EU Commission's draft Plan of Action on Decision VII/8f –
Response by Communicant of ACCC/C/2010/54 and ACCC/C/2013/96

Pat Swords[1] - 17 April 2022

Contents

[1] **Biography:** Pat Swords is a Fellow of the Institution of Chemical Engineers, a Professional Process Safety Engineer and a Chartered Environmentalist. He has more than thirty years' of experience in the design and regulatory compliance of industrial projects in Europe, USA, Asia and the Middle East covering such sectors as chemicals, pharmaceuticals, food and energy. Between 2000 and 2016, he was extensively involved as a consultant on EU technical aid projects in Central and Eastern Europe implementing the industrial pollution control and control of major accidents legislation.

1.1 Background to Decision VII/8f

On the 29 March 2022, the EU Commission published its draft Plan of Action for 'Decision VII/8f concerning compliance by the European Union (EU) with the UNECE Aarhus Convention', with a four-week period for written comment by the Communicants and Observers.[2] The key obligations of Decision VII/8f comprised:

- *Reaffirms its decision V/9g and, in particular, requests the Party concerned, as a matter of urgency:*
- *(a) To provide the Committee with evidence that it has adopted a proper regulatory framework and/or clear instructions for implementing article 7 of the Convention with respect to the adoption of National Energy and Climate Plans, and, in particular, to take the necessary legislative, regulatory or practical measures to:*
    - *(i) 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;*
    - *(ii) Ensure that the adopted regulatory framework and/or clear instructions ensure that the requirements of article 6 (4) and (8) of the Convention are met, including allowing for early public participation when all options are open, and ensuring that due account is taken of the outcome of the public participation;*
- *(b) To adapt the manner in which it evaluates National Energy and Climate Plans accordingly;*

It is useful therefore, as the completed in the next sections, to break the above requirements into the following 'tasks' and then consider in turn how the draft Plan of Action complies with them in the context of the "*necessary legislative, regulatory or practical measures*":

- Provision of the necessary information to the public.
- Early public participation when all options are open.
- Ensuring due account is taken of the outcome of the public participation.

As regards the section of Decision VII/8f addressing Communication ACCC/C/2013/96 and the Projects of Common Interest, the Decision stated:

- *Recommends that the Party concerned take the necessary legislative, regulatory or other measures and practical arrangements to ensure that in public participation procedures within the scope of article 7 of the Convention carried out under the Trans-European Networks for Energy Regulation, or any superseding legislation:*
    - *(a) The main consultation documents, including the notification to the public, are provided to the public in all the official languages of the Party concerned;*
    - *(b) Due account of the outcomes of the public participation is taken, in a transparent and traceable way, in the decision-making;*

[2] https://ec.europa.eu/environment/aarhus/pdf/Decision%20VII.8f%20-%20EU%20plan%20of%20action.pdf

1.2 National Energy and Climate Plans (NECPs)

The National Renewable Energy Action Plans (NREAPs), which were adopted in 2010 and ran until 2020, were the subject of the original Decision V/9g of non-compliance by the EU in 2014. Their adoption occurring without environmental assessment and public participation, in which their Section 5.3 on 'Impacts' comprised solely of the Table below.

5.3. Assessment of the impacts (Optional)

Table 13

Estimated costs and benefits of the renewable energy policy support measures

Measure	***Expected renewable energy use (ktoe)***	***Expected cost (in EUR) — indicate time frame***	***Expected GHG reduction by gas (t/year)***	***Expected job creation***

Nineteen Member States left the above blank, while the others provided little or no information. In their 'Second progress review of the implementation of decision V/9g on compliance by the European Union with its obligations under the Convention' the Compliance Committee recorded.[3]

- *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 lead to the adoption of the Renewable Energy Directive in April 2009 and the NREAPs in June 2010.*

Regulation (EU) 2018/1999 'on the governance of the energy union and climate action' requires in its Article 3(1) that each Member State submit its final NECP for the 2021-2030 period by 31 December 2019, and subsequently by 1 January 29 and every ten years thereafter.[4] These plans are required "*to contain the elements set out in"* Article 3(2) and Annex I of the Regulation, while the objectives of these NECPs is essentially defined in Article 4 of the Regulation, which includes;

[3] https://unece.org/DAM/env/pp/compliance/MoP5decisions/V.9g_EU/Second_progress_review_on_V.9g_EU_final.pdf

[4] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02018R1999-20210729

- *Member State's binding national target for greenhouse gas emissions and the annual binding national limits pursuant to Regulation (EU) 2018/842;*

- *.. the Union's binding target of at least 32 % renewable energy in 2030 as referred to in Article 3 of Directive (EU) 2018/2001, ….*

There is zero reference in these 'elements' of the Governance Regulation to the impact of these measures on the environment, the necessary mitigation measures or the alternatives to the plan contributing usefully to the objectives above. Neither do the NECPs contain any such information.[5]

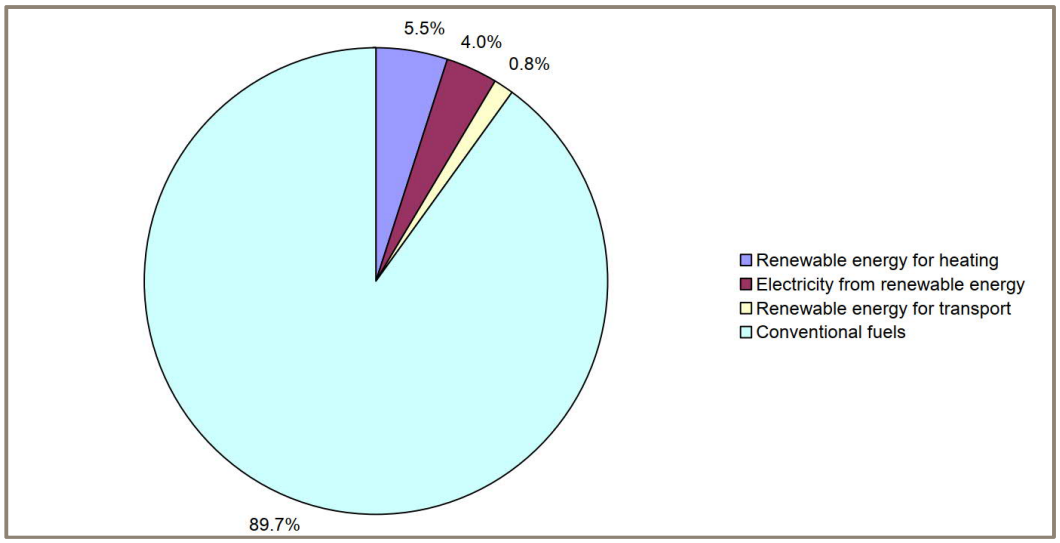

Figure 1: EU-27 breakdown of gross final energy consumption in 2008[6]

Therefore, the EU has adopted and implemented successive plans, namely the NREAPs for the period 2010 to 2020 and the NECPs for the period 2021 to 2030, to force in two decades, an increase in renewable energy from less than 10% to greater than 32%, without first evaluating:

- What it would cost, either financially or environmentally;
- What its impacts would be and how they could be mitigated;
- What it would deliver other than a nominal political target;
- What alternatives could be usefully deployed at potentially lower costs and impacts;

As the history books will no doubt record, the EU administration is ridiculous in the manner in which it is essentially 'flying blind' on its energy strategy, but this has to be addressed in the context that the EU is also acting highly unlawful with respect to its International legal commitments and own legal structure.

[5] The current legally binding NECPs are available at: https://energy.ec.europa.eu/topics/energy-strategy/national-energy-and-climate-plans-necps_en#final-necps

[6] https://ec.europa.eu/eurostat/web/products-statistics-in-focus/-/KS-SF-10-056

1.3 Responsibilities of the EU

The EU as a Regional Economic Integration Organisation is a unique structure and many of the Communications at UNECE address the complex relationship between it and its Member States. In particular, as to where responsibilities for legal compliance lie. It is therefore useful to point out that the Governance Regulation (EU) 2018/1999 is an EU binding legislative act to be applied in its entirety across the EU. As Recital (56) of the Regulation states:

- *Should the ambition of integrated national energy and climate plans or their updates be insufficient for the collective achievement of the Energy Union objectives and, for the first period, in particular the 2030 targets for renewable energy and energy efficiency, the Commission should take measures at Union level in order to ensure the collective achievement of those objectives and targets (thereby closing any 'ambition gap').*

The EU Commission is therefore empowered to take such enforcement measures as it sees fit, including financial transfers, if a Member States fails to implement the objectives of these NECPs. As it states in the first line of Article 1 of the Governance Regulation on 'Subject matter and scope': "*This Regulation establishes a governance mechanism*". That governance rests with the EU in that while the Member State are required under Article 3 to "*notify to the Commission an integrated national energy and climate plan*", the content of the plan (Article 3), its mandatory objectives (Article 4), and the assessment of the adequacy of the plan (see Article 13), remains with the EU.

It is therefore concerning to read in this draft Plan of Action, with respect to "*Outline of the steps necessary to implement the proposed measures*":

- *The Commission will remind that Member States are themselves parties to the Aarhus Convention and therefore committed to comply with relevant provisions concerning transparent and fair public consultations, including providing the necessary information to the public at early stage.*

While the EU can delegate certain provisions of its administrative structure to be completed by its Member State, the responsibility for ensuring the fulfilment of the necessary results rests with the EU and not the Member States. Decision V/9g made this clear, as reaffirmed by Decision VII/8f in that the EU is required to provide:

- *(…) evidence that it has adopted a proper regulatory framework and/or clear instructions for implementing article 7 of the Convention with respect to the adoption of National Energy and Climate Plans, and, in particular, to take the necessary legislative, regulatory or practical measures to: (…)*

As the same section of the draft Plan of Action goes on to states:

- *The Commission will engage with Member States to assist them with due preparation of their draft NECPs.*

'Reminding' and 'engaging', which is the sum total of the level of 'Governance' the EU is proposing to leverage to ensure that these draft NECPs are compliant with the requirements of the Aarhus Convention, does not fulfil the requirements of taking "*the necessary legislative, regulatory or practical measures*". Indeed, why wouldn't the Member States simply prepare a draft updated NECP to the same format as already

completed in December 2019 and assessed then by the EU Commission, as compliant with the requirements of Regulation (EU) 2018/1999? Are there any other "*legislative, regulatory or practical measures*", which would require them to do otherwise, as ensured and enforced by the EU?

