonable'. Alternatively one could simply put it that access was denied, as it was considered that the information could be subsequently used in a 'dishonourable' fashion.

Clearly on both occasions the reasons supplied by, and the decision-making of, the Commissioner for Environmental Information can only be described as convoluted in the extreme. However, with regard to the practicalities of a subsequent High Court challenge of those decisions, one can only refer to the order of magnitude of costs in the Irish High Court raised in Communication ACCC/C/2014/113 and as to how clearly unaffordable and disproportionate it would be.

Returning to the issue of the time required for the Commissioner for Environmental Information to reach a decision, the previous position raised in '*McMullen -v- Ireland*' clearly applies, but also the fact that in relation to the timeframes on both CEI/13/0005 and CEI/12/0005, by the time one actually obtains a decision relating to access to environmental information, the relevant public participation procedure is well and truly closed. Note: That period also including the timeframe in which an effective Judicial Review of the resulting decision could be taken.

Unfortunately, this situation with time delays at the Office of the Commissioner for Environmental Information (OCEI) is not improving. As one of the environmental NGOs in Ireland "Concerned About Wind Turbines – Donegal" reports as recently as the 19th December⁶:

"A quick review of the recent [decisions list](#) highlights a phrase common to all:

- I regret the delay in concluding this review: it arose due to a shortage of resources in my Office, which has now been addressed.*

*On reading this most people would now understand that the long delays on appeals, and resource issues, at the Office of the Commissioner for Environmental Information are now over. However, a friend of our group had reason to make an appeal to the OCEI recently. After waiting nearly seven weeks he wrote to the OCEI seeking an update on his appeal only to be told that the appeal as being processed by the Support Unit and they would notify him as soon as the Commissioner for Environmental Information decided whether or not to **accept** the appeal.*

This raised alarm bells and he followed up with a number of queries in relation to processing appeals and expected timelines. We have to say we are shocked by the response of the OCEI:

⁴ See answer to Question 3:

http://www.unece.org/fileadmin/DAM/env/pp/compliance/Communications/Ireland_European_Platform/frComm_response_to_Committee_s_questions_01.12.2014.pdf

⁵ <http://www.ocei.gov.ie/en/Decisions/Decisions-List/Mr-Pat-Swords-and-the-Department-of-Environment-Community-and-Local-Government-.html>

⁶ <https://cawtdonegal.wordpress.com/2015/12/19/ocei-delays-remain-for-aie-appeals/>

- *Our best current estimate is that, if a case is accepted today, an investigator would not be in a position to commence actively working on the case for at least **six months**.*

Sadly it seems the Commissioner for Environmental Information has been overstating the effect of the additional resources he has received. It seems an appeal to his office can now take about 7 weeks to be accepted but then must wait for an additional six months before an investigator begins working on it. Bearing in mind that a request has to go through an initial decision and internal review before it makes its way to the OCEI access to environmental information through the Access to Information on the Environment (AIE) regulations may take at least a year, in particular where public bodies object to release. This seems to run contrary to the principles of timeliness of access contained in national and international law which underpin the AIE regulations.”

If we consider the Party’s response this December:

- *“6.4 In so far as complaint is made in relation to the length of time that is taken for appeals to be heard, it should be noted that further resources were recently allocated to the Commissioner for Environmental Information to enable his office to process more appeals in a timely manner.*
- *11.1 The Communicants make complaint in relation to the manner in which funding has been provided to the Office of the Commissioner of Environmental Information. Firstly, it is not correct to assert that semi state companies are “given billions of euros” to progress renewable energy programmes. Commercial semi-state companies are expected to manage their assets and to conduct their businesses on a sound commercial basis. Most are competing with private companies in the same sectors and must be able to do so on an equivalent basis”.*

With regard to the second point, until it was subject to a recent major upgrade, the Department of Communications, Energy and Natural Resources’ website contained a webpage entitled: “The Green Economy is here – Minister Eamon Ryan”. As this clarified:

1. Investment

Semi-state investment in energy

The following table demonstrates the already announced investment plans by the semi-state companies in sustainable energy generation / building of smart grids.

