

**Response to the Party's First Progress Report on ACCC/M/2017/3 (European Union)**  
**From the Communicant Pat Swords on C54**  
**22<sup>nd</sup> October 2018**

Dear Ms Marshall

In relation to the EU's First Progress Report, I would appreciate raising the following with respect to the requirements of Decision V/9g:

**I: Evaluation of NREAPs**

In this regard, I would first like to reiterate the position of my short correspondence on the 26<sup>th</sup> June 2018 namely: Paragraphs 74 and 75 of the Committee's Second Progress Review of the 24th February 2017 were very clear, in particular as to what should be replied to and that the date set for reply by the Party concerned was the 1st April. The Party concerned has not answered those written questions.

I would also once again point out the Compliance Committee's Report to the 6<sup>th</sup> Meeting of the Parties on compliance by the European Union with its obligations under the Convention (ECE/MP.PP/2017/39) of 7/6/2017, which was very specific:<sup>1</sup>

- *40. In the light of the statement by the Party concerned during the audio-conference at the Committee's fifty-second meeting that, following its assessment of the information provided by member States, it may open infringement proceedings to enforce the requirements of article 7 of the Convention, the Committee in its second progress review invited the Party concerned to:
  - *Provide more detailed information regarding its assessment of the public participation carried out by each member State based on the information provided in each 2015 NREAP progress report, and*
  - *Explain, for each member State whose information on their implementation of article 7 was either insufficient or revealed a possible failure to carry out public participation that fully met the requirements of article 7, the specific measures it proposes to take with respect to that member State**
- *41 The Committee requested the Party concerned to provide the above information by 1 April 2017.*
- *42. The Committee expresses its concern that the Party concerned has entirely failed to respond to the Committee's questions as set out in paragraph 40 above. In its further information provided on 16 May 2017, the Party concerned provided examples of four member States that had provided for public participation in the preparation of certain measures in the field of renewable energy, apparently as examples of good practice by its member States.<sup>23</sup> However, the Party concerned did not reply at all to the Committee's actual questions (see para. 40 above). As noted in paragraph 39 above, the Party concerned itself has stated that ten member States had entirely failed to report on public participation in the preparation of their NREAPs and a further six member States had provided insufficient information. In its second progress review, the Committee thus asked the*

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<sup>1</sup> [https://www.unece.org/fileadmin/DAM/env/pp/mop6/English/ECE\\_MP.PP\\_2017\\_39\\_E.pdf](https://www.unece.org/fileadmin/DAM/env/pp/mop6/English/ECE_MP.PP_2017_39_E.pdf)

*Party concerned to explain the specific measures it proposes to take with respect to each of these sixteen member States. To date, the Party concerned has provided no information on this point. The Committee therefore finds that the Party concerned has not fulfilled the final sentence of paragraph 3 of decision V/9g either.*

It is very clear from the EU's first progress report on ACCC/M/2017/3 that they consider all of this to be completely and utterly irrelevant to them, which is demonstrating not only what can be considered an unprofessional and contemptuous attitude to the compliance proceedings, but also an equally unprofessional and contemptuous attitude to the rights of those which they continue to abuse. With regard to the latter, I would also reiterate my correspondence of 26<sup>th</sup> February 2018, which demonstrated that in compliance proceedings with the EU Ombudsman, the position of the EU Commission was made very clear:<sup>2</sup>

- *"... the Commission had considered in some detail Ireland's National Renewable Energy Action Plan, prepared under the Renewable Energy Directive. Whilst no formal SEA had been carried out for this plan, the Commission concluded that there was no reason to believe that insufficient public participation had taken place prior to its adoption".*

Clearly now at the UNECE compliance proceedings, this is the position the EU also expect to be adopted with respect to all Member States and not just Ireland.