In this regard, it is necessary to highlight the final part of Decision V/9g,[7] while noting that Decision VII/8f "*Reaffirms its decision V/9g*":

- *(c) 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 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;*

Where Article 3(1) of the Convention, as adopted into EU law by Decision 2005/370EC,[8] requires that:

- *Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.*

If we consider in turn the above "*necessary legislative, regulatory and other measures, (…), as well as proper enforcement measures*" in the context of the EU's draft Plan of Action:

- *"(…) the necessary legislative, regulatory (…)"*: The only EU legislative / regulatory act, mentioned in the draft Plan of Action, is the Governance Regulation (EU) 2018/1999. The EU has a considerable body of environmental legislation, some of which is specifically relevant to the adoption of these NECPs, as will be clarified in the next section of this 'Response'. However, as these EU legislative measures were omitted from the draft Plan of Action, one can only conclude, that the EU Commission has decided that they are not "*necessary*" to implement "*the provisions of this Convention*".

- *"(…) other measures, (…)":* In this regard, the draft Action Plan limits itself to the EU Commission reminding the Member States that they are Parties to the Convention and a sole commitment *"to assist Member States with due preparation of their draft NECPs".*

- *"(…) as well as proper enforcement measures, (…)"*. The only EU legislative commitment in the draft Plan of Action is the Governance Regulation (EU) 2018/1999, in which the only enforcement applicable is in circumstances where "*the ambition of integrated national energy and climate plans or their updates be insufficient for the collective achievement of the Energy Union*

[7] https://unece.org/DAM/env/pp/mop5/Documents/Post_session_docs/Decision_excerpts_in_English/Decision_V_9g_on_compliance_by_the_European_Union.pdf

[8] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32005D0370

objectives". This being a criterion, which has nothing to do with the implementation of "*the provisions of this Convention".*

The rational conclusion being therefore that **the draft Plan of Action does not fulfil Article 3(1) of the Convention and hence Decision V/9g and therefore Decision VII/8f.** While there is unfortunately, when the wider legal context below is considered, clear indication that the EU Commission, with this draft Plan of Action, is actively seeking to circumvent its own internal legal framework and commitments in International law to UNECE.

1.4 EU's own Internal Legal Framework and Commitments in International Law to UNECE

As highlighted above, the EU has a considerable body of environmental legislation, some of which is specifically relevant to the adoption of these NECPs. In particular, in June 2001 the EU adopted Directive 2001/42/EC 'on the assessment of the effects of certain plans and programmes on the environment', the so called 'Strategic Environmental Assessment' (SEA) Directive. The Member States being required to bring *"into force the laws, regulations and administrative provisions necessary to comply with this Directive before 21 July 2004"*. As Article 4 of this SEA Directive confirms:

- *The environmental assessment referred to in Article 3 shall be carried out during the preparation of a plan or programme and before its adoption or submission to the legislative procedure.*

Where it is reasonable to conclude that the notification of an NECP to the Commission, in order to fulfil the specific requirements of the Governance Regulation (EU) 2018/1999, is a "*submission to the legislative procedure*". Furthermore, Article 3(2) of the SEA Directive specifies that:

- *An environmental assessment shall be carried out for all plans and programmes, (a) which are prepared for, (…), energy, (….) and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC.*

Where Directive 85/337/EEC is the original Environmental Impact Assessment Directive, which in its current consolidated format includes in its Annex II:[9]

- *3. Energy Industry. (…) (b) Industrial installations for carrying gas, steam and hot water; transmission of electrical energy by overhead cables (projects not included in Annex I); (….) (i) Installations for the harnessing of wind power for energy production (wind farms);*

Annex I of the Governance Regulation (EU) 2018/1999 defines the elements to be contained in the NECPs. In particular, in its Part 1, Section 2 'National Objectives and Targets', Subsection 2.1.2 'Renewable energy':

- *iii. Estimated trajectories by renewable energy technology that the Member State projects to use to achieve the overall and sectoral trajectories for renewable energy from 2021 to 2030, including expected total gross final*

[9] https://ec.europa.eu/environment/eia/pdf/EIA_Directive_informal.pdf

energy consumption per technology and sector in Mtoe ***and total planned installed capacity*** *(divided by new capacity and repowering) per technology and sector in MW* [emphasis added in bold]

While Annex I, Part 2, Section '2. Energy balances and indicators', subsection '2.2 Electricity and heat' requires itemisation of:

- *(…) (4) Capacity electricity generation by source, including retirements and new investment [MW]. (7) Cross-border interconnection capacities for gas and electricity [Definition for electricity in line with outcome of ongoing discussions on basis for 15 % interconnection target] and their projected usage rates.*

It is therefore no surprise, that examination of these Member State NECPs, prepared to the above standard template, demonstrates how they itemise future wind energy generation and electricity grid expansions. These being projects falling with the scope of Annex I and II of the Environmental Impact Assessment Directive. For example, the already adopted Irish 'National Energy & Climate Plan 2021-2030' itemises the following capacities of renewable energy to be installed, where an average wind turbine size is 2 MW:[10]

Renewable Electricity-Installed Capacities (MW)												
	2018	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2040
Hydro	234	234	234	234	234	234	234	234	234	234	234	234
Biodegradable Municipal Solid Waste	39	39	39	39	39	39	39	39	39	39	39	39
Biogas	24	24	24	24	24	24	24	24	24	24	24	24
Biomass CHP	10	60	60	60	60	60	60	60	60	60	60	60
Biomass Co-Firing	51	153	153	153	153	213	213	213	355	355	355	0
Onshore Wind	3572	4359	4544	4728	4912	5097	5281	5465	5650	5834	6018	8465
Offshore Wind	25	25	25	247	469	691	913	1134	1356	1578	1800	3300
Solar PV	10	124	197	271	286	300	490	680	870	1060	1250	1750

Table 6 of Irish NECP: Trajectories by renewable energy technology

As to whether these NECPs also "*set the framework for future development consent*" for such projects as wind energy and high voltage grids, the EU's own Court of Justice of the European Union (CJEU) has provided plenty of clarification on the interpretation of 'setting the framework'. For example, in Case C-290/15 - *D'Oultremont and Others.*[11]

- *47 As regards the argument that the order of 13 February 2014 does not set out a sufficiently complete framework concerning the wind power sector, it should be recalled that the assessment of the criteria laid down in Articles 2(a) and 3(2)(a) of Directive 2001/42 for determining whether an order, such*

[10] https://energy.ec.europa.eu/system/files/2020-08/ie_final_necp_main_en_0.pdf

[11] https://curia.europa.eu/juris/liste.jsf?num=C-290/15

as that at issue in the main proceedings, may come within that definition must in particular be carried out in the light of the objective of that directive, which, as is apparent from paragraph 39 of the present judgment, is to make decisions likely to have significant environmental effects subject to an environmental assessment.

- *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).*

- *49 Having regard to that objective, it should be noted that the notion of 'plans and programmes' relates to any measure which establishes, by defining rules and procedures for scrutiny applicable to the sector concerned, a significant body of criteria and detailed rules for the grant and implementation of one or more projects likely to have significant effects on the environment (see, to that effect, judgment of 11 September 2012, Nomarchiaki Aftodioikisi Aitoloakarnanias and Others, C-43/10, EU:C:2012:560, paragraph 95 and the case-law cited).*

The NECPs specify, for the period 2021 to 2030, the delivery of specific wind energy capacities and related high voltage lines and the supporting measures to do so. For example, Annex I, Part 1 Section 3 of the Governance Regulation (EU) 2018/1999 is entitled 'Policies and Measures' and requires itemisation, among others, of:

- *Specific measures on financial support, where applicable, including Union support and the use of Union funds, for the promotion of the production and use of energy from renewable sources in electricity (…). Specific measures to introduce one or more contact points, streamline administrative procedures, (…).*

Therefore, the NECPs, as the NREAPs before them, established *"a significant body of criteria"* for the grant and implementation of such projects and hence "*set the framework for future development consent".*

In its first National Implementation Report by European Community in 2008,[12] the EU stated in Section XIX 'Practical and/or other provisions made for the public to participate during the preparation of plans and programmes related to the environment pursuant to Article 7':

- *89. Public participation concerning plans and programmes relating to the environment prepared and adopted by Member States' authorities is ensured through the implementation and application of the following legislation: (…) (b) 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;*

The EU Commission has subsequently reaffirmed this position in subsequent reporting to the Meeting of the Parties on the Aarhus Convention, such as in 2021 National Implementation Report, as prepared by the same EU Commission staff

[12] https://unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_ir_2008_EC_e.pdf

members who prepared the draft Plan of Action, their response to Section XIX comprising:[13]

- *Public participation concerning plans and programmes relating to the environment by Member States' authorities is ensured through the following legislation: (…); - the Strategic Environmental Assessment Directive 2001/42/EC ('SEA-Directive');*

Section XXII on 'Further information on the practical application of the provisions of Article 7' elaborating on how:

- *In 2017 the Commission adopted the second implementation report of the SEA Directive[14]. The report shows that the Member States did not raise major implementation concerns. The report concluded that all Member States should pursue their implementation efforts to ensure compliance with the SEA Directive.*

Clearly the lack of an SEA for the adoption of first the NREAPs and then the NECPs is not a concern to the EU and its Member States, even though it is a breach of the EU's international legal commitments and its own domestic legal framework.

