From: Pat Swords
To: Fiona Marshall, Aarhus Compliance, David Malone, Neil van Dokkum
Date: 27/02/2017 14:45
Subject: Update on ACCC/C/2014/112

Dear Fiona

Sorry for contacting yourselves so close to the actual Compliance Committee meeting, but I do see that C-112 will not be considered until presumably the next Compliance Committee meeting, although new information on Communications is to be considered. The below in relation to the wind energy guidelines, which were part of Section 4.7 of the original communication, has been politically announced back in December, but no actual formal announcement has occurred:

https://www.kildarestreet.com/debate/?id=2016-12-08a.83

- *"If we do, a judgment of the Court of Justice of the European Union now requires that we undertake an environmental impact assessment of any new guidelines, which will involve some consultation early next year.*
- *"It will, therefore, be a few months before new guidelines are settled and agreed because we are required to go through a process that had not been anticipated. However, getting a draft agreed that can then be subject to environmental impact assessment is a priority for us."*

Note: This refers to the recent Decision in the European Court of C-290/15 in relation to the scope of the Strategic Environmental Assessment Directive 2001/42/EC.

http://curia.europa.eu/juris/liste.jsf?num=C-290/15

- *Articles 2(a) and 3(2)(a) of 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 must be interpreted as meaning that a regulatory order, such as that at issue in the main proceedings, containing various provisions on the installation of wind turbines which must be complied with when administrative consent is granted for the installation and operation of such installations comes within the notion of 'plans and programmes', within the meaning of that directive.*

While it is long overdue that a Strategic Environmental Assessment of the Irish renewable programme should be done, and while noting again that this has yet to be formally announced, it also appears that the intent is to restrict this assessment solely to noise and shadow flicker issues, which is very much in breach of the legal position, as articulated in the same C-290/15 below. Namely the intent is to split measures and avoid an assessment of the whole programme.

- *48 Furthermore, as the Advocate General stated in point 55 of her Opinion, it is necessary to avoid strategies which may be designed to circumvent the obligations laid down in Directive 2001/42 by splitting measures, thereby reducing the practical effect of that directive (see, to that effect, judgment of 22 March 2012, Inter-Environnement Bruxelles and Others, C-567/10, EU:C:2012:159, paragraph 30 and the case-law cited).*

Recurring themes raised to date by the Communicants on C-112 were the refusal to provide environmental information, which was in many cases was directly connected to public participation exercises, plus that Ireland has a scattered rural population and insufficient space exists to build out large wind farm developments without adverse effects due to inadequate separation. As such then the recent decision of the Commissions for Environmental Information (CEI/15/0027) of Damien McCallig and the Department of

Housing, Planning, Community and Local Government is of relevance, some points being highlighted below:

http://www.ocei.gov.ie/en/Decisions/Decisions-List/Damien-McCallig-and-The-Department-of-Housing-Planning-Community-and-Local-Government-CEI-15-0027-.html

- *The Department added that: "It would also not be appropriate to provide information or material that is being used to assist or inform the deliberative process, before that process complete and a final decision is reached". I have difficulty in accepting that statement, as it seems to fly in the face of the public right to participate in an informed way in environmental decision- making (a right recognised by the Aarhus Convention). However, I have no remit to investigate or rule on whether and to what extent public authorities have recognised the right to participate in decision-making. I also accept that the existence of this right does not necessarily mean that there is a right to participate at every stage in decision-making. In any event, I feel that I must conclude that further public input (following disclosure) could potentially benefit the decision-making process and therefore it would be in the public interest. Any finding to the contrary would, I suggest, display an underappreciation for the contribution that informed citizens can make.*
- *The Programme for a Partnership Government (published on 11 May 2016) indicated that the Wind Energy Development Guidelines would be completed "as a matter of urgency" within 3 to 6 months. I concluded that anything which would significantly delay the deliberative process would not be in the public interest. The Department submitted in July 2016 that disclosure before a decision is taken "would* ***contaminate the decision-making process****, by creating further expansive debate and engagement prior to the new Ministers and both Departments having an opportunity to further consider and reflect on the available information". [****emphasis added in bold****]*

Unfortunately it took a further three months after the Decision of the Commissioner before the Department actually released the relevant information, which was a highly important modelling study completed by the Irish Government of the wind energy potential. Essentially the bottom line is shown below, in that even with the most basic of restrictions, namely a 125 meter height and a 40 dB(A) noise limit at the nearest sensitive receptor (house) only circa 2,000 MW of wind energy would be built within the available space in the Country. This is despite the 2010 National Renewable Energy Action Plan (NREAP) documenting in its Table 10 two scenarios, the first the base case 4,094 MW of onshore and 550 MW of offshore wind, while the export scenario gave 4,737 MW onshore and 2,408 MW offshore.