I would also like to take this opportunity to update the Committee with respect to the requirement to amend current NREAPs. This was dealt with in some detail in compliance proceedings on Decision V/9g and summarised in the same Compliance Committee report to the 6<sup>th</sup> Meeting of the Parties:

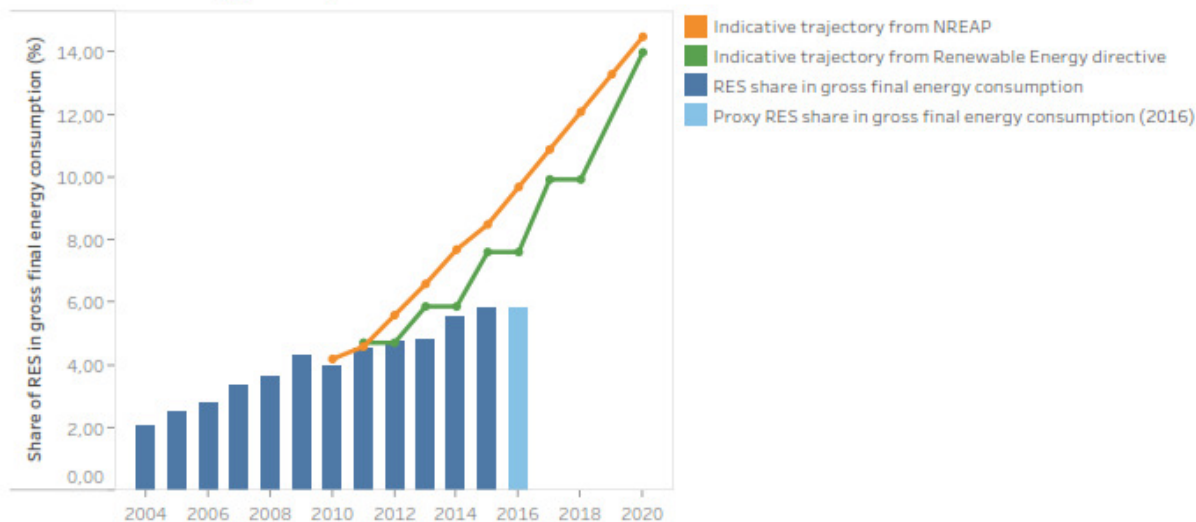
- *21. In accordance with article 4, paragraph 4 of the Renewable Energy Directive, "a member State whose share of energy from renewable sources fell below the indicative trajectory in the immediately preceding two-year period...shall submit an amended national renewable energy action plan to the Commission by 30 June of the following year..."<sup>2</sup> The Committee understands that, while two member States amended their NREAPs in 2013, no member States have amended their NREAPs since the adoption of decision V/9g and no member States are known to be currently doing so. However, article 4, paragraph 4, of the Renewable Energy Directive remains in force and will remain in force until such time as it is amended, repealed or superseded by new legislation. Therefore, even though no NREAPs have been amended since 2013, this does not preclude the possibility of amendments going forward. The Committee accordingly does not consider the fact that no NREAPs have to date been amended since the adoption of decision V/9g to remove the requirement in paragraph 3 of decision V/9g for the Party concerned to adopt a proper regulatory framework and/or clear instructions for implementing article 7 with respect to the adoption of NREAPs.*

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<sup>2</sup> "Decision in case 1689/2016/MDC on the Commission's failure to reply in a satisfactory manner to an infringement complaint against Ireland": <https://www.ombudsman.europa.eu/en/decision/en/74989>

The European Environment Agency has an internet portal entitled: “Country profiles - greenhouse gases and energy 2017”.<sup>3</sup> This is showing for the Netherlands the following data related to 2016:

**Figure 3: Progress towards targets regarding renewable energy sources (RES) consumption as a proportion of Netherlands’s energy consumption**



Sources: EC, 2017b; EEA, 2017j; EU, 2009d; Eurostat, 2017c and 2017d.

Clearly according to Article 4 paragraph 4 of Directive 2009/28/EC, the Netherlands should by this time in late 2018 have prepared an amended NREAP with public participation, which is in compliance with the requirements of the Convention.