1.5 Provision of the Necessary Information to the Public

Article 7 of the Convention requires the provision of the "*necessary information to the public*", but not necessarily the preparation of a detailed environmental report complying with Annex I of the SEA Directive. UNECE's 'The Aarhus Convention: An Implementation Guide (second edition)' explains this in more detail, such as:[15]

- *Proper public participation procedures in the context of SEA are a valuable tool to assist in the implementation of article 7.*

While further clarifying in relation to the "*necessary information*":

- "*The word "necessary" should be understood in the context of effective participation".*

Furthermore, "*In planning and programme development, the information and documentation developed would normally differ from that specified in article 6, paragraph 6. Though the differences between decisions on specific activities, plans and programmes should be taken into account if applying this paragraph, mutatis mutandis, paragraph 6 may still serve as a source of inspiration".* Where Article 6(6) of the Convention includes:[16]

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[13] https://ec.europa.eu/environment/aarhus/pdf/1_EN_ACT_part1_v3.pdf

[14] COM (2017) 234, 15.05.2017.: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2017:234:FIN

[15] https://unece.org/environment-policy/publications/aarhus-convention-implementation-guide-second-edition

[16] https://unece.org/DAM/env/pp/documents/cep43e.pdf

- *(…) (b) A description of the significant effects of the proposed activity on the environment; (c) A description of the measures envisaged to prevent and/or reduce the effects, including emissions; (…); (e) An outline of the main alternatives studied by the applicant;*

In its findings and recommendations on Communication ACCC/C/2014/100 of April 2019,[17] as noted by the Seventh Meeting of the Parties in its Decision VII/8 'General issues of compliance',[18] the Compliance Committee further elaborated:

- *90. An important difference between article 6 and article 7 is that article 6 covers specific activities commonly considered as those "which may have a significant effect on the environment", while article 7 relates to plans and programmes "relating to the environment".*

- *91. Specific activities "which may have a significant effect on the environment" would normally be required by national law to undergo some form of environmental impact assessment. Hence, article 6 (6) refers to information typically provided in the process of environmental assessment, such as a description of "the significant effects of the proposed activity on the environment" or of "the measures envisaged to prevent and/or reduce the effects".*

- *92. The concept of plans and programmes "relating to the environment" is much broader and covers not only plans and programmes "which may have a significant effect on the environment" but also those which may have an effect on the environment without the effect being "significant" and those plans or programmes intended to promote environmental protection. Plans and programmes "which may have a significant effect on the environment" would normally be required under national law to undergo some form of strategic environmental assessment and for these plans and programmes the requirements of article 6 (6) could be applied mutatis mutandis. By contrast, for plans and programmes relating to the environment but not subject to strategic environmental assessment, in particular those intended to promote environmental protection (for example, an environmental education programme or an environmental inspection plan), some of the information listed in subparagraphs (a)–(f) of article 6 (6) may not be relevant.*

- *93. The Committee considers that some of the requirements included in article 6 (6) should nonetheless be used as guidance as to what constitute elements of the obligation under article 7 to provide the public with "the necessary information". The first element is the obligation to provide "all information relevant to the decision-making … that is available at the time of the public participation procedure". This would include, inter alia, the "main reports and advice issued to the public authority" available at the time when the public is informed in accordance with article 6 (2) (see article 6 (6) (f)). It would also include any available information on the effects of the proposed plan or programme on the environment (see article 6 (6) (b)). A second element is the obligation to provide an "outline of the main alternatives studied by the applicant", which, in the case of plans and programmes, would mean those studied by the competent authority responsible for the preparation of the given plan or programme.*

[17] https://unece.org/fileadmin/DAM/env/pp/compliance/CC-64/ece.mp.pp.c1.2019.6.e.pdf

[18] https://unece.org/sites/default/files/2022-02/ECE_MP.PP_2021_2_Add.1_E_aec.pdf

- *94. In the light of the above observations, the Committee considers that the obligation in article 7 to provide "the necessary information to the public" includes requirements both: (….) (b) To make available to the public all information that is in the possession of the competent authorities and is relevant to the decision-making and is to be used for that purpose. The relevant information under category (b) would normally include the following information:*
    - *(i) The main reports and advice issued to the competent authority;*
    - *(ii) Any information regarding possible environmental consequences and cost benefit and other economic analyses and assumptions to be used in the decision making;*
    - *(iii) An outline of the main alternatives studied by the competent authority.*

To reiterate, while the EU's own legal framework required the NECPs to undergo strategic environmental assessment before adoption, this is not a legal requirement of the Aarhus Convention, although the above provides UNECE's context for the "*necessary information*" to ensure compliance with the Convention. Comparing this context with Annex I of the Governance Regulation (EU) 2018/1999, which provides the template for the preparation of these NECPs, shows that the information specified above in Point 94 (ii) and (iii) is absent.

For example, Annex I, Part 1, Section 5 is entitled 'Impact Assessment of Planned Policies and Measures', these being impacts related to:

- *"(…) energy system and GHG emissions and removals".*

- *"Macroeconomic and, to the extent feasible, the health, environmental, employment and education, skills and social impacts (…)".* However, no cost benefit and other economic analysis and assumptions are included and the Irish NECP, like those of other Member States, makes no assessment of the impact this renewable infrastructure will have on the environment.

- *"(….) on other Member States and regional cooperation (….)".*

While there is not a single mention of alternatives to the defined objectives specified in Annex I of the Governance Regulation (EU) 2018/1999. On the other hand, as the 'Annex to this Response' shows, the environmental report required by the SEA Directive, in conjunction with some additional information on cost benefit and other economic analyses and assumptions, would fulfil UNECE's context for the "*necessary information*".

Regarding the draft Plan of Action and its requirement for the Member States to submit the draft updated NECPs by 30 June 2023:

- There is little over a year remaining to; (i) first scope and; (ii) then prepare such a complex degree of environmental information, see again the Annex of this Response, before; (iii) making it available to the public and; (iv) providing them with an opportunity to effectively participate, and finally; (iv) taking due account of that participation in the finalised decision. Is this a realistic timeframe given that: (a) Little or no information has been prepared to date on the strategic impacts of this renewable programme, such as an ex-ante evaluation of what has been built to date, while; (b) the impacts of this

programme are on a scale not seen since WWII and involve not just National, but transboundary considerations?

- In this regard referring to the 'Study concerning the preparation of the report on the application and effectiveness of the SEA Directive (Directive 2001/42/EC)', completed on behalf of the EU Commission in 2016.[19] This stated in relation to a similar 2009 report: *"It also found that Member States experienced difficulties in assessing impacts at the strategic level, where there is typically greater uncertainty and higher incidence of complicated cumulative effects. It was also found that, in some cases, public administrations lacked the qualified staff to carry out or even supervise SEAs, or failed to appreciate the potential benefits of carrying out robust SEAs".* While concluding that studies that are more recent, as carried out by national authorities and academics, have confirmed the findings of this 2009 EC SEA report.

- The 2016 study also reported as to how: "*In Ireland, the time and effort needed to compile baseline information has prompted guidelines to emphasise that much of the information collection can and should be compiled before the statutory plan preparation and review processes".* While: *"Alternatives remain an issue for many Member States"*. Such information collection and evaluation has not even begun. For example, the failure to complete an SEA for the renewable programme to date has resulted in an absence of the legally required monitoring for unforeseen adverse environmental impacts, such as noise from wind turbines. See the 'Annex to this Response'.

- Despite the short timeframe and complexity involved, the EU Commission in the draft Action Plan is solely committing to "*engage with Member States to assist them with due preparation of their draft NECPs. The assistance will reflect the obligations of Member States stemming from both the Aarhus Convention and Governance Regulation. Member States will be accompanied to provide in the NECPs for a description on how they ensured that public participation was transparent and fair, and that the necessary information was provided to the public".*

In conclusion, such engagement in this manner over this prescribed short timeframe does not ensure the provision of the "*necessary information*". As a minimum, the content should be first prescribed and a realistic timeframe then developed for its preparation.

1.6 Early Public Participation When All Options Are Open

Article 7 of the Convention requires application of Article 6(4) in that: *"Each Party shall provide for early public participation, when all options are open and effective public participation can take place"*. The Compliance Committee clarifying in its finding and recommendations on Communication ACCC/C/2014/100:

- *84. In a tiered decision-making procedure, the requirement for "early public participation, when all options are open" refers to the availability of options at a given stage of the decision making. It neither requires that all options must be studied nor indicates which options/alternatives must be studied and at*

[19] https://ec.europa.eu/environment/eia/pdf/study_SEA_directive.pdf

which stage – this is within the discretion of the competent authorities. It merely precludes foreclosing any options without public participation. Nothing in article 6 (4) precludes the right of the competent authorities in the context of article 7 (or, in the case of article 6, of project proponents) to select their preferred option (or options) and promote it (or them); nor does it require that all options studied by the competent authorities, for example those considered in passing at an early exploratory stage, be presented to the public. However, it does imply that members of the public should be able in their comments to challenge the options put forward in the draft plan and to propose other options, including the zero option. This has a bearing on the obligation in article 6 (8) to take due account of the outcome of the public participation. This provision, seen in this context, requires the competent authorities to consider the option or options suggested by the public and provide reasons for not accepting them.

The NECPs prescribe the delivery of a defined degree of renewable energy and associated parameters, as per Article 4 of the Governance Regulation (EU) 2018/1999. For example, to facilitate this objective, and as previously highlighted in 'Table 6 of Irish NECP: Trajectories by renewable energy technology', the amount of onshore wind in Ireland is to increase by 50%. This is despite the already major conflict occurring between such wind turbine projects and the scattered rural population in Ireland. While such negative health (e.g. noise) and landscape impacts are also occurring in other Member States.[20]

This is irresponsible 'top down' decision-making on steroids, in which targets are repeatedly set, without any form of analysis of how and where this infrastructure is going to be built. While despite the visible adverse impacts already occurring, this EU legislation continues to prescribe a huge degree of infrastructure for a financial and natural environment, which clearly cannot harmoniously accommodate it.

