



Pat Swords &lt;pat.swords.chemeng@gmail.com&gt;

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**Fw: Complaint to European Commission**

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**Sunnyheat Ireland** <info@sunnyheat.ie>  
Reply-To: Sunnyheat Ireland <info@sunnyheat.ie>  
To: Pat Swords <pat.swords.chemeng@gmail.com>

Mon, Oct 12, 2015 at 9:24 PM

see bold/italic below..

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----- Original Message -----

**From:** Antoinette.Long@ec.europa.eu  
**To:** info@sunnyheat.ie  
**Sent:** Monday, October 12, 2015 3:17 PM  
**Subject:** RE: Complaint to European Commission

Dear Mr. Greijmans,

Apologies for the delay in coming back to you in response to your message below. I was on leave for the month of August and have been busy dealing with urgent priorities since I came back.

I am sorry that you are disappointed with my initial response to your arguments. I found your initial correspondence difficult to understand and I have read through your response below. However, I still do not see any clear grounds to investigate further.

With respect to the EIA Directive, it is our view that Irish legislation complies with the Directive, as explained in my previous message. You refer to a CHAP "(2015) 01244". However, I am not aware of any complaint with that reference number. Perhaps this is an incorrect reference? ***Even if I have received specific complaints concerning issues that you raise I would not at liberty to reveal information on these files as they are confidential. In relation to the NREAP, the Commission has no reason to believe that insufficient public participation took place prior to the adoption of this plan.***

One thing I didn't mention on my previous message is that the Commission is in contact with the Irish authorities concerning the future application of the EIA Directive to planning decisions concerning wind farms. We will be following developments with a view to ensuring that the Directive is complied with.

However, we cannot intervene in relation to judgements already handed down by Irish courts.

I hope that the above clarifies my previous response.

Regards,

Antoinette Long

**LONG Antoinette**

Case handler for Ireland - infringements

**European Commission**

DG ENV

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**From:** Sunnyheat Ireland [mailto:[info@sunnyheat.ie](mailto:info@sunnyheat.ie)]

**Sent:** Friday, July 31, 2015 6:13 PM

**To:** LONG Antoinette (ENV)

**Subject:** Re: Complaint to European Commission

Dear Ms. Long,

I'm disappointed with your analysis on two of my arguments.

**1. EIS/EIA definition**

Are you telling me that it doesn't matter which legislation is used to carry out an EIA? Would it not be very easy when it's clear from the first page you read which legislation is used? The EIA-directive 2011/92/EC and the European Union (Environmental Impact Assessment) (Planning and Development Act, 2000) Regulations 2012 are to be used at the moment. C50-09 brought this

legislation, but it is obviously not being used in planning applications and EIA. You state that you need a more systemic failure to comply. You are well aware of CHAP (2015) 01244, where the Meenwaun Wind Farm 15/44 is listed. Is that systemic enough? Why did you not mention this?

Following the European Court judgment (C-50/09) there was a new regulation adopted by Ireland to implement C-50/09 which was the European Union (Environmental Impact Assessment) (Planning and Development Act, 2000) Regulations 2012. Having read that regulation it clearly gives three definitions:

1. What the current Environmental Impact Assessment directive is (2011/92/EC) (not the 2014/52/EU)
2. for Environmental Impact Statement, which states that it shall include the information specified in Annex 4 of the EIA-directive 2011/92/EC
3. what an Environmental Impact **Assessment** is.

None of these 3 remedies have been complied with concerning the Meenwaun Wind Farm. The regulation is in place, but the implementation and enforcing of this regulation is apparently not important?

## 2. SEA-directive

On the point of SEA. You tell me that this is a project. That's correct.

However, projects should only derived from Article 3 of the SEA-directive describes this:

- *The legislation adopted to implement the SEA Directive in Ireland is set out in the national Regulations, S.I. No. 435 of 2004. The SEA regulations stipulate that SEA is mandatory for certain plan/programmes which are prepared in a number of specified areas, including agriculture, energy and transport **and which set the framework for future development consent of projects listed in Annexes I and II to Environmental Impact Assessment Directive 85/337/EEC**, or where it has been determined under the Habitats Directive that an assessment is required.*

European case law states that energy projects should derive as a result of the SEA and there must be tiering of SEA and EIA.

