Dear Sir,

Re. the UK 2013 Draft NIR.

Please find below comments in respect of Article 7 of the Draft Report.

1. In the 2011 and 2013 UK Aarhus Implementation Reports the lists of UK legislation which implements Article 7 are identical. It is clear from the ratified findings of the Committee on complaint ref. ACCC/C/2012/68 that there has not been compliance with Article 7. Therefore this should be reflected in the new report by addressing how compliance will be both initiated and undertaken.

2. In essence the draft report is ignoring the ruling of the Compliance Committee on ACCC/C/2012/58. If compliance with Article 7 is to be achieved, there will be a need to comply with the provisions identified in the previous Implementation Reports, which implement Article 7 in the UK legal context. This means the UK NREAP should have undergone compliance with those legal provisions before its adoption, i.e. an SEA. The UK did two things, adopted the NREAP without ensuring compliance with the Convention's Article 7. Adopted the NREAP without complying with the EU's and UK legislation on SEA. The latter failure will now need to be addressed by court action in the UK.

3.Re. **XXI.**

OBSTACLES ENCOUNTERED IN THE IMPLEMENTATION OF ARTICLE 7

74. No obstacles have been encountered.

An incorrect statement as, in company with relevance to Article 9(4) there has been no reference to the current legal action in the European Courts of Justice against the UK in relation to the cost of access to the Courts, which is an issue for all citizens adversely affected by wind farm installations.

4. **The position of the UK re. claims made & missing information relevant to the ACCC ratified ruling.**

The UK Energy Research Centre's Technology and Policy Assessment is a public authority in the sense of access for information legislation and was set up to inform decision-making processes and address key controversies in the energy field. Its 2006 report on the costs and impacts of intermittent generation on the UK grid was limited in scope as it contained no measured data but it did acknowledge that:

'Wind turbines do not displace fossil generating capacity on a one-for-one basis. But it is unambiguously the case that wind energy can displace fossil fuel-based generation, reducing both fuel use and carbon dioxide emissions. **Wind generation does mean that the output of fossil fuel-plant needs to be adjusted more frequently to cope with fluctuations in output. Some power stations will be operated below their maximum output to facilitate this, and extra system balancing reserves will be needed. Efficiency may be reduced as a result.**

The degree to which efficiency may be reduced is yet to be agreed but, despite advice to the UK authorities that fossil-fuelled generating capacity is *not* displaced on a one-to-one basis, **that is exactly what the UK claims in official documentation.**

DECC has failed to provide access to information about the assumptions underlying its computer modelling of wind-generated input, citing instead *Implementation of the EU's 2020 Renewable Target in the UK Electricity Sector: Renewable Support Schemes*. This does not document how the increased emissions from thermal power plant were assessed (if indeed they were) though it does have a lengthy section on increased balancing costs. However, it states at one point that:
It should be noted that determining exactly which [power] plant will provide these extra services was outside of the scope of this study; the balancing costs reported should be seen as approximate only.

This is a clear admission of a paucity or absence of the data needed to assess the situation reliably. As noted, providing a 'qualitative assessment' only (in other words, an opinion) of expected emissions cuts and fossil fuel savings was justified by the suggestion that the competent authority was not required to generate data where 'none already exists' and obliged only to 'include the information that may reasonably be required'. This again clearly fails to comply with Article 7 of the Convention, which stipulates that the authorities are required to provide ' **necessary information**.' The UK has been found to be in non-compliance with Article 7.

Given that they form the justification for the current rapid expansion in the UK's heavily-subsidised, wind generated energy programme, that information must include the basis for claims made for emissions savings.

5. In respect of Compliance with the Convention, there is a need to recognise the relevance of the(Law of the Environment) Article on Aarhus Convention Compliance mechanisms see:-
• http://doku.cac.at/rdu-2011-04_136_thomas_alge.pdf

Translation of a relevant section below.
<u>D: Legal Effect and Conclusions</u>

The Compliance Mechanism of the Aarhus Convention is **an effective instrument**. So far all States have, with the exception of the Ukraine and Turkmenistan (which have to battle with internal political problems), followed the decisions of the Compliance Committee. Indeed while these process and the decisions are not formally legally comparable with those of the European Court of Human Rights, they come however to considerable legal significance. The justified determinations of noncompliance and the recommendations are of binding International Law by means of the Treaty State conference (*Meeting of the Parties*). Through the censure of this decision by the findings and recommendations of the Aarhus Convention Compliance Committee (ACCC) this then comes to **considerable legal significance**.

As the EU is also a Treaty Party to the Convention, breaches of the Convention, which has been transposed through Community law, are regularly also breaches of Community

law (the so called '**Mixed Agreement**'1). As a result the Jurisprudence of the European Court of Justice comes to fore, whereby the decisions of the organs of Treaty application have the same legal quality as the treaties to which they implement and these have immediate effect2 . *If it under consideration of its wording and in consideration of the object of the nature of the Treaty there is a clear and precise obligation contained, whose fulfilment or its effect is not dependent on enactment of a further Act.* Convincing in this regard was a previous decision of the Aarhus Convention Compliance Committee (ACCC) against the EU. The situation was the same subject matter, as in the process against Lithuania. The plaintiff brought forward that the Integrated Pollution Prevention and Control (IPPC) Directive did not correctly transpose all the requirements of the Aarhus Convention. The ACCC followed in the decision the argument of the EU, whereby Lithuania is obligated to supplement or correctly apply the requirements of the Convention that were missing in the IPPC Directive by means of interpretations compliant with International Law and that these would also be possible in a concrete case3.

In the meantime a considerable legal practice of the ACCC has been developed. Thereby it is becoming clearer and clearer how the provisions of the Convention are interpreted. **This is of importance for the National Courts and the authorities**. The decisions of the ACCC and the (unanimous) adoption by the Meeting of the Parties (MoP) are central manifest forms of practice of International Law, which for the legal continual forming of Treaty design are of importance and in an individual case can even alter formal Treaties. In a legal complaint process in relation to the A5 North Autobahn, the plaintiff had complained of a breach against Article 9(4) of the Convention (suspensive effects) and this was related to decisions of the ACCC. The Austrian High Court (VwGH) did not indeed in its judgement expressly go into these, however it investigated if the Austrian legal acts corresponded to the requirements of the Convention. From this I conclude, that not only in Austria there will in the future be a multitude of legal cases, in which the interpretations of the ACCC will play a role.'

6. Also of relevance are:- Aarhus Convention Compliance Committees Decisions within the EU legal order.

In order to properly identify possible deficits of the EIA Directive, one has to take into account the Case Law of the Aarhus Convention Compliance Committee (ACCC). The case law of the ACCC has the same legal status in the EU legal order as the Convention itself and thus must be observed when implementing the Aarhus Convention:17

According to the case law of the ECJ, a provision of an international treaty is directly applicable " *when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure*"18. The same test applies to decisions of an institution established by an international treaty,19 such as the ACCC.20 The "findings and recommendations" of the ACCC, however, very often contain clear and precise obligations and/or criteria to be met by the Parties. Provisions of EU law

thus can be directly tested on their consistency with the case-law of the ACCC and, if they contravene the obligations set out by the ACCC, they can be annulled by the ECJ (or are, at least, not applicable, since the principle of supremacy of EU law also applies to the – in relation to the EIAD higher-ranking – Aarhus Convention).

Yours sincerely,

Mrs. V.C.K. Metcalfe. For Avich & Kilchrenan Community Council.