Communication ACCC/C/2014/100 reiterated the Committee' findings on communication ACCC/C/2007/22 (France) in that:

- *"…from the viewpoint of compliance with article 6, paragraph 4, of the Convention, the decisive issue is whether 'all options are open and effective participation can take place' at the stage of decision-making in question. This implies that when public participation is provided for, the permit authority must be neither formally nor informally prevented from fully turning down an application on substantive or procedural grounds. If the scope of the permitting authority is already limited due to earlier decisions, then the Party concerned should have also ensured public participation during the earlier stages of decision-making."*

It is certainly not hypothetical that when the "*necessary information*" for the implementation of these NECPs is finally prepared, that it provides a demonstration of how the impacts of this Governance Regulation (EU) 2018/1999 far outweigh its benefits. This being a substantive reason for the 'zero option' or, as a minimum, a revision of the mandatory objectives, targets and contributions defined in its Article 4. Yet the consideration of such alternatives is limited by the legislative binding nature

[20] For example, there have been a number of Irish High Court settlements in relation to adverse noise impacts:
https://www.irishexaminer.com/news/arid-30983997.html
https://www.irishexaminer.com/news/arid-30793550.html

of the Regulation, and as this Communicant has pointed out before, the required public participation for the adoption of this Regulation was bypassed.[21]

Furthermore, one can refer to the UNECE 'Maastricht recommendations on promoting effective public participation in decision-making in environmental matters',[22] which states:

- *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) (see also para 16 above);*
    - *b. In addition, at each stage of a tiered decision-making process, the public should have the opportunity to participate in an early and effective manner on all options being considered at that stage;*
    - *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;*
    - *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.*

To reiterate, Decision VII/8f requires the EU:

- *To provide the Committee with evidence that it has adopted a proper regulatory framework and/or clear instructions for implementing article 7 of the Convention with respect to the adoption of National Energy and Climate Plans, and, in particular, to take the necessary legislative, regulatory or practical measures to: (... allow) for early public participation when all options are open, (…).*

The EU Commission is proposing no legislative nor regulatory measures in its draft Plan of Action, which is limited to engaging and assisting the Member States to implement a Governance Regulation (EU) 2018/1999. A Regulation, which is clearly in conflict with the requirements of Article 7 of the Convention, as with respect to the requirements under Article 6(4) to provide "*for early public participation, when all options are open and effective public participation can take place",* it does not provide for considerations of alternative objectives, including the 'zero option'.

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[21] See Section 1.3 of 'Comments on the Party concerned's second progress report' on ACCC/M/2017/3 European Union by the Communicant on C/54, dated 13.12.2019: https://unece.org/fileadmin/DAM/env/pp/compliance/Requests_from_the_MOP/ACCC-M-2017-3_European_Union/Correspondence_with_the_communicants___observers/frCommM3_C54__13.12.2019.pdf

[22] https://unece.org/environment-policy/publications/maastricht-recommendations-public-participation-decision-making

1.7 Ensuring that Due Account is taken of the Outcome of the Public Participation

Article 7 of the Convention also requires application of its Article 6(8):

- *Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.*

The UNECE Maastricht Recommendations clarifying in this regard that:

- *130. With respect to evidence of taking due account of the outcome of the public participation, the obligation to take "due account" under article 6, paragraph 8, should be seen in the light of the obligation in article 6, paragraph 9, to "make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based". This means that the statement of reasons accompanying the decision should include a discussion of how the public participation was organized and its outcomes taken into account. It is recommended that the legal framework should therefore include a clear requirement that the statement of reasons include, as a minimum:*
    - *A. A description of the public participation procedure and its phases;*
    - *B. All comments received;*
    - *c. How the comments received have been incorporated into the decision, identifying clearly which comments have been accepted in the final decision, where and why, and which have not and why not.*

The last point referring to the findings of the Compliance Committee on communication ACCC/C/2008/24 concerning compliance by Spain,[23] as endorsed by the Meeting of the Parties in Decision IV/9f:[24]

- *101. The Committee cannot assess, on the basis of the information provided, if indeed all the comments were ignored, as alleged by the communicant. Nevertheless, the Committee notes that a system where, as a routine, comments of the public were disregarded or not accepted on their merits, without any explanation, would not comply with the Convention.*

Section 1.4 already referred to the EU Commission adopting in 2017 its second implementation report of the SEA Directive, COM(2017) 234 final, which recorded how:

- *(…) after 10 years of implementing the SEAD* [Strategic Environmental Assessment Directive], *the Member States have noted that the extent to which the results of the SEA procedure are considered in the final decision of plans and programmes often depends on the decision-making specifics, and can vary from a committed reflection of the results of the assessment to a simple procedural box-ticking requirement.*

[23] https://unece.org/fileadmin/DAM/env/pp/compliance/CC-26/ece_mp.pp_c.1_2009_8_add.1_e.pdf

[24] https://unece.org/spain-decision-iv9f

The aforementioned 'Study concerning the preparation of the report on the application and effectiveness of the SEA Directive (Directive 2001/42/EC)', completed on behalf of the EU Commission in 2016, elaborating further on this point:

- *The extent to which the results of the SEA are accounted for in the final planning decision often depends on the attitude of the individuals involved in the decision making process, with some very engaged and willing to take recommendations on board, and others simply following the procedural requirements of SEA, viewing it as a box-ticking compliance exercise.*

As the Compliance Committee are all too aware, such as from Communications ACCC/C/2014/112 (Ireland) and ACCC/C/2015/133 (Netherlands), there is considerable evidence that decision-making by Member States in relation to the renewable programme is 'box-ticking'. A point already highlighted by this Communicant in relation to the adoption of the Irish NECP.[25] Furthermore, the draft Plan of Action solely states that:

- *The Commission will assist Member States with due preparation of their draft NECPs. The assistance will reflect the obligations of Member States stemming from both the Aarhus Convention and Governance Regulation. Member States will be accompanied to provide in the NECPs for a description on how the early public participations when all options are still open was conducted, and for an explanation of how the outcome of the public participation was duly taken into account.*

Given that the EU Commission in its evaluation of the SEA Directive openly acknowledges that Member States do not comply with the requirements to 'take due account of the outcome of the public participation in the final decision'. While in addition, is now only requiring that the Member States provide in the NECPs "*an explanation of how the public participation was taken into account*". How then does this provide *"evidence that it has adopted a proper regulatory framework and/or clear instructions for implementing article 7 of the Convention*", which comprises of "*the necessary legislative, regulatory or practical measures"*?

The answer is, it does not; as evidence is absent to demonstrate the necessary reform of current practices non-compliant with the Convention. This is despite the clear advice provided to the EU by the Compliance Committee, such as in their July 2021 "Report to the Meeting of the Parties on request ACCC/M/2017/3".[26]

- *99. On this point, the Committee notes with concern that a significant number of the individual assessments find that the member State's NECP contains neither a summary of the public's views nor a summary of how those views were taken into account in its NECP.*

- *100. As the Committee has repeatedly indicated, an assessment by the Party concerned of the information provided by member States on the public*

[25] See pages 6 and 7 of 'Comments on the Party concerned's second progress report' on ACCC/M/2017/3 European Union by the Communicant on C/54, dated 13.12.2019: https://unece.org/fileadmin/DAM/env/pp/compliance/Requests_from_the_MOP/ACCC-M-2017-3_European_Union/Correspondence_with_the_communicants___observers/frCommM3_C54__13.12.2019.pdf

[26] https://unece.org/sites/default/files/2022-01/ECE_MP.PP_2021_51_E.pdf

participation procedure carried out on their plans, coupled with a real possibility of infringement proceedings against any member State whose information is insufficient or reveals a failure to carry out public participation that fully met the requirements of article 7, may fulfil the final sentence of paragraph 3 of decision V/9g.

1.8 Adapt the manner in which it evaluates National Energy and Climate Plans accordingly

In their Draft Plan of Action, the EU Commission has solely committed to assessing the draft NECPs, once submitted by 30 June 2023, and "*may issue country-specific recommendations*". The intersessional documents prior to the Seventh Meeting of the Parties on ACCC/M/2017/3 European Union[27] demonstrate the concerns the Communicants and Compliance Committee had with respect to the EU Commission's inadequate assessment of the original draft NECPs in 2019. To put it mildly, there were systematic failures to comply with the Aarhus Convention, which the EU Commission studiously avoided to do anything about in its assessment of these draft NECPs, subsequently adopting and implementing the finalised NECPs submitted by the Member States in December 2019, which were legally flawed. Thereby resulting in the UNECE Meeting of the Parties in October 2021 adopting Decision VII/8f.

Returning to Decision VII/8f, which places a clear obligation on the EU "*to take the necessary legislative, regulatory or practical measures"* to implement Article 7, while as the previous Sections has documented, it has done no such thing. This then begs the question, what are the benchmarks against which it is going to assess the draft updated NECPs to be submitted by June 2023? The same as were so 'successfully' deployed in 2019 to circumvent the legal framework of the Convention?

There is a very valid saying in that if you can't define it, you can't measure it and hence can't manage it. The Convention has been in force since 2001 and twenty years of compliance proceedings, international forums, decisions taken by the Meeting of the Parties, etc., has provided a wealth of information on the valid interpretation of its obligations. Yet a decade after the original findings and recommendations on Communication ACCC/C/2010/54, regarding the NREAPs not complying with Article 7, we are left once again in a position where the EU Commission refuses to accept or acknowledge the defined context associated with Article 7.