<i>ESB</i>	<i>€22 billion</i>
<i>Bord Gais</i>	<i>€2.5 billion</i>
<i>EirGrid</i>	<i>€4 billion</i>
<i>Bord na Mona</i>	<i>€1.5 billion</i>
<i>TOTAL</i>	<i>€30 billion</i>

For example on the 23rd December 2015, the Commission for Energy Regulation approved a decision in relation to the two transmission system operators, Eirgrid and ESB, for €1.83 billion in expenditure to be recuperated from electricity consumers in

the period 2016 to 2020⁷. This expenditure is to directly facilitate the renewable energy programme. In other words enormous amounts of funding can be made available for certain objectives and none for others.

We would also like to highlight the further gross inaccuracy in the Party's response, ostensibly designed to mislead the Committee, in relation to paragraph 2.1 of its response, in particular the footnote 3:

- *“For example it is clear from paragraph 75 of the Findings and Recommendation that the finding that Ireland’s NREAP constituted a plan or programme relating to the environment subject to Article 7 was made in circumstances where the Communicant asserted that this was the case and the Party Concerned (i.e. the EU) confirmed this in oral and written submissions. Ireland did not get to express a view and did not make this concession.”*

As the Compliance Committee already knows, Ireland attended its 34th meeting in September 2011 as an observer on the discussions related to Communication ACCC/C/2010/54. Despite being provided with an opportunity to speak, its representative declined to do so. As a subsequent access to environmental information request by that Communicant revealed, related to the documentation prepared by the Irish Administration in advance of this meeting:

In the letter of 23rd February 2011 from the Department of the Environment, Community and Local Government (DECLG), (John McCarthy, Assistant Secretary), to Department of Communications, Energy and Natural Resources, (Sarah White, Deputy Secretary), emphasises the context of the proceedings to Ireland, whilst confirming our view that the State could have participated directly in the proceedings:

- *“As you will be aware from previous communications, Ireland is the only EU Member State which has not ratified the Aarhus Convention. However, as the EU is a Party to the Convention in its own right, it has certain obligations, not least an obligation to cooperate with the Aarhus Compliance Committee (ACC) on issues such as this. While we are anxious to avoid creating legal precedence by engaging directly with the ACC until such time as the Convention is ratified, nonetheless it is critical that the State cooperates fully with the Commission as it investigates this matter.”*

This letter seeks specific information about the public participation procedures:

- *“Numerous documents concerning this matter are available on the UNECE website: <http://www.unece.org/env/pp>, although four initial questions have been put to the EU (these are annexed to the attached communication). While questions 1 and 2 are a matter for the Commission to investigate internally, the Commission, through this Department, has informally requested input from Ireland on questions 3 and 4. I would be obliged therefore, as a first step in this process, if your Department would ascertain whether the appropriate Environmental Impact Assessment and/or Strategic Environmental Impact Assessment procedures, including the public participation requirements stipulated in the relevant legislation, were applied*

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<http://www.cer.ie/docs/001043/CER15296%20Decision%20on%20TSO%20and%20TAO%20Transmission%20Revenue%20for%202016%20to%202020.pdf>

to the development of the Inter-Connector and to the development and implementation of the Renewable Energy Action Plan.”

The second letter dated 19th April 2011⁸ from DEHLG (Lorraine O'Donoghue, Aarhus National Focal Point, DEHLG) to European Commission (Antoinette Long, DG Environment) reiterates the Department's involvement in the administrative proceedings:

- *“In assisting the Commission in responding to the communication, Ireland was asked to provide information on whether the National Renewable Energy Action Plan was developed in accordance with Directive 85/337/EC on Environmental Impact Assessment and Directive 2001/42/EC on Strategic Environmental Assessment.”*

Further, it summarises the public participation process and acknowledges the relevance of Article 7 of the Convention to this same public participation process:

- *“Section 5.4 of the plan describes the consultation that was undertaken as part of the process. The first phase of the consultation process involved an initial, targeted consultation with key stakeholders, who are listed in Appendix 6 of the NREAP. The draft plan was then revised on the basis of the feedback received and published on DCENR's website for public comment. In response to this second phase of consultation, 58 submissions were received, which are listed in Appendix 8 of the NREAP. These were reviewed by DCENR prior to the finalisation of the NREAP and its publication. Notwithstanding the fact that Ireland has not yet ratified the Aarhus Convention, I would consider that this process was consistent with the requirements of Article 7 of the Convention.”*

Despite the fact that the Party was well aware at the time that it would be provided with an opportunity to represent its views, and furthermore had agreed a joint position with the EU in relation to Article 7, it is now seeking to contest this issue in its response of December 2015. In effect the Party is directly contradicting its previous position, which would seem to indicate either confusion or connivance on its part.