https://cawtdonegal.wordpress.com/2017/01/16/irish-government-modelling-of-wind-energy-potential/

Naturally this just shows how dysfunctional and stupid the decision-making process is, which is facilitated by a refusal to complete the necessary environmental assessments and associated public participation, plus a very deliberate stance to withhold key environmental information, such as the above, from the public. Finally, with regard to the Party's response of the 30-11-2015 to the Committee, in particular compliance with Article 6 as articulated by Point 8.1:

- https://www.unece.org/fileadmin/DAM/env/pp/compliance/C2014-112_Ireland/Party_s_response_to_communication/frPartyC112_30.11.2015_response.pdf

- *8.1 The Communicants allege that public consultation undertaken in Ireland relating to the implementation of the renewable programme in Ireland is a "pro forma exercise in which the options are already closed". It must be emphasised again that the renewable programme in Ireland is informed by the legally binding targets set for Ireland by the European Union. Insofar as it is contended that the public consultation required on individual applications for development permits pursuant to Article 6 is pro forma the Communicants' real complaint appears to be that the decision making bodies are not prepared to revisit the merits of policy decisions taken at a national level (often prior to ratification of the Convention) or to dis-apply that policy at the behest of members of the public making submissions in the course of the public participation procedure. For the reasons set out at paragraphs 1.3 to 1.7 above this contention is entirely misconceived.*

The Party's own legal structure has included since 2004 a requirement to comply with the 2001/42/EC Directive on Strategic Environmental Assessment and since 2005 the Public Participation Directive 2003/35/EC. It is thus relevant to point out the jurisprudence in Case C-295/10 of the European Court below, which is binding on the Party, namely if there was no Strategic Environmental Assessment and associated public participation of the overarching plan / programme, then how can downstream decisions on wind farms and high voltage lines subject to the Environmental Impact Assessment Directive be remotely legal, if that downstream decision is not a 'joint procedure' inclusive of a Strategic Assessment and public participation on the overarching programme? This shows how in Point 8.1 above, the Party is establishing a position for itself, which is very clearly outside its own legal framework, as it has never carried on a Strategic Environmental Assessment or equivalent public participation at the overarching plan / programme level, plus it is refusing point blank at the downstream project decision level to even consider any aspects of a 'joint procedure'.

http://curia.europa.eu/juris/document/document.jsf?text=&docid=109923&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=424410

The third, fourth and fifth questions

55 *By those questions, which it is appropriate to examine together, the referring court seeks essentially to ascertain whether Article 11(1) and (2) of Directive 2001/42 must be interpreted as meaning that an environmental assessment carried out under Directive 85/337 permits exemption from the obligation to carry out such an assessment under Directive 2001/42.*

56 For the purpose of answering that question, it should be pointed out that it is apparent from the order for reference that when the detailed plans in question were being prepared, no assessment under Directive 2001/42 was carried out.

57 According to the very wording of Article 11(1) of Directive 2001/42, an environmental assessment carried out under that directive is without prejudice to any requirements under Directive 85/337.

58 It follows that an environmental assessment carried out under Directive 85/337, when required by its provisions, is in addition to an assessment carried out under Directive 2001/42.

59 Similarly, an assessment of the effects on the environment carried out under Directive 85/337 is without prejudice to the specific requirements of Directive 2001/42 and cannot dispense with the obligation to carry out an environmental assessment pursuant to Directive 2001/42 in order to comply with the environmental aspects specific to that directive.

60 As assessments carried out pursuant to Directive 2001/42 and Directive 85/337 differ for a number of reasons, it is necessary to comply with the requirements of both of those directives concurrently.

61 In that regard, it should be pointed out that, on the assumption that a coordinated or joint procedure was provided for by the Member State concerned, it is clear from Article 11(2) of Directive 2001/42 that, in the context of such a procedure, it is mandatory to verify that an environmental assessment has been carried out in accordance with the dispositions of the different directives in question.

62 Under those circumstances, it is for the referring court to assess whether the assessment which, in the main proceedings, was carried out pursuant to Directive 85/337 may be considered to be the result of a coordinated or joint procedure and whether it already complies with all the requirements of Directive 2001/42. If that were to be the case, there would then no longer be an obligation to carry out a new assessment pursuant to Directive 2001/42.

63 In light of those considerations, the answer to the third, fourth and fifth questions is that Article 11(1) and (2) of Directive 2001/42 must be interpreted as meaning that an environmental assessment carried out under Directive 85/337 does not dispense with the obligation to carry out such an assessment under Directive 2001/42. However, it is for the referring court to assess whether an assessment which has been carried out pursuant to Directive 85/337 may be considered to be the result of a coordinated or joint procedure and whether it already complies with all the requirements of Directive 2001/42. If that were to be the case, there would then no longer be an obligation to carry out a new assessment pursuant to Directive 2001/42.

Regards

Pat