For example, "*may issue country-specific recommendations*", but on what basis? In any form of management structure there are 'benchmarks', such as in a traffic lights system of green, orange and red, i.e. the criteria for go / no go, pass or fail. Since the EU Commission has studiously avoided taking the "*necessary legislative, regulatory or practical measures"* in the context of giving effect to:

- Provision of the necessary information to the public.
- Early public participation when all options are open.
- Ensuring due account is taken of the outcome of the public participation.

[27] https://unece.org/env/pp/cc/accc.m.2017.3_european-union

Then there are no benchmark and this commitment of committing solely to assessing / may issue recommendations, is nothing but a 'cheat's charter' with respect to the 'rule of law', for which for a decade, it is systematically in non-compliance with.

1.9 TEN-E Regulation – Provision of Consultation Documentation in Official Languages of the EU

Decision VII/8f endorsed:

- *(….) the findings of the Committee with respect to communication ACCC/C/2013/96 that: (…); (d) By not making the main consultation documents, including the notification to the public, available to the public in its official languages other than English, the Party concerned discriminated against non-English-speaking members of the public in the European Union and thus failed to comply with article 3 (9) of the Convention;*

It was also very clear and precise in its recommendation on public participation procedures by the EU "*within the scope of article 7 of the Convention*" carried out in relation to the Trans-European Networks for Energy (TEN-E) Regulation (EU) No 347/2013:[28]

- *The main consultation documents, including the notification to the public, are provided to the public in all the official languages of the Party concerned;*

The draft Plan of Action's objectives in this regard can be summarised by the extract below from the Plan regarding the Projects of Common Interest (PCIs), which are the subject matter of this TEN-E Regulation.

- *Therefore, for each PCI, a project promoter have to carry out a project-specific permit granting process. This process will be carried out in the local language(s), so that all information disclosed to stakeholders and members of the public will also be available in the local language(s). Consequently, before any binding decision is taken by national authorities with regard to any PCI, local communities and individuals living in close vicinity of the project will receive information about that project and will be able to communicate their views on that project in their own languages.*

The first thing to note here, is project-specific permit grating process, which falls under Article 6 of the Convention and follows after the strategic decision-making at the plan, programme level, i.e. the next level of decision-making in tiered decision-making. Given that, the scope of Decision VII/8f relates to Article 7 of the Convention and the obligations of the EU in this regard, on can only conclude that the content of the EU's draft Plan of Action is irrelevant to the scope of Decision VII/8f.

To explain further, this 'Response to the draft Plan of Action' has already dealt in depth with the requirements of Article 7 of the Convention, and its wider context of interpretation, regarding the *"necessary information"* and *"early public participation, when all options are open and effective public participation can take place".* This being relevant once again with respect to the assertion by the EU Commission above relating to *"(…) before any binding decision is taken by national authorities with regard to any PCI, (…)".*

[28] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02013R0347-20200331

In this regard the TEN-E Regulation (EU) No 347/2013 is clear in its: *Chapter III 'Permit Granting and Public Participation', Article 7 'Priority status' of Projects of common interest:*

- *1. The adoption of the Union list shall establish, for the purposes of any decisions issued in the permit granting process, the necessity of these projects from an energy policy perspective, without prejudice to the exact location, routing or technology of the project.*

Therefore, all the strategic decision-making, occurs at the phase when the PCI is adopted on the list, a procedure occurring at EU level under the TEN-E Regulation. There is also a very nice video on the UNECE website, funded by the EU, in relation to the importance of Strategic Environmental Assessment (SEA) in the context of a national energy strategy.[29] In the same manner, as how the adoption of the NECPs failed to comply with the SEA Directive, see previous Section 1.4, the adoption of these large transboundary projects as part of the PCI list for subsequent funding and accelerated permitting procedures, see Chapter III of the TEN-E Regulation, should have occurred in compliance with the SEA Directive.

While this did not happen, the adoption of such a list of projects, which determines their necessity and configuration, is still subject to Article 7 of the Convention. Failing to complete the public participation at this stage, in the languages of the EU, prevents effective public participation, when 'all options are open', and therefore invalidates the legality of subsequent decision-making at the next tier(s) involving National project permitting.

The EU Commission's COM(2020) 824 final is a 'Proposal for Regulation of the European Parliament and of the Council on guidelines for trans-European energy infrastructure and repealing Regulation (EU) No 347/2013', i.e. an updated TEN-E Regulation, as this explains:

- *An estimated annual average investment of EUR 50.5 billion for electricity transmission and distribution grids is required for achieving the 2030 targets alone.*

It is therefore a useful context to compare with the position of the same EU Commission in its draft Plan of Action:

- *(…) it is often more effective to communicate in a single language throughout the process, while the PCI selection process relies heavily on the outcome of various stakeholder groups. Therefore, it would be unnecessary, disproportionate and practically impossible to provide all documents and all technical and other project details in all 24 EU official languages.*

'Unnecessary' is an interesting choice of words when it comes to legal obligations, obligations which reflect that the percentage of EU citizens, who utilise English as their first language is very limited. For example, the recent EU consultation on extending the EU Digital COVID Certificate obtained 385,191 submissions, 99.99% of which were very angry with the EU Commission, and written in a range of official languages, with less than 10% in English.[30]

[29] https://unece.org/video

[30] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13375-Extension-of-EU-Digital-COVID-Certificate-Regulation_en

As for ‘disproportionate’, it is hard to visualise the enormity of translation costs when compared to the scale of multi-billion Euro annual investments in these PCIs. While it is also hard to envisage why it should be ‘practically impossible‘. After all the legal requirement is for only one overarching SEA environmental report, which could be written in English in a clear and logical fashion and then with the assistance of ‘machine translation’, finalised by the translators in the other languages. However, what we have instead is a developer led process, in which no strategic assessment of decision-making is occurring, as the EU Commission solely sees its role as a cash dispenser for facilitating the implementation of its arbitrarily chosen political targets.

1.10 TEN-E Regulation - Due Account of the Outcomes of the Public Participation

Decision VII/8f endorsed:

- *(….) the findings of the Committee with respect to communication ACCC/C/2013/96 that: (…); (c) By failing to demonstrate, in a transparent and traceable way, how due account was taken of the public participation on the first list of “Projects of Common Interest”, the Party concerned failed to comply with article 7 in conjunction with article 6 (8) of the Convention;*

This subsequently led to the Recommendation for the EU to:

- *(…) take the necessary legislative, regulatory or other measures and practical arrangements to ensure that in public participation procedures within the scope of article 7 of the Convention carried out under the Trans-European Networks for Energy Regulation, or any superseding legislation: (…); (b)Due account of the outcomes of the public participation is taken, in a transparent and traceable way, in the decision-making.*

The EU in its draft Plan of Action discusses in depth “*public participation in the implementation of PCI at the local level*”. For example:

- *(…) one public consultation shall be carried out by the project promoter, or, where required by national law, by the competent authority, before submission of the final and complete application file to the competent authority (…).*

All of this refers to project approval, which to reiterate falls within the scope of Article 6 of the Convention. While having absolutely nothing to do with the scope of Decision VII/8f, which relates specifically to Article 7 of the Convention and prior public participation at the plan / programme tier, where decision making is occurring in relation to the necessity and configuration of these projects., i.e. by adopting them according to the TEN-E Regulation on the PCI list.

So where does that leave us, given that the EU has already failed to demonstrate how it complied “*with article 7 in conjunction with article 6 (8) of the Convention”* when adopting the first PCI list. The previous Sections 1.7 and 1.8 of this ‘Response to the draft Plan of Action’ demonstrates that the EU has no benchmarks or procedures for implementing Article 6(8) of the Convention, i.e. ‘taking due account of the outcome of the public participation in the final decision’. Even though UNECE has provided the specific context on its interpretation and measures to be utilised.

Given these circumstances and a refusal in this draft Plan of Action to provide any details on how the EU Commission will give effect to the requirements of Decision VII/8f, one can only conclude that the EU intends once again to ignore its obligations under the Convention.

1.11 Conclusions

Following the adoption of Decision V/9g by the fifth Meeting of the Parties in July 2014 the Compliance Committee. In their subsequent June 2017 'Report to the sixth Meeting of the Parties on compliance by the European Union with its obligations under the Convention',[31] recorded "*that the Party not yet fulfilled the requirements of paragraph 3 of decision V/9g*" and expressed:

- (…) *its concern at the slow progress by the Party concerned.*

At the end of the subsequent intersessional period and their July 2021 "Report to the Meeting of the Parties on request ACCC/M/2017/3",[32] the Compliance Committee concluded:

- *The Committee recommends to the Meeting of the Parties that it reaffirm its decision V/9g and, in particular, request the Party concerned, as a matter of urgency: (….)* [see Recommendations of Decision VII/8f]

However, we are not a situation nearly a year later with a draft Plan of Action which yet again provides zero evidence that the EU is actually going to comply with recommendations of the Compliance Committee, which were adopted as part of Decision VII/8f. In fact, it is a 'serial offender' for non-compliance with Article 7 of the convention, not only with respect to the adoptions of the NREAP and NECPs, but also on the adoption of the PCI list as part of the TEN-E Regulation. The only conclusion to be deducted from this draft Plan of Action is that it is to facilitate further serial non-compliance with Article 7. The Compliance Committee should therefore reject this draft Plan of Action, in order that it can be revised with references to specific and measurable benchmarks related to the published interpretations for compliance with Article 7. For example, paragraphs 100 to 101 of the June 2017 'Report to the sixth Meeting of the Parties on compliance by the European Union with its obligations under the Convention'.

Indeed, in this regard it is useful to reiterate the clarification given on 21.11.2007 by the EU Commission to the Compliance Committee in Communication ACCC/C/2006/17 European Community:[33]

"On the basis of the case-law of the Court of Justice of the European Communities, the decisions of which are binding on the Community and its Member States, three main aspects should be stressed.