This project (according to the EIS) is taken under the NREAP. The NREAP as you are aware is the national renewable energy action plan. This is a plan/programme which explains how Ireland is going to meet 16% target set for Ireland by the EU. This plan, part of the energy program for Ireland, needs an SEA as I stated in my further information. This SEA was never done. Therefore we don't know how many turbines need to be built, where they need to be built, in other words what we can expect in the area where we live.

Companies in my area are lining up with planning application for wind farms, in which there is no SEA to establish the need and the cumulative effects and alternatives are not adequately considered. In this regard, we have Element Power, Bord na Mona, Gaeletec, Gaelectric coming into our area. We learned that Bord na Mona is going to erect 30 turbines in the bog (Clongawny) next to Meenwaun and a further 30 the other side of Cloghan (Drinagh). There is no mention of this at all in the EIS, even though there have been pre planning meetings and discussions of wind take, of which the public concerned is not privy.

If you are correct that SEA doesn't apply, how can the cumulative effects and alternatives be adequately assessed as it is clearly established that the EIA is inadequate to deal with alternatives and cumulative effects.

I'm happy with your statement that the Aarhus convention and the 2003/35/EC directive are not complied with, but surely you know the importance of public participation at the early stage. In this case at the SEA stage as there is clearly both an SEA and EIA required for these ENERGY projects..

Regards

Pierre Greijmans

----- Original Message -----

**From:** [Antoinette.Long@ec.europa.eu](mailto:Antoinette.Long@ec.europa.eu)

**To:** [info@sunnyheat.ie](mailto:info@sunnyheat.ie)

**Sent:** Thursday, July 30, 2015 1:48 PM

**Subject:** RE: Complaint to European Commission

Dear Mr. Greijmans,

We have now had a chance to go through the information you have provided, both in your original letter to Ms. Aile and in your follow up e-mail below. Based on our analysis of the issues you have raised, we cannot see any evidence of an infringement of EU environmental legislation insofar as the planning decision in relation to the Meenwaum Wind Farm project is concerned.

First, you suggest that the reference by the Irish authorities to the 2001 Regulations, as amended, is an incorrect legal basis for carrying out an EIA. The 2012 Regulations, adopted to implement the ruling of the Court of Justice of the EU in Case C-50, do amend the 2001 Regulations. In your view, such a reference is not incorrect. It is indeed true that Irish legislation in this area is complicated and difficult to follow, but it is technically correct. Second, you state that a reference by the Irish authorities to the latest version of the EIA Directive which has yet to be implemented in Ireland is incorrect. Such a reference, in itself does not mean that an EIA was not properly carried out. What is important in any given case is that the requirements of the Irish legislation transposing the EIA Directive are complied with. In your correspondence, you have not provided any evidence on the substance of how the authorities are not complying with the Directive. In any event, it is not for the Commission to intervene in individual decisions on specific projects; in order to pursue this type of issue, the Commission would need to have evidence of a systemic failure to comply with EU legislation.

The third issue you raise is compliance with the SEA Directive. However, you have not clearly explained the basis upon which SEA required. In principle, individual wind farm projects are not regarded as plans or programmes in the context of the SEA Directive, but rather projects in the

context of the EIA Directive – therefore the SEA Directive would not apply.

Finally you refer to the Aarhus Convention and Directive 2003/35 on access to justice. I can assure you that the Commission is well aware of what it regards as deficiencies in the standard of review applied by the Irish courts and indeed of the prohibitive costs associated with an application for judicial review. These are two issues which the Commission is pursuing in an infringement proceeding against Ireland.

In light of the above, and on the basis of information you have provided, we do not see any basis to pursue your complaint.

Please do not hesitate to contact me if you require further clarification.

Regards,

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**From:** LONG Antoinette (ENV)  
**Sent:** Wednesday, July 22, 2015 11:11 AM  
**To:** 'Sunnyheat Ireland'  
**Subject:** RE: Complaint to European Commission

Dear Mr. Greijmans,

Thank you for this additional information. I will come back to you as soon as possible with a response.

Regards,

Antoinette Long

**LONG Antoinette**

Case handler for Ireland - infringements

**European Commission**

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**From:** Sunnyheat Ireland [<mailto:info@sunnyheat.ie>]  
**Sent:** Tuesday, July 21, 2015 6:25 PM  
**To:** LONG Antoinette (ENV)  
**Subject:** Re: Complaint to European Commission

Dear Ms. Long,

Please find below some further Information/Clarification regarding my complaining.