However, as the Communicants on ACCC/C/2014/112 we would like to clarify, despite the contrary assertion of the Party in its response, that this Communication is not about the compliance of the NREAP with the Convention, which is being dealt with elsewhere. Rather, the core issue of this Communication is that since ratification by Ireland, public participation on the renewable programme in relation to approval of downstream projects and development plans has been *pro forma*, as options are no longer open to enable effective public participation.

This can be seen in Section 8.16 of the Party's response:

- *“However, as previously noted the Communicants' real concern does not appear to be the contention that submissions made by members of the public are not considered but that where those submissions challenge and seek the invalidation or dis-application of national policy, the decision makers do not comply with this request on the basis that under statute they must have regard to national policy and do not have the jurisdiction to set it aside.”*

⁸ http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-54/Correspondence%20with%20communicant/Response_08.01.2012/frCommC54LetterIrishAd2ECreNREAP.pdf

This is further reinforced in the 'Conclusions', i.e. Section 12 of the response:

- *“The Communicants are dissatisfied with the manner in which onshore wind energy has developed within Ireland but fail to acknowledge the legally binding nature of the targets established by Directive 2009/28/EC.*
- *It is submitted that Ireland has transposed the Convention in a robust manner that allows for significant public consultation to be undertaken in the course of decision making processes. This allows members of the public **to express their views on decisions to be taken** while national policy is also developed to ensure that the legally binding targets established by Directive 2009/28/EC are met.” [emphasis added]*

There are a number of key issues here. First, expressing one views and active public participation in decision making are two very different things, as is clearly articulated in the case law and guidance on the Convention. Secondly, as the EU has confirmed already with the Compliance Committee⁹:

- *“An agreement concluded by the Council is binding on the Community's institutions and Member States¹⁰. It is the above Court's settled case-law that such an agreement forms **an integral part of the Community's legal order and the Court of Justice ensures compliance with it.**¹¹*

This rule applies not only to international agreements concluded by the Community alone but also to joint agreements,¹² in respect of the provisions which fall within the competence of the Community.¹³

- ***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.¹⁴*

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

¹⁰ Article 300(7) of the Treaty establishing the European Community.

¹¹ Judgment of 30.4.1974, Case 181/73, Haegeman, paragraph 5; judgment of 26.10.1982, Case 104/81, Kupferberg; judgment of 30.9.1987, Case 12/86, Demirel, paragraph 7. This principle was most recently confirmed in the judgment of 11 September 2007, Case C-431/05, Merck Genéricos- Productos Farmacêuticos Lda/ Merck Co. Inc, Merck Sharp & Dohme Lda, paragraph 31.

¹² Joint agreements are those concluded by the Community and all or some of its Member States with other countries and/or international organisations.

¹³ Judgment of 19.3.2002 in Case C-13/00, Commission v Ireland, paragraph 14; judgment of 30.5.2006 in Case C-459/03, Commission v Ireland, paragraph 84, and judgment of 11 September 2007 in Case C-431/05 above, paragraphs 31 to 33.

¹⁴ 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.

This precedence also has the effect of requiring Community law texts to be interpreted in accordance with such agreements.”

Third, as Decision V/9g on Compliance by the European Union states¹⁵:

- *“That the Party concerned, 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 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;”*

In essence, the implementation of the Directive 2009/28/EC, by both the EU and Ireland, failed to comply with the provisions of the Convention, which takes precedence over such secondary legislation. Despite this, what Ireland is concluding in its response, namely that the nature of renewable targets in Directive 2009/28/EC is binding on it as a Member State, cannot be used as a justification for not complying with the by now well established principles of compliance with the Convention.