The situation for Ireland is not a whole lot different, see similar graphics overleaf. The objective of the Irish NREAP, that the 16% overall renewable energy target would be primarily met by 40% renewable electricity, of which 90% of the infrastructure was to be wind energy, has simply hit economic, environmental, technical and legal reality, as it has ground to a halt. A position inherently recognised by the responsible Minister in a recent Oireachtas (Parliament) debate of 31<sup>st</sup> May 2018.<sup>4</sup>

- Overall, SEAI analysis shows that 10.6% of Ireland’s energy requirements in 2017 were met from renewable sources, with an expectation that Ireland will achieve at least 80% of its 16% renewable energy target by 2020.

Note: The Irish NREAP’s trajectory for 2017 was for 12.9% of energy to come from renewable sources.<sup>5</sup>

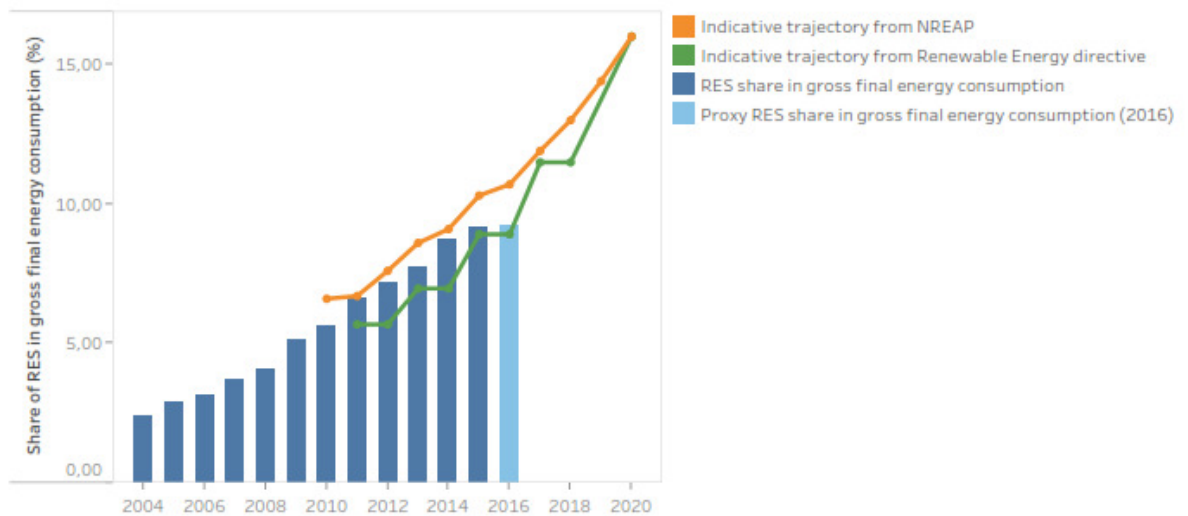
As the trajectories in the NREAPs get steeper as 2020 is approached, there are a number of Member States now struggling to meet targets, which were from outset ill-conceived and dysfunctional.

<sup>3</sup> <https://www.eea.europa.eu/themes/climate/trends-and-projections-in-europe/trends-and-projections-in-europe-2017/country-profiles-greenhouse-gases-and-energy>

<sup>4</sup> <https://www.oireachtas.ie/en/debates/question/2018-05-31/31/>

<sup>5</sup> See Table 3.2 of the Irish NREAP: [https://www.dccae.gov.ie/documents/The%20National%20Renewable%20Energy%20Action%20Plan%20\(PDF\).pdf](https://www.dccae.gov.ie/documents/The%20National%20Renewable%20Energy%20Action%20Plan%20(PDF).pdf)

**Figure 3: Progress towards targets regarding renewable energy sources (RES) consumption as a proportion of Ireland's energy consumption**



Sources: EC, 2017b; EEA, 2017j; EU, 2009d; Eurostat, 2017c and 2017d.