- *An agreement concluded by the Council is binding on the Community's institutions and Member States[34]. It is the above Court's settled case-law that*

[31] https://unece.org/DAM/env/pp/mop6/English/ECE_MP.PP_2017_39_E.pdf

[32] https://unece.org/sites/default/files/2022-01/ECE_MP.PP_2021_51_E.pdf

[33] https://unece.org/env/pp/cc/accc.c.2006.17_european-community

[34] *Article 300(7) of the Treaty establishing the European Community.*

such an agreement forms ***an integral part of the Community's legal order and the Court of Justice ensures compliance with it.***[35]

This rule applies not only to international agreements concluded by the Community alone but also to joint agreements,[36] *in respect of the provisions which fall within the competence of the Community.*[37]

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

- ***In ensuring compliance with commitments arising from an agreement concluded by the Community institutions, the Member States fulfil an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement.***[39]

Therefore, under Article 226 EC, the Court of Justice may punish a Member State for non-compliance with an agreement concluded by the Community[40]*. It has also been declared competent to hand down a preliminary ruling under Article 234 EC on the interpretation and validity*[41] *of Community legal acts incorporating the agreement into the Community system".*

The serial non-compliance of the EU with its obligations related to the Aarhus Convention occur because it enacts secondary legislation, such as the Governance

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[35] *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.*

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

[37] *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.*

[38] *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.*

[39] *Settled case-law, Court's judgment of 30.9.1987 in Case 12/86, referred to above, paragraph 9; judgment of 19.3.2002 in Case C-13/00 referred to above, paragraph 15, judgment of 30.5.2006 in Case C-459/03 referred to above, paragraph 85, and judgment of 7.10.2004 in Case C-239/03, Commission v France, paragraph 26.*

[40] *Judgments of 10.9.1996 in Case C-61/94 and of 7.10.2004 in Case C-239/03, both referred to above.*

[41] *Paragraphs 27 and 39 of the judgment of 10.1.2006 in Case C-344/04, referred to above.*

Regulation (EU) 2018/1999 and the TEN-E Regulation (EU) No 347/2013, which are in conflict with its overarching legal obligations under the Aarhus Convention. The EU clearly does not want to be a legal entity, which embraces the benefits of environmental democracy, while clearly in this draft Plan of Action; it intends to remain that way

Appendix A: The UNECE context for 'necessary information' and the environmental report of the SEA Directive – considerations with respect to NECPs.

Sections 1.4 and 1.5 have outlined already the legislative requirement in the EU for Strategic Environmental Assessment (SEA) and how; "*Proper public participation procedures in the context of SEA are a valuable tool to assist in the implementation of article 7*". In addition, Section 1.4 outlines how the Compliance Committee has scoped the context for interpretation of the 'necessary information' required under Article 7 of the Convention, which includes provision of:

- *(ii) Any information regarding possible environmental consequences and cost benefit and other economic analyses and assumptions to be used in the decision making.*

While Section 1.9 highlights the very nice video on the UNECE website, funded by the EU, in relation to the importance of Strategic Environmental Assessment (SEA) in the context of a national energy strategy.[42] The contents of such an SEA environmental report being specified in Annex I of the SEA Directive 2001/42/EC and comprises:

- *(a) an outline of the contents, main objectives of the plan or programme and relationship with other relevant plans and programmes;*
- *(b) the relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the plan or programme;*
- *(c) the environmental characteristics of areas likely to be significantly affected;*
- *(d) any existing environmental problems which are relevant to the plan or programme including, in particular, those relating to any areas of a particular environmental importance, such as areas designated pursuant to Directives 79/409/EEC and 92/43/EEC;*
- *(e) the environmental protection objectives, established at international, Community or Member State level, which are relevant to the plan or programme and the way those objectives and any environmental considerations have been taken into account during its preparation;*
- *(f) the likely significant effects(1) on the environment, including on issues such as biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage including architectural and archaeological heritage, landscape and the interrelationship between the above factors;*
- *(g) the measures envisaged to prevent, reduce and as fully as possible offset any significant adverse effects on the environment of implementing the plan or programme;*
- *(h) an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties*

[42] https://unece.org/video

(such as technical deficiencies or lack of know-how) encountered in compiling the required information;

- *(i) a description of the measures envisaged concerning monitoring in accordance with Article 10;*
- *(j) a non-technical summary of the information provided under the above headings.*
- *(h) These effects should include secondary, cumulative, synergistic, short, medium and long-term permanent and temporary, positive and negative effects.*

In the following pages, some brief aspects of these 'elements' of an SEA are considered in the context of the National Energy and Climate Plans (NECPs). While in relation to "*cost benefit and other economic analyses and assumptions*", this author during the COVID lockdowns prepared a book on: 'The Polluter Pays, but to Whom, How Much and On What Basis -Science or the Cult of Witchcraft? A badly needed critical evaluation and judgement of the EU's Energy Related Green Crusade to Net Zero'. This being freely available on 'Researchgate' to download,[43] where it references and utilises the EU's own scientific and statistical information. As this evaluates and documents, as presented by this Communicant to the Seventh Meeting of the Parties on 18 October 2021:

"***cost benefit and other economic analyses and assumptions"***

"Sooner or later we all have to sit down to a banquet of consequences. EU citizens are facing a winter with repeated electricity blackouts, gas shortages and soaring energy costs, to be repeated in subsequent winters. As they question, what will they find about this 2020 programme?

- *More than 100,000 wind turbines and countless PV panels now blight the natural environment of the EU, representing a financial investment of a trillion Euros. An investment required again at end of the equipment's 20-year lifespan.*
- *If instead €10 million a day were 'sprinkled around' for the common good, it would take 274 years to spend the thousand billion, which is a trillion Euros.*
- *Over the same period, the USA simply replaced old coal fired generation with modern gas fired units and obtained an equal 27% reduction in carbon emissions. Their electricity now being half the price paid in the EU and far more reliable.*

Then there is the thorny question of what value are carbon emissions, as not all of us adopt a fanatical belief system, that such matters are 'life and death'. Since the EU bypassed the environmental assessment of its renewable programme, the only quantification of benefit available, was solely in terms of the circular logic of its ability to meet pre-determined political targets.

One has to go back to 2005 and a joint initiative with the USA, called ExternE, which established external costs of energy systems by quantifying their negative environmental impacts. Due to uncertainties, a price range was assigned to the external cost of carbon. Multiplying this by the carbon savings the renewable

[43] https://www.researchgate.net/publication/355079171_The_Polluter_Pays_but_to_Whom_How_Much_and_On_What_Basis_-Science_or_the_Cult_of_Witchcraft_A_badly_needed_critical_evaluation_and_judgement_of_the_EU%27s_Energy_Related_Green_Crusade_to_Net_Zero

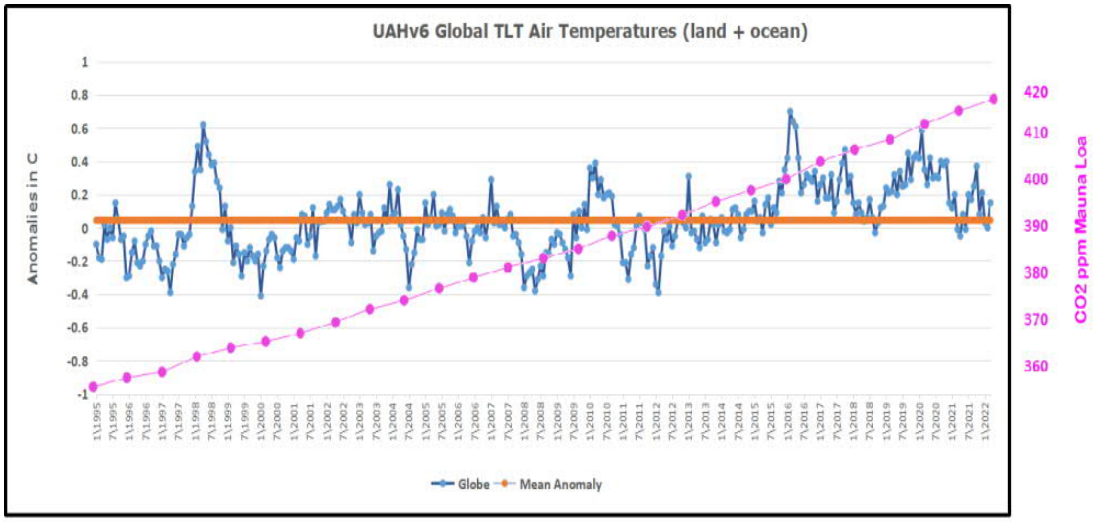
investment has achieved on the EU electricity grid, we get an estimated saving of annual avoided environmental damage ranging from €42 million to €6.9 billion.

However, data doesn't lie and clearly the lower value is applicable as a return for the trillion Euros invested. For example, Irish meteorological records go back to before 1800 and are included as an Appendix to this Statement [See Appendix E of book]. *As a life experience of a half century also confirms, the weather is boringly normal, there is no crisis. The hypothesis that carbon dioxide is driving the weather systems into a catastrophe is fundamentally based on wild speculation, and with each passing year, rapidly diverging from reality, as it is based on clearly unsound principles.*

Sadly, when many scientific personnel like myself raise these issues, not only are we shouted down and insulted, but we see repeated contempt of legal procedures requiring environmental assessment and public participation. Why have the checks and balances of a democratic society, when your dogma is so righteously right? After all, as the last months have shown, you can just get ever more authoritarian with your citizens, deny fundamental rights and shut dissenters out of society".