As Article 6(4) of the Convention and the associated Judgment in Case C-416/10 of the European Court of Justice¹⁶ clarify:

- *“Under the Aarhus Convention, when a decision-making procedure concerning the environment is initiated, the public concerned must be able to participate in it from its beginning, that is to say, when all options are still open and effective public participation can take place”.*

As this position is so critical to this Communication, the Table overleaf summarises the decision making steps taken by the Irish administration to date in relation to its renewable energy policy and clarifies:

- The 13.2% target for renewable electricity adopted in Directive 2001/77/EC occurred prior to the legal adoption of procedures related to public participation.
- The target of 15% of electricity production from renewable sources by 2010 adopted in the National Development Plan of 2007 – 2013 underwent public participation at the policy level. However, this plan contained measures to be implemented, particular grid expansions, which were at a plan / programme level and arguable set the framework for future development consent. Therefore, a Strategic Environmental Assessment should have been completed before adoption of this plan.
- The target of 33% of electricity production from renewable sources by 2020, adopted by “Delivering a Sustainable Energy Future for Ireland: The Energy Policy Framework 2007 – 2020” only underwent public participation at the policy level. There was essentially zero information available on the financial and environmental impacts of implementing this target at the plan / programme level.

¹⁵ http://www.unece.org/fileadmin/DAM/env/pp/mop5/Documents/Post_session_docs/Decision_excerpts_in_English/Decision_V_9g_on_compliance_by_the_European_Union.pdf

¹⁶ <http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-01/cp130001en.pdf>

No further legally compliant public participation has occurred in Ireland in relation to the renewable energy programme. Indeed, not only is there a complete and utter vacuum in relation to information concerning the impacts of this programme, but there is also a complete absence of any public participation in relation to those impacts. The target of 40% of electricity to be obtained from renewable sources was not adopted in accordance with the legal framework, while that of 33% has never been subject to proper assessment and public participation at the plan / programme level. In other words, there is no legal basis on which these targets can be enforced.

If we consider UNECE's Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters¹⁷:

- “78. In the case of tiered decision-making (see para. 17 above), in order to ensure early and effective public participation when all options are open:
 - ***(d) When in a tiered decision-making process new information subsequently sheds doubt on decisions made in the earlier tiers or stages or severely undermines their justification it should be possible to reopen these decisions.***”

Irish citizens have not had the chance to examine the actual impacts of a 33% target at the plan / programme level and until such an opportunity occurs, we do not know if it is suitable. Furthermore, when objections in public participation in decision making on downstream projects and development plans matters are raised, which contradict or undermine the very limited justification established to date for this renewable programme, then these have to be addressed in the decision making and not simply be swept aside as not worthy of consideration. That is not public participation. It is public exclusion and subsequent emasculation.

¹⁷http://www.unece.org/fileadmin/DAM/env/pp/mop5/Documents/Post_session_docs/ece_mp_pp_2014_2_add.2_eng.pdf