## **II. The adoption of new NREAPs post-2020**

While the position of the EU with respect to Articles 10 and 10a of their proposal for a Regulation on the Governance of the Energy Union is an improvement on the position they adopted with Directive 2009/28/EC, I would respectfully point out that it does not comply with the requirements of Decision V/9g, namely:

- *This would entail that the Party concerned ensure that the arrangements for public participation in its member States are transparent and fair and that within those arrangements the necessary information is provided to the public. In addition, such a regulatory framework and/or clear instructions must ensure that the requirements of article 6, paragraphs 3, 4 and 8, of the Convention are met, including reasonable timeframes, allowing sufficient time for informing the public and for the public to prepare and participate effectively, **allowing for early public participation when all options are open**, and ensuring that due account is taken of the outcome of the public participation. [Emphasis added in bold]*

When one actually goes and reads the proposed Regulation<sup>6</sup>, which is lengthy, one starts to realise as to how many key aspects are already in effect decided, such as is documented by Recital (5):

- *"...at least 40% cut in economy wide greenhouse gas ("GHG") emissions, at least 27% improvement in energy efficiency with a view to a level of 30%, at least 27% for the share of renewable energy consumed in the Union, and at least 15% for electricity interconnection".*

So clearly what we have here is a situation of what is described so well in the UNECE Maastricht Recommendations of tiered decision making, in particular that in relation to Article 6(4) of the Convention:<sup>7</sup>

<sup>6</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2016:759:REV1>

- 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:*
  - *a: There should be at least one stage in the decision-making process when the public has the opportunity to participate effectively on whether the proposed activity should go ahead at all (the zero option)*
  - *c. Information about the decision-making in the earlier tiers should be available in order for the public to understand the justification of those earlier decisions — including the rejection of the zero option and other alternatives*

Recital (5) of the proposed Regulation demonstrates how the ‘zero option’ is effectively closed once this Regulation is adopted. With respect to the over 500 million inhabitants in the EU, it is worthwhile quoting below the introduction to the proposed Regulation, which states with respect to ‘Stakeholder consultations’:

- *The online survey received a total of 103 submissions with additional submissions by email, out of which 15 from Member States*

The requirement for effective public notice in public participation procedures requires an output to be achieved, rather than just going through procedures where online surveys are buried into the cavernous website of [www.europa.eu](http://www.europa.eu). In this regard see also Communication C96.

In an Irish context I would also point out that there is a requirement set by Government for Regulatory Impact Analysis<sup>8</sup>, which applies among others to:

- *Proposals for EU Directives and significant EU Regulations when they are published by the European Commission*

This form of Regulatory Impact Analysis includes a detailed analysis addressing not just costs and benefits, but also environmental impacts, and requires associated public participation. There is no doubt that this form of Regulatory Impact Analysis goes a long way to fulfilling the requirements of Article 7 of the Convention. The problem though is that Irish public authorities and Government authorities simply break their own rules and do not bother to complete such Regulatory Impact Analyses. This not only happened with the 2009/28/EC renewable energy Directive, but has happened again with this proposal for a Regulation on the Governance of the Energy Union.

If we consider the Oireachtas (Parliamentary) Joint Committee on Communications, Climate Action and Environment at their Meeting of 31st January 2017, the Proposal for a Regulation on the Governance of the Energy Union was discussed and it was recorded:<sup>9</sup>

- *It was agreed that this proposal warrants further scrutiny.*

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<sup>7</sup> [https://www.unece.org/fileadmin/DAM/env/pp/Publications/2015/1514364\\_E\\_web.pdf](https://www.unece.org/fileadmin/DAM/env/pp/Publications/2015/1514364_E_web.pdf)

<sup>8</sup> <https://publicspendingcode.per.gov.ie/conducting-a-regulatory-impact-assessment/>

<sup>9</sup> <http://www.ipex.eu/IPEXL-WEB/dossier/files/download/082dbcc55a4960d5015a5c93f28e010b.do>

- *It was also agreed that officials from the Department be invited to present their views on the proposal.*