My complaint concerns a failure by the Irish planning authorities concerning a failure to comply with European law pertaining to non-compliance with the SEA Directive 2001/42/EC; the EIA Directive 2011/92/EC and the Public Participation Directive 2003/35/EC.

**Non-Compliance with the SEA Directive 2001/42/EC**

My complaint identifies why an SEA is required under the provisions of Article 3(1) of the SEA Directive. The legislation adopted to implement the SEA Directive in Ireland is set out in the national Regulations, S.I. No. 435 of 2004. The SEA regulations stipulate that SEA is mandatory for certain plan/programmes which are prepared in a number of specified areas, including agriculture, energy and transport **and** which set the framework for future development consent of projects listed in Annexes I and II to Environmental Impact Assessment Directive 85/337/EEC, or where it has been determined under the Habitats Directive that an assessment is required.

The background to and purpose of the SEA Directive were carefully explained by Advocate General Kokott in her opinion in Joined Cases C-105/09 and C-110/09 ***Terre Wallone ASBL v Région Wallone and Inter- Environnement Wallonie ASBL v Région Wallone*** [2010] ECR, I-5611. At points 31-32 of her opinion, she explained (Para 31) that:

*“The specific objective pursued by the assessment of plans, and programmes is evident from the legislative background: the SEA Directive complements the EIA Directive, which is more than ten years older and concerns the consideration of effects on the environment when development consent is granted for projects.”*

The CJEU in Case C-295/10 [2012] Env LR 283 as explained by Lord Reed in *Walton v Scottish Ministers* [2012] UKSC 44 at paras 57 – 60, it follows from art 11(1) that an assessment under the EIA Directive (an “EIA”) cannot dispense with the obligation to carry out an SEA where required by the SEA Directive, and is additional to any such assessment. At the same time, the court has inferred from art 11(2) that, where an EIA has been carried out under a co-ordinated or joint procedure, it may meet all the requirements of the SEA Directive; and, in that eventuality, there is no obligation to carry out a further assessment under the latter directive (*Valčiukiene*, paras 62-63). If on the other hand the two assessments differ in their scope or content, then a second assessment is appropriate.”

The relationship between the SEA and EIA Directives, and between the SEA Directive and other Community legislation, is expressly addressed in Article 11 of the SEA Directive, paragraphs 1 and 2 of which provide that an environmental assessment carried out under this Directive shall be without prejudice to any requirements under Directive 85/337/EEC and to any other Community law requirements.

Accordingly, there is both an SEA and an EIA required for this proposed project. Part of my complaint is that there was no SEA carried out which violates the above mentioned European Court cases.

### **Non-Compliance with the EIA Directive 2011/92/EC**

Following the European Court case C-50/09, the European Union (Environmental Impact Assessment) (Planning and Development Act, 2000) Regulations 2012, was enacted to implement the judgment. Section 2 of the Regulations states that the Planning and Development Act, 2000 was amended (a) in section 2 (i) by substituting for the definition of “Environmental Impact Assessment Directive” the following definition:

“Directive No. 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment”, and (ii) in the definition of “environmental impact statement” by inserting the following words after “the environment”: “and shall include the information specified in Annex IV of Council Directive No. 2011/92/EU”

However, the EIS for this project was prepared using the EIA Directive 2014/52/EU, which is the wrong EIA Directive, which is not yet transposed into Irish law.

The new Regulations also amended the definition of “environmental impact statement” by inserting the following words after “the environment”: “and shall include the information specified in Annex IV of Council Directive No. 2011/92/EU”.

However, the EIS for the proposed project at Section 1.5.1 (p.3) states that the EIS has been prepared in accordance with Schedule 6 of the Planning and Development Regulations 2001, as amended, which sets out the contents of an EIS,

Accordingly, both the wrong EIA Directive and Statute was used. In other words, the EIS submitted was not in accordance with the EIA Directive 2011/92/EC or the European Union (Environmental Impact Assessment) (Planning and Development Act, 2000) Regulations 2012, which was adopted to correctly transpose the EIA Directive 2011/92/EC, into Irish law.

Following the European Court judgement in Case C-215/06, the Irish planning authorities cannot accept or validate a retention planning application that requires

an EIS. I believe that following the European Court ruling in Caes C-50/09, the planning authorities should also not accept or validate a planning application that contains an EIS prepared under Schedule 6 of the Planning & Development Regulations 2001.