Table 1: Summary of Public Participation completed to date on Renewable Energy

Date	Decision	Brief Description	Legislative requirement related to Public Participation	Public Participation Completed	Remarks
<p>Adopted on 27th September 2001.</p> <p>Transposition required by 27th October 2003</p>	<p>Directive 2001/77/EC on the promotion of electricity produced from renewable energy sources in the internal electricity market</p>	<p>Member States required to set national indicative targets for the consumption of electricity produced from renewable sources.</p> <p>National indicative targets were consistent with the global indicative target of 12 % of gross national energy consumption by 2010 and in particular with the 22.1 % indicative share of electricity produced from renewable energy sources in total Community electricity consumption by 2010.</p> <p>Reference values for Member States' national indicative targets for the contribution of electricity produced from renewable energy sources to gross electricity consumption by 2010 – for Ireland 13.2%</p>	<p>Both EU and Ireland had signed but not ratified the Aarhus Convention.</p> <p>Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (Strategic Environmental Assessment) did not require transposition until 21st July 2004. Actual transposition occurred through S.I. No. 435 of 2004, which applied to plans and programmes (or modifications thereto) whose first formal preparatory act occurs on or after 21st July 2004.</p>	<p>None</p>	<p>Signing a convention does not have a binding effect on the prospective Party concerned if the convention requires ratification. However, in accordance with the Vienna Convention on the law of treaties of 23rd May 1969 (article 18), after a country signs a convention, it is obliged to refrain from acts which could defeat the object and purpose of the convention.</p>
<p>January 2007 is referred to in Foreword by Minister of Finance</p>	<p>National Development Plan 2007-2013</p>	<p>National Development Plan encompassed investment of €184 billion over seven years.</p> <p><i>“Investment in key strategic energy infrastructure projects including the East/West and North/South interconnectors and ongoing investment in sustainable energy with a view to meeting the target of 15% of electricity production from renewable sources by 2010”.</i></p> <p><i>“The projected Energy Network Investment Programme 2006-2010 includes:</i></p> <ul style="list-style-type: none"> • 350,000 new connections; • 50 new transmission/HV stations; • 1100 MW connections for renewables; and • 400 km transmission lines”. <p><i>“In the case of electricity, the 2010 target for renewable energy consumption has been increased to 15%”.</i></p> <p><i>“A 2020 target for the share of electricity produced from renewable energy sources and targets for renewable heat and transport sectors, including bio-energy, will be finalised in the context of the Energy Policy White Paper and in the light of EU developments”.</i></p> <p><i>“During the period 2007-2013, the main focus of investment by EirGrid will entail improvement of the transmission network for electricity to accommodate increased usage and enhance security of supply, to allow increased connection of sustainable</i></p>	<p>Some elements of the National Development Plan concerned ‘plans and programmes related to the environment’.</p> <p>As the EU had ratified the Aarhus Convention in 2005 and it was therefore part of Community Law, the requirements of Article 7 on “Public Participation Concerning Plans and Programmes relating to the Environment” applied.</p> <p>Strategic Environmental Assessment applies to plans or programmes 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 the Directive on Environmental Impact Assessment.</p>	<p><i>“To assist consideration of the appropriate investment strategy for the National Development Plan 2007-2013 the Government engaged in a comprehensive consultation process and commissioned an ex-ante study by the Economic and Social Research Institute (ESRI) of their recommended investment priorities for the Plan.</i></p> <p><i>A widespread and extensive consultation process was undertaken with the social partners, regional bodies and other interested bodies”.</i></p> <p>77 submissions were received.</p>	<p>As regards Article 7 of the Aarhus Convention, the necessary public participation was carried out, but there is no record of ‘in the decision due account being taken of the outcome of the public participation’.</p> <p>The National Development Plan specified specific energy infrastructure to be delivered and allocated the defined financial resources. In the context of emerging jurisprudence of the European Court of Justice and Member State Courts, such as the UK Supreme Court, it did ‘set the framework for future development consent’ of projects related to wind energy and high voltage transmission. Yet no Strategic Environmental Assessment was completed.</p> <p>Note the inclusion of the North/South Interconnector to N. Ireland and the East/West Interconnector to the UK, which engaged transboundary issues.</p>