At the same Committee's meeting of the 14<sup>th</sup> February 2017:<sup>10</sup>

- *It was agreed that this proposal warrants further scrutiny.*
- *It was also agreed that the views of the relevant stakeholders would be sought.*

At their meeting two weeks later on the 28<sup>th</sup> February 2017, the agreed decision was that:<sup>11</sup>

- *It was agreed that this proposal does not warrant further scrutiny.*
- *It was also agreed that there are no subsidiarity concerns with this proposal*

At no stage was it ever considered that that any form of impact assessment should be completed or the public engaged, despite the fact that it was clearly a very significant proposed Regulation, which would have major impacts on the Irish public and environment. Indeed, as the Oireachtas Committee's own website explains:<sup>12</sup>

- *The Oireachtas has responsibility for scrutiny of EU draft proposals, for proper transposition of EU legislation into Irish law and for holding the Government accountable for the decisions taken by Ministers at Council meetings. Much of the work in relation to EU Affairs is delegated by the Houses of the Oireachtas to the Oireachtas Committees.*

Obviously these Oireachtas Committees do not feel there is any benefit at all in preparing impact assessments and engaging the Irish public, when a quick rubber stamp will do when it comes to delegating such sovereignty in decision making to the EU. Therefore the Irish public were never involved in the public participation in the development of this proposal for a Regulation on Governance of the Energy Union, as neither the EU Commission nor their own Administration considering it remotely necessary.

It is also worthwhile considering further Point 78c of the Masstricht Recommendations, namely does sufficient information exist in relation to decisions at an earlier tier, such as the rejection of the zero option and other alternatives? In the Compliance Committee's Second Progress Review on Decision V/9g of 23<sup>rd</sup> February 2017 it is recorded:<sup>13</sup>

<sup>10</sup>[https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint\\_committee\\_on\\_communications\\_climate\\_action\\_and\\_environment/euScrutiny/2017/2017-02-14\\_decision-list-for-schedule-a\\_en.pdf](https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_communications_climate_action_and_environment/euScrutiny/2017/2017-02-14_decision-list-for-schedule-a_en.pdf)

<sup>11</sup>[https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint\\_committee\\_on\\_communications\\_climate\\_action\\_and\\_environment/euScrutiny/2017/2017-02-28\\_decision-list-for-schedule-a\\_en.pdf](https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_communications_climate_action_and_environment/euScrutiny/2017/2017-02-28_decision-list-for-schedule-a_en.pdf)

<sup>12</sup><https://www.oireachtas.ie/en/committees/32/communications-climate-action-and-environment/eu-scrutiny/>

<sup>13</sup>[https://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP5decisions/V.9g\\_EU/Second\\_progress\\_review\\_on\\_V.9g\\_EU\\_final.pdf](https://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP5decisions/V.9g_EU/Second_progress_review_on_V.9g_EU_final.pdf)

- 27. *The communicant queried why the Commission, in its Consultation Questionnaire for the “Preparation of a new renewable energy directive for the period after 2020” published on 19 November 2015, was only at the end of 2015 asking the public to “identify and ideally also quantify the direct and indirect costs and benefits such as macroeconomic effects, competitiveness effects, innovation, cost and cost reductions, environmental and health effects of the [Renewable Energy Directive]”. The communicant submitted that the European Union and member States should have had this information assessed and available to justify the decision-making that led to the adoption of the Renewable Energy Directive in April 2009 and the NREAPs in June 2010. In contrast, the NREAP’s template’s section 5.3 “Assessment of the impacts” was expressly stated to be an optional table in which to set out the estimated costs and benefits of the renewable energy policy support measures. In keeping with its optional nature, nineteen member States left the table blank while others inserted little or no information. The communicant submitted that the Party concerned’s proposed plan of action in paragraph 15(b) above was thus completely unnecessary, because the information relating to the inadequacy of public participation was already available to them.*