### **Non Compliance with the Public Participation Directive**

Article 10a of the Environmental Impact Assessment Directive (as inserted by the so-called Public Participation Directive, Directive 2003/35/EC) requires Member States to provide a "review procedure" whereby the "substantive or procedural legality" of "decisions, acts or omissions" subject to the public participation provisions of the EIA Directive may be challenged. Article 10a requires that the "review procedure" shall not be "prohibitively expensive".

Article 11 (4) of the EIA Directive 2011/92/EC states that "The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law."

Ireland does not have in place the right to a public hearing before an independent and impartial tribunal within reasonable time. Most (if not all) Judicial Review cases are transferred to the Commercial Court which creates excessive costs.

Garrett Simons, the leading Irish planning practitioner, considers that it is a condition precedent that the applicant have succeeded in all or part of his case and that it does not necessarily follow that a successful applicant is then automatically entitled to his costs. He states that:

*"On a literal reading of the new cost rule, therefore, the High Court would appear to have a very wide discretion as to the circumstances in which it allows a successful applicant his costs. However, it must be doubtful whether such a seemingly wide discretion would be consistent with EU law. It is a general principle of EU law that the provisions of a Directive must be implemented with the specificity, precision and clarity required in order to satisfy the need for legal certainty. ....It seems to follow from all of this that a potential applicant should be able to predict with some certainty whether or not he is likely to obtain a costs order in his favour if successful in the legal proceedings."*

In addition, because the Irish Courts are not applying the findings of the CJEU in C-50/09, means there is no remedy for non-compliance with the EIA Directive through the Irish courts.

Regards

Pierre Greijmans

----- Original Message -----

**From:** [Antoinette.Long@ec.europa.eu](mailto:Antoinette.Long@ec.europa.eu)

**To:** [info@sunnyheat.ie](mailto:info@sunnyheat.ie)

**Sent:** Tuesday, July 14, 2015 3:17 PM

**Subject:** RE: Complaint to European Commission

Dear Mr. Greijmans,

We are currently examining your complaint. In the meantime, I note that you



are unhappy with a decision of an Bord Pleanala. Have you considered applying for judicial review? It is not entirely clear to me exactly what your arguments are in terms of EU law so I may come back to you for further clarifications.

Regards,

Antoinette Long

**LONG Antoinette**

Case handler for Ireland - infringements

**European Commission**

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**From:** Sunnyheat Ireland [<mailto:info@sunnyheat.ie>]

**Sent:** Tuesday, July 14, 2015 1:41 PM

**To:** LONG Antoinette (ENV)

**Subject:** Fw: Complaint to European Commission

Dear Ms. Long,

Can you tell me the status of my complaint?

Regards

Pierre Greijmans

----- Original Message -----

**From:** [Silvija.AILE@ec.europa.eu](mailto:Silvija.AILE@ec.europa.eu)

**To:** [Antoinette.Long@ec.europa.eu](mailto:Antoinette.Long@ec.europa.eu) ; [info@sunnyheat.ie](mailto:info@sunnyheat.ie)

**Sent:** Tuesday, July 14, 2015 12:32 PM

**Subject:** FW: Complaint to European Commission

Dear Mr Greijmans,

I acknowledge the receipt of your letter.

Please contact Antoinette Long for follow-up on your complaint.

Kind regards,

**Silvija AILE**  
DG ENV D.3  
European Commission  
☎ +32-2-29.61709  
E-mail: [silvija.aile@ec.europa.eu](mailto:silvija.aile@ec.europa.eu)

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**From:** Sunnyheat Ireland [<mailto:info@sunnyheat.ie>]  
**Sent:** Tuesday, July 14, 2015 1:24 PM  
**To:** AILE Silvija (ENV)  
**Subject:** Fw: Complaint to European Commission

Dear Mr. Aile,

Can you please confirm receipt of this complaint.

Thanking you

Pierre Greijmans

----- Original Message -----

**From:** [Sunnyheat Ireland](#)

**To:** [Silvija.AILE@ec.europa.eu](mailto:Silvija.AILE@ec.europa.eu)

**Sent:** Monday, June 29, 2015 7:52 PM

**Subject:** Complaint to European Commission

Dear Mr. Aile,

Please find attached my complaint to the Commission of the European Communities.

Could you please confirm receipt of this complaint.

Regards

Pierre Greijmans

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ireland

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