Date	Decision	Brief Description	Legislative requirement related to Public Participation	Public Participation Completed	Remarks
		<p><i>and renewable energy sources to the network and to support greater interconnection with Northern Ireland and Great Britain. Expenditure of some €770 million is envisaged on the transmission system over the period of the Plan. Such work on the transmission system will be undertaken by ESB (as asset owner) and will be carried out in accordance with EirGrid's Development Plan, as approved in advance by the CER. Ownership of the East-West Interconnector, for completion in 2012, will be vested in EirGrid".</i></p> <p><i>"Bord na Mona's proposed capital expenditure of €270 million over the period of the NDP relates to the development of wind farms in Mayo and the Midlands and the development of a waste management facility, which may include a waste-to-energy function. These projects will contribute to the security of energy supply and will also have a positive environmental impact in terms of helping to meet Ireland's target of 15% of electricity from renewable sources by 2010".</i></p>	<p>In Irish legislation this includes wind farms greater than 5 MW and high voltage infrastructure of 220 kV or more, which were an integral part of the National Development Plan.</p>		
<p>March 2007</p>	<p>Delivering A Sustainable Energy Future For Ireland: The Energy Policy Framework 2007 – 2020</p> <p>Government White Paper on Energy</p>	<p><i>"This White Paper sets out the Government's Energy Policy Framework 2007-2020 to deliver a sustainable energy future for Ireland".</i></p> <p><i>"The Government is committed to delivering a significant growth in renewable energy as a contribution to fuel diversity in power generation with a 2020 target of 33% of electricity consumption. Wind energy will provide the pivotal contribution to achieving this target. We also need a balanced portfolio of renewable technologies including biomass and ocean technology".</i></p> <p><i>"We will ensure through EirGrid's Grid Development Strategy 2007-2025 and in light of the All-Island Grid Study the necessary action to ensure that electricity transmission and distribution networks can accommodate, in an optimally economic and technical way, our targets for renewable generation for the island to 2020 and beyond".</i></p> <p><i>"There are other constraints to be addressed, including planning, and issues of public acceptance and local community support. These will be tackled through coordinated national, regional and local approaches".</i></p> <p><i>"The Semi-State Energy Companies (BGE, ESB, Bord na Móna and EirGrid) will build on the progress made under the last NDP by investing over €7bn, mainly in the electricity and gas transmission and distribution networks, in new and modernised power generation and in wind energy projects".</i></p>	<p>The White Paper concerned 'policies related to the environment'.</p> <p>As the EU had ratified the Aarhus Convention in 2005 and it was therefore part of Community Law, the requirements of Article 7 on "Public Participation Concerning Policies relating to the Environment" applied namely:</p> <ul style="list-style-type: none"> - <i>"To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment".</i> 	<p>There was a 2006 Green Paper on Energy, which attracted over 100 submissions and discussions held with a number of key stakeholders. The outcomes of the consultation process are set out in Section 2 of the White Paper.</p> <p>The public participation therefore met the requirements of Article 7 of the Convention in relation to policies.</p>	<p>One has to be critical of the degree of analysis inherent in setting the targets for renewable electricity consumption.</p> <p><i>"We are setting very ambitious targets for expanding the role of renewable energy notably the target of 33% of electricity consumption to come from renewable resources by 2020. There are considerable challenges inherent in realising these ambitious targets. The growth of emerging technologies remains constrained by their relative cost. (Offshore wind which is capital intensive and technologically challenging is a case in point). High fossil fuel prices have contributed to making renewables more cost competitive but investment costs do remain a key challenge.</i></p> <p><i>The Government considers that the balance of social costs and benefits must be recognised as positive and that is our starting point".</i></p> <p>In this regard the preamble of the Aarhus Convention provides additional guidance:</p>

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		<p>"We will ensure completion of the ongoing capital investment programme in transmission and distribution networks by 2010 and oversee further extensive investment in a programme expected to total €4.9bn up to 2013".</p>			<p>- "Recognizing the importance of fully integrating environmental considerations in governmental decision-making and the consequent need for public authorities to be in possession of accurate, comprehensive and up-to-date environmental information".</p>
15 th October 2008	<p>Dail Eireann Debate Vol. 663 No. 4: Speech of John Gormley Minister for Environment, Heritage and Local Government on Financial Resolution No. 15 (resumed).</p> <p>'Carbon Budget'.</p>	<p>The Minister said:</p> <p><i>"One of the most effective ways of reducing our national greenhouse gas emissions is to generate as much electricity as possible from renewable sources rather than from fossil fuels. The previous Government adopted a target that 33% of electricity consumed would be from renewable sources by 2020. Today I can confirm that the Government has now agreed, on the recommendation of my colleague, the Minister for Communications, Energy and Natural Resources, Eamon Ryan, T.D. to increase this target to 40%.</i></p> <p><i>The target is underpinned by analysis conducted in the recent All Island Grid Study which found that a 40% penetration is technically feasible, subject to upgrading our electricity grid and ensuring the development of flexible generating plant on the electricity system."</i></p>	<p>Article 7 of the Aarhus Convention applied as the EU had ratified in 2005. The target can be considered a 'statement of intent', therefore:</p> <p>- <i>"To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment".</i></p>	None	<p>The extent of increasing the target from 33% to 40% had a huge impact on the extent of infrastructure, which would have to be delivered by any subsequent plan or programme.</p> <p>Lots of things are 'technically feasible', that doesn't mean they make sense with regard to economic and environmental impacts.</p>
Directive adopted on 23 rd April 2009, but Member States would have been engaged in its preparation.	Directive on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC	<p>Recitals clarify:</p> <p><i>(9) "The European Council of March 2007 reaffirmed the Community's commitment to the Community-wide development of energy from renewable sources beyond 2010. It endorsed a mandatory target of a 20 % share of energy from renewable sources in overall Community energy consumption by 2020 and a mandatory 10 % minimum target to be achieved by all Member States for the share of biofuels in transport petrol and diesel consumption by 2020, to be introduced in a cost-effective way".</i></p> <p><i>(15) "The starting point, the renewable energy potential and the energy mix of each Member State vary. It is therefore necessary to translate the Community 20 % target into individual targets for each Member State, with due regard to a fair and adequate allocation taking account of Member States' different starting points and potentials, including the existing level of energy from</i></p>	<p>Irish 2005 guidelines on "How to conduct a Regulatory Impact Analysis"¹⁸. The Irish Government decided in June 2005 that Regulatory Impact Analysis should be introduced across all Government Departments and Offices and applied to:</p> <p>- Proposals for primary legislation involving changes to the regulatory framework, significant Statutory Instruments,</p> <p>- Proposals for EU Directives</p>	There was no Regulatory Impact Assessment or other public participation completed in Ireland with regard to the adoption of this Directive.	<p>The only reference to public participation in the Directive was to be found in Recital (90):</p> <p><i>"The implementation of this Directive should reflect, where relevant, the provisions of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, in particular as implemented through Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information".</i></p> <p>The Irish 2005 Regulatory Impact</p>