Regarding the content of the SEA environmental report in the context of the NECPs, some insight is provided below to some of its 'elements', for which information that is more detailed, can be found in the previously referenced book on Researchgate:

(b) the relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the plan or programme;

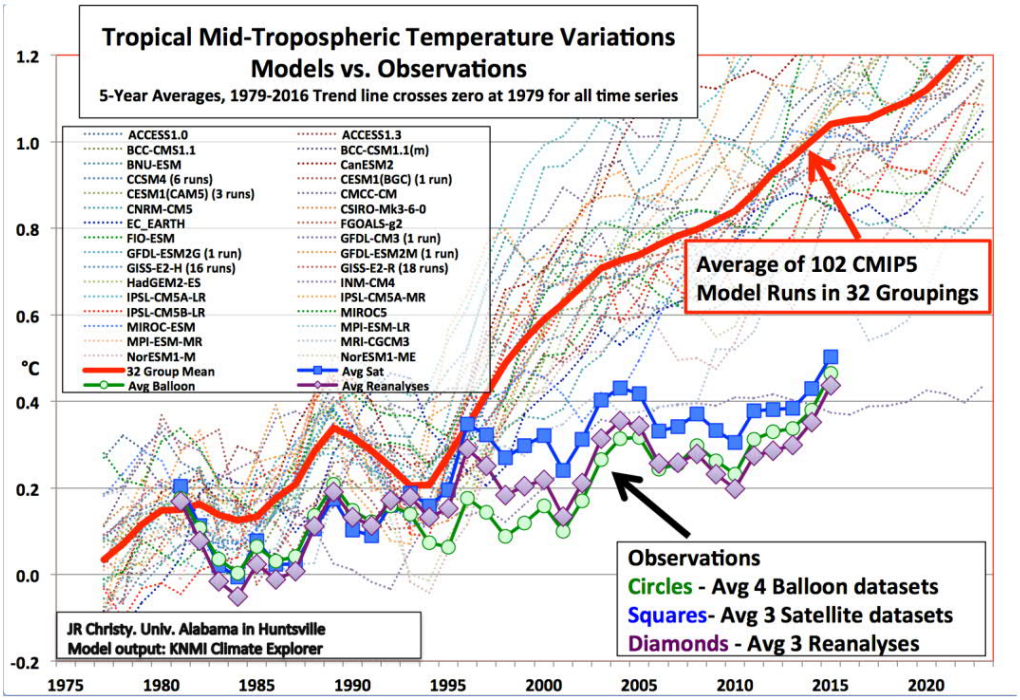


While atmospheric CO_2 concentrations, due to natural and anthropogenic causes, continue to increase, it is only in the last three decades that we have been able to measure global temperatures accurately by satellite. However, current values being recorded are comparable with values recorded in the 1990s and must be considered in the following context. The sun at the end of the 20th Century had a level of activity not seen in some 8,000 years, with a commensurate magnetic field strength, deflecting cosmic rays known to play a role in cloud nucleation.

Satellite data also shows how global cloud coverage decreased from 69% in the early 1980s to 65% a decade later.[44] The oceans warmed and there were two large

[44] For a summary of the ISCCP data see: https://clivebest.com/blog/?p=5694

El Ninos in 1998 and 2016, which as the global temperature record above shows, pumped heat and moisture from the Pacific into the atmosphere. However, the sun has now gone into a quiet period, sunspot activity is down, cosmic rays have increased, and the Pacific has entered a cooling La Nina phase.



As the above graphically shows, there is an ever-growing chasm between the predictions of the IPCC climate computer models, the Russian model excepted, and the temperature observations. The wavelengths over which CO_2 absorbs infrared radiation, which causes the greenhouse effect, are already saturated at low concentrations, such that increasing atmospheric CO_2 concentrations have limited and decreasing effect.

Doubling the pre-industrial atmospheric CO_2 concentration leads only to a ≈ 1.2 ºC rise in global temperatures. This is negligible in comparison to diurnal (daily) and seasonal (annual) fluctuations, being equivalent to moving ≈ 200 km closer to the equator; e.g. Belfast in the North of Ireland gets the temperatures of Cork in the South of Ireland. The hypothesis of catastrophic anthropogenic climate change rests upon a highly unstable climatic system, where minor increases in temperature lead to a significant increase in atmospheric water vapour, itself a potent greenhouse gas, which then in a feed forward mechanism causes global temperatures to spiral out of control. This has never happened in the past and the evidence demonstrates it is not happening now, i.e. the 'scientific method' shows it to be a failed hypothesis. Furthermore, increasing CO_2 concentrations are highly beneficial, fertilising the biosphere, particularly so in arid regions, where vegetative growth is constraint.

In conclusion, the impact of fossil fuel usage on the planet's climatic system dominated by natural influences is very limited, while the fertilisation of the biosphere is a positive benefit. Simply put, it is impossible to demonstrate any linkage between these natural climatic systems and the 100,000 turbines and countless PV solar panels installed to date in the EU. Neither is there any evidence that installing further such infrastructure will also have any impact.

(f) the likely significant effects[1] on the environment, including on issues such as biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage including architectural and archaeological heritage, landscape and the interrelationship between the above factors;

In 2020, renewable energy represented 22.1 % of energy consumed in the EU, a figure inflated by COVID impacts, of which 42.3% was in the electricity sector and 36% of that deriving from wind. Therefore, the 100,000 plus wind turbines installed in the EU only supplied 3.36% of its energy.

However, these turbines have had a very significant impact on the natural environment, which is fundamentally related to the folly of harvesting such a highly diffuse and irregular energy source. Air is very light, while wind velocities are low. Even in Ireland, which is considered windy, average wind speeds are 4 to 6 m/s (14 to 22 km/h), which is a range classified as a "*gentle breeze*".

Mean annual wind speed
(units in m/s)

A large onshore wind turbine to harvest such a diffuse energy source has a maximum output of circa 2 megawatts (MW), but requires a wind speed of between 12 to 15 m/s to reach full (rated) output. As electrical output is intrinsically linked to the cube of the wind velocity, at half that velocity, i.e. 6 to 7.5 m/s, the turbine only produces 12.5% of its design power output. Yet ***each individual*** 2 MW turbine comprises:

- Foundations: 270 m^3 of concrete with a total weight of 700 t utilising 25 t of iron for reinforcement
- Tower: Measuring 67 m and comprising 143 t of steel
- Nacelle: Weight 50 t comprising 3.5 t of copper with the rest mostly iron and steel
- Rotor Weight approximately 35 t - three blades of 39 meters containing 18.5 t of resin and fibreglass and a blade hub containing approximately 14 t of cast iron

Note: In contrast, a typically power generation station output is some several hundred megawatts (MWs) with a far smaller footprint and resource utilisation. Therefore, the sheer consumption of resources to deliver some 100,000 plus turbines, which provide only 3.36% of the EU's energy, is staggering. While these resources include 'rare earths' mined in an environmentally unacceptable manner in China. Furthermore, while a power station has an economic life of 35+ years, a wind

turbine's economic life is circa 15 years and for which there are no lasting solutions for decommissioning and disposal.

As regards biodiversity impacts, estimates are that wind turbines in Germany each year kill some 250,000 bats and 12,000 raptors (birds of prey). After several years of intensive conservation measures in the 1980s and 1990s, the number of successful raptor breeding pairs, which was increasing, is now once again in decline. Huge concern and conflict is occurring as wind turbine developments encroach on forested areas, while their visual impact blights the landscape of many regions.

The 100,000 plus turbines in the EU, blighting many parts of its landscape, still only contributes 3.36% of its energy needs.

As the turbine blade sweeps past the supporting tower, it generates a high-energy pulse of low frequency noise (infrasound). In their 2020 Report on the ‚Lärmwirkungen von Infraschallimmissionen' [Noise effects of infrasound immissions], the German Federal Environment Agency (UBA) stated in Section 2.3 'Possible effects of infrasound':[45]

- *Residents who report being bothered by infrasound complain more often of dizziness and discomfort. These are disorders that can be caused by cardiovascular dysregulation as well as by disturbances of the vestibular system and the nervous system, and have already been associated with them in studies.*

The report also explaining: *"Based on the evaluation of the hitherto existing scientific literature, the potential effects of low frequency/infrasound noise exposure on the human body identified in the feasibility study on the effect of infrasound conducted on behalf of the Federal Environmental Agency can be summarized as follows:*

- *Changes in the cardiovascular system (e.g. change in blood pressure, heart rate)*
- *Lack of concentration*

[45] https://www.umweltbundesamt.de/en/publikationen/laermwirkungen-von-infraschallimmissionen

- *Effects on vestibular system*
- *Psycho-vegetative disorders associated with the above physiological effects, such as experienced unease (vertigo, tiredness, drowsiness, feeling of pressure on tympanic membrane, feeling of vibration)."*

It is little wonder that the value of housing in a rural area plummets when wind turbine developments are located nearby. While as regards other health effects, emerging EU rules seek to restrict bisphenol A and other bisphenols with endocrine-disrupting properties for the environment. Particulate matter sheds from turbine blades and scientific reports are demonstrating a bisphenol emission of 50 kg / turbine / year or 1,000 kg over 20 years, while each year in Europe some 24,000 t of bisphenol A based epoxy resins are used for manufacturing such wind turbine rotor blades.

(g) the measures envisaged to prevent, reduce and as fully as possible offset any significant adverse effects on the environment of implementing the plan or programme;

Right around the EU, authorities have bent over backwards to facilitate the development of wind energy and related infrastructure, ignoring not just the protestations of concerned local communities, but also the legal structure and their 'duty of care'. In relation to the health impacts of noise, the 2018 World Health Organisation's (WHO) Environmental Noise Guidelines for the European Region adopted **conditional** recommendations for wind turbine noise, but in doing so they make it very clear: "*There are serious issues with noise exposure assessment related to wind turbines"*.

- "*Balance of benefits versus harms and burdens: Further work is required to assess fully the benefits and harms of exposure to environmental noise from wind turbines and to clarify whether the potential benefits associated with reducing exposure to environmental noise for individuals living in the vicinity of wind turbines outweigh the impact on the development of renewable energy policies in the WHO European Region*".

Not only were the Strategic Environmental Assessments required under Directive 2001/42 /EC never completed, but there was also an associated legal failure "*to monitor the significant environmental effects of the implementation of plans and programmes in order, inter alia, to identify at an early stage unforeseen adverse effects, and to be able to undertake appropriate remedial action"*.

The same report as above from the German Federal Environment Agency (UBA) stating:

- *The general assessment procedure contained in the German Technical guidelines for Noise Reduction refers to "A-weighted" sound levels. The harmfulness threshold of low-frequency noise or infrasound is therefore not defined in sufficiently concrete terms by the determination and assessment method specified in the German Technical Guidelines for Noise Reduction.*

In a previous 2014 study ‚Machbarkeitsstudie zur Wirkung von Infraschall' [Feasibility study on the effect of infrasound] the UBA concluded:[46]

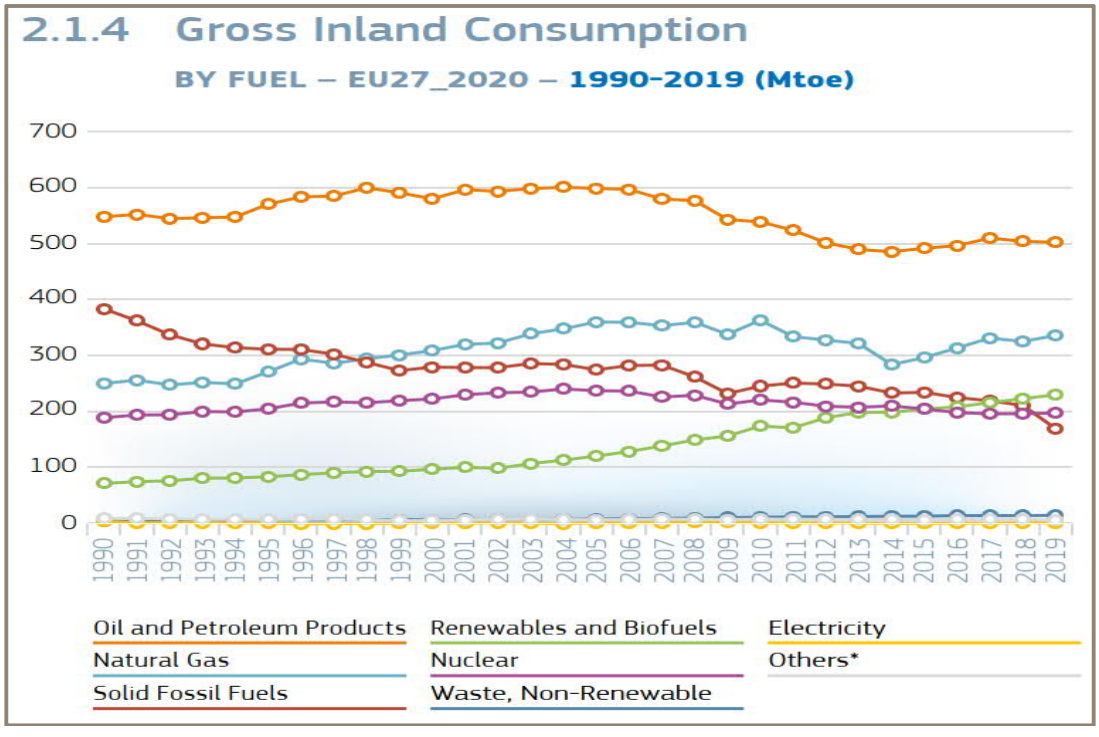
[46] https://www.umweltbundesamt.de/publikationen/machbarkeitsstudie-zu-wirkungen-von-infraschall

- *Wind energy plants are a frequently studied source of noise in connection with infrasound. The publications show that the measurement of emission and propagation of noise from wind energy plants is plagued by uncertainties that complicate a substantiated noise forecast. With an increasing height of the wind energy plants, the rotor blades cut through an even more varied wind profile. It is therefore questionable whether the emission and propagation models of smaller wind energy plants can be applied to more modern and larger wind farms. This is very unlikely given the theoretical observations of aeroacoustic scientists. Deeper knowledge of the abovementioned processes would not only be a prerequisite of better immission forecasting, but the acquired knowledge could also provide information for an improved noise reduction of wind energy plants.*

To date, right around the EU, noise assessments for planning permits have been made using methodologies, which limit themselves to A weighted Decibels dB(A), screening out the low frequency impacts, and also ignoring the complex relationship of amplitude modulation, which is the annoyance caused by the tonal or impulsive 'blade swish'. In short, current measures to mitigate such adverse impacts are inadequate and the authorities are legally liable for the known adverse impacts occurring.

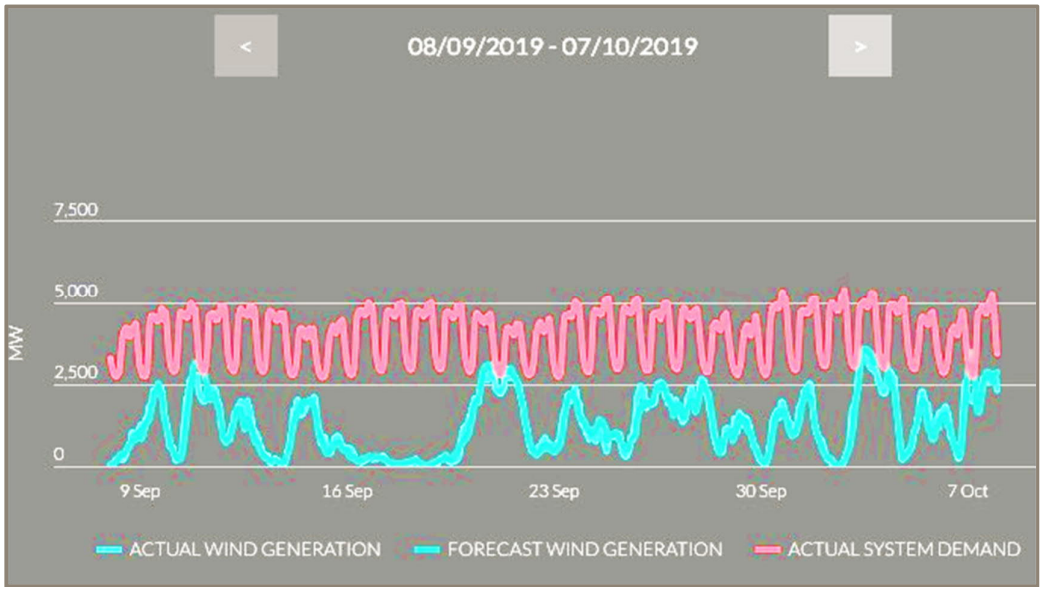
(h) an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information;

The 'EU energy in figures: Statistical pocketbook 2021' provides the following graphic:[47]



[47] https://op.europa.eu/en/publication-detail/-/publication/41488d59-2032-11ec-bd8e-01aa75ed71a1/language-en

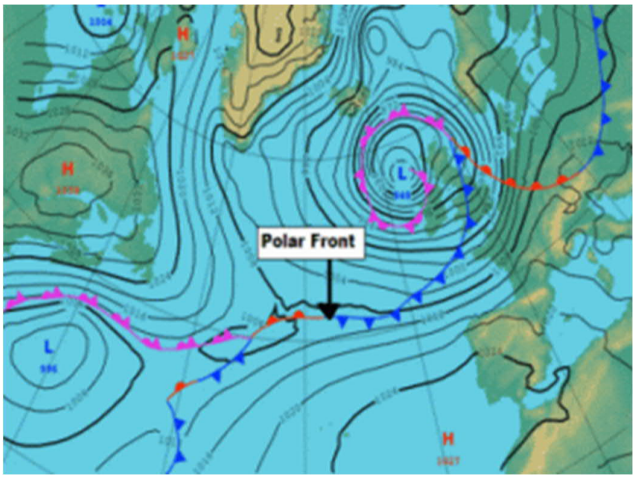
The gross inland consumption for 2020 comprising 34.6% oil and petroleum products, 23.1% natural gas, 11.6% solid fossil fuels, 13.6% nuclear, while renewables and biofuels amounted to 15.8%. This final fraction having essentially doubled in the last 15 years, primarily as a result of a trillion Euros investment in 100,000 wind turbines and countless PV solar panels. However, the input from these diffuse sources is highly variable and they are therefore incapable of replacing conventional power stations.



All Ireland electricity demand and wind energy output for period 8/9/2019 to 7/10/2019

This irregular supply of wind and solar energy causes huge problems with the existing generators on the grid, as they have to reduce their output or even cease generation for the period in which the wind energy rushes on to the grid, a procedure called curtailment. This stop / start and highly variable operation results in increased wear and tear and lower efficiencies, in that more fuel has to be consumed for the same electrical output. In Ireland, not only are the fossil fuel generators curtailed, but so too are the two Waste to Energy plants, which produce electricity, which is 50% renewable.

As the incoming municipal waste arrives on a continuous basis, it is necessary to maintain the furnaces at a minimum temperature of 850 °C to prevent the formation of hazardous pollutants. Normally the steam subsequently generated in the boilers is routed to the steam turbines for power generation, but when the Waste to Energy plant is curtailed, this steam has to be dumped to the plant cooling system. Already in 2018, some 7% of the electrical energy from these plants was curtailed, which is equivalent to dumping 1.5 times the annual electrical requirement of the Dublin suburban rail network, a figure which is rising as more wind energy is installed in Ireland.



Weather systems are inherently linked to large air masses, such as along the polar front, the isobars on the weather map close together signifying a significant pressure differential. These low-pressure climatic conditions give rise to periods of windy weather, and conversely high-pressure conditions give rise