It is not difficult to calculate that the investment to date in the EU on wind turbines and photovoltaic solar has exceeded €1,000 billion (€1 trillion), for which one would expect that there would be a quantified analysis of what has actually been achieved. Plus that for a 27% target there would also be such a similar quantified analysis. In this regard there is an Impact Statement accompanying the proposed Regulation for the Energy Union, the primary document being the Commission Staff Working Document Impact Assessment SWD(2016) 394 final.<sup>14</sup> Note: This document is only available in English, which is a language not available to the majority of the EU’s 500 million citizens. As regards the criteria highlighted previously with respect to Recital (5) of the Regulation, nowhere does it discuss the ‘zero option’ or any alternatives to these objectives. The only alternatives discussed are different administrative approaches to achieving the same objectives.

It is also difficult to determine the current status of the proposed new renewable energy Directive, but a Commission Staff Working Document Impact Assessment SWD(2016) 418 final does exist,<sup>15</sup> but again only available in English. As regards the simple question as to why do we need all this massive investment in renewable energy, what are the benefits, what are the impacts and what are the alternatives? Unfortunately one won’t find that answer in this document other than that a political decision has already been taken and the only purpose of this document is to discuss possible ways of delivering it.

Sad to say history repeats itself, the fact that something was potentially technically realisable sufficed for the ideological decision making that went on behind the Iron Curtain, which resulted in a mess being left behind there. Factually the weather just continues to be the weather, which doesn’t interfere with us having rewarding lives. That there is an impending weather related catastrophe was always wild speculation and with each passing year, it is clearer how speculative that was. Even for those who choose to believe rather than assess, as this agenda has now become an

<sup>14</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1540235848078&uri=CELEX:52016SC0394>

<sup>15</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1540238092571&uri=CELEX:52016SC0418>

effective quasi-religion, nowhere in this appalling bureaucratic mumbo jumbo of the EU Commission can one remotely decipher what this renewable programme is actually going to tangibly deliver, such as a 0.00x °C alleged decrease in temperatures. In short it's just a 'blank cheque' / 'carte blanche' to spend hundreds of billions with enormous environmental impacts. As to the legality of this, well this depends on whether the Party is a law on to itself or whether the 'rule of law' actually exists and is enforceable.

### **III Comments on the Party's Position on C32**

From a legal perspective, the Renewable Energy Directive 2009/28/EC by-passed the requirements of the Aarhus Convention, as Point 34 of the Committee's Second Progress Review clarified:

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

Until such time as EU citizens can access the Court of Justice of the European Union to enforce such matters, the above are completely empty words. I completely fail to understand why such studies, etc., now proposed by the Party, are required to transpose the simple requirements of Article 9(3) of the Convention, namely:

- *... members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.*

After all the EU Commission has already published a "Handbook on the implementation of EU environmental legislation"<sup>16</sup>. It being no mystery with respect to the EU, as to what its 'national law in relation to the environment' comprises of. Furthermore, when the EU Commission wants to implement its renewable energy programmes, it can adopt a proposal in 2008<sup>17</sup>, the associated Directive in 2009 and the NREAPs of the Member States by mid-2010. So I fail to see from the Party's progress report, as to why it is taking so long to transpose the above legislative requirements, which was in theory adopted as Community Law in February 2005 when the Party ratified the Aarhus Convention. Neither do I see as to why an update of Regulation No. 1367/2006<sup>18</sup> will transpose the requirements of Article 9(3) above, given that this Regulation is effectively limited in scope to access to justice regarding plans and programmes related to the environment and not the much wider aspects of the 'national law related to the environment'.

Regards  
Pat Swords

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<sup>16</sup> <https://publications.europa.eu/en/publication-detail/-/publication/2b832b9d-9aea-11e6-868c-01aa75ed71a1>

<sup>17</sup> [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_.2009.077.01.0043.01.ENG&toc=OJ:C:2009:077:TOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2009.077.01.0043.01.ENG&toc=OJ:C:2009:077:TOC)

<sup>18</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006R1367>