¹⁸ A copy of these can be downloaded from: <http://www.legislationline.org/search>

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		<p><i>renewable sources and the energy mix. It is appropriate to do this by sharing the required total increase in the use of energy from renewable sources between Member States on the basis of an equal increase in each Member State's share weighted by their GDP, modulated to reflect their starting points, and by accounting in terms of gross final consumption of energy, with account being taken of Member States' past efforts with regard to the use of energy from renewable sources".</i></p> <p>Ireland was therefore assigned a 16% mandatory national overall target.</p> <p>Article 4 clarifies:</p> <p><i>"Each Member State shall adopt a National Renewable Energy Action Plan. The national renewable energy action plans shall set out Member States' national targets for the share of energy from renewable sources consumed in transport, electricity and heating and cooling in 2020, taking into account the effects of other policy measures relating to energy efficiency on final consumption of energy, and adequate measures to be taken to achieve those national overall targets, including cooperation between local, regional and national authorities, planned statistical transfers or joint projects, national policies to develop existing biomass resources and mobilise new biomass resources for different uses, and the measures to be taken to fulfil the requirements of Articles 13 to 19".</i></p>	<p>and significant EU Regulations when they are published by the European Commission, and</p> <ul style="list-style-type: none"> - Policy Review Groups bringing forward proposals for legislation. <p>In their first National Implementation Report of 2014 to the UNECE Aarhus Convention Meeting of Parties the Irish State clarified in Section XX: Opportunities for public participation in the preparation of policies relating to the environment provided pursuant to Article 7:</p> <p><i>"The Cabinet Handbook states that Government approval is required for significant new or revised policies or strategies and that approval should be sought sufficiently in advance of publication of such initiatives to allow proper consultation and consideration. There is also a requirement to conduct a Regulatory Impact Analysis (RIA) before any policies (both regulatory and non-regulatory) are officially adopted".</i></p> <p><i>"The introduction of the RIA process in June 2005 provided that a RIA must be conducted by all Policy Review Groups proposing primary legislation or a significant regulatory change".</i></p>		<p>Assessment guidelines contained some important points:</p> <p><i>"Regulatory Impact Analysis is a tool used to assess the likely effects of a proposed new regulation or regulatory change. It involves a detailed analysis to ascertain whether or not the new regulation would have the desired impact. It helps to identify any possible side effects or hidden costs associated with regulation and to quantify the likely costs of compliance on the individual citizen or business".</i></p> <p><i>"The steps of Regulatory Impact Assessment comprise":</i></p> <ol style="list-style-type: none"> 1. Statement of policy problem and objective 2. Identification and description of options 3. Impact analysis including costs and benefits of each option 4. Consultation 5. Enforcement and compliance for each option 6. Review 7. Summary of merits / drawbacks of each option and identification of recommended option where appropriate". <p><i>"Cost-benefit analysis: This entails identifying and evaluating expected economic, environmental and social benefits and costs of proposed public initiatives. A measure is considered justified where net benefits can be expected from the intervention".</i></p>
The date set in Directive 2009/28/EC for notification of the NREAPs to the EU	Ireland's National Renewable Energy Action Plan (NREAP)	In the NREAP sectoral targets for renewable energy are set in Section 3, the measures for achieving those targets are set in Section 4, in particular those for the electricity infrastructure development in Section 4.2.6 and the support schemes in Section 4.3, while in Section 5, the contribution of each renewable technology is defined, as the template states:	The NREAP was a plan or programme related to the environment, this was confirmed by the EU both in writing and verbally to UNECE in Communication ACCC/C/2010/54. Therefore,	A completely inadequate two week consultation was held in the middle two weeks of June 2010 prior to its adoption on 30 th June 2010. The findings and recommendations of the	The position of the Irish State is as articulated in the introduction to the NREAP:

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<p>Commission was 30th June 2010.</p> <p>After some slight modifications, the NREAP was resubmitted to the EU Commission in October 2010.</p>		<p>- "For the electricity sector, both the expected (accumulated) installed capacity (in MW) and yearly production (GWh) should be indicated by technology".</p> <p>To summarise, the NREAP is a ten year plan in which defined infrastructure is to be supported and brought through the regulatory framework. However, there was no assessment of impacts. Section 5.3 of the NREAP template, a template established by the EU Commission's Decision C(2009) 5174-1, was entitled "Assessment of Impacts". It was an optional section and the Irish NREAP goes from Section 5.2 to Section 5.4.</p>	<p>Article 7 of the Convention applied.</p> <p>The EU and Irish State chose not to apply the Strategic Environmental Assessment procedure to the adoption of the NREAP. Their claim was that the NREAP was not specific enough to 'set the framework for future development consent'.</p> <p>While the case law in relation to what 'sets the framework for future development consent' continues to evolve, as Advocate General Kokott of the European Court of Justice has concluded¹⁹:</p> <p>- "To summarise, it can therefore be said that a plan or programme sets a framework in so far as decisions are taken which influence any subsequent development consent of projects, in particular with regard to location, nature, size and operating conditions or by allocating resources".</p>	<p>UNECE Aarhus Convention Compliance Committee in ACCC/C/2010/54 were endorsed by the July 2014 Meeting of the Parties and now form Decision V/9g on compliance by the European Union with its obligations under the Convention:</p> <p>(a) <i>That the Party concerned, 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 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;</i></p> <p>(b) <i>That the Party concerned, by not having properly monitored the implementation by Ireland of Article 7 of the Convention in the adoption of Ireland's NREAP, has also failed to comply with Article 7 of the Convention;</i></p> <p>(c) <i>That the Party concerned, by not having in place a proper regulatory framework and/or clear instructions to implement and proper measures to enforce Article 7</i></p>	<p><i>and concrete measures to deliver on Ireland's 16% target under Directive 2009/28/EC".</i></p> <p>Therefore they claim that the NREAP was not a plan or programme related to the environment, but only a: "Summary of national renewable energy policy".</p> <p>With regards to the absence of any information relating to assessment of impacts, it is worthwhile reiterating the preamble to the Aarhus Convention, which states:</p> <p>- "Recognizing the importance of fully integrating environmental considerations in governmental decision-making and the consequent need for public authorities to be in possession of accurate, comprehensive and up-to-date environmental information".</p>

¹⁹ See further analysis in 'In sowing the wind, how Ireland could reap the whirlwind' – a case against Irish wind development(s): <http://www.tandfonline.com/doi/full/10.1080/02646811.2015.1008847#.VQQVYo6sXmo>

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				<p><i>of the Convention with respect to the adoption of NREAPs by its member States on the basis of Directive 2009/28/EC, has failed to comply also with Article 3, paragraph 1, of the Convention.</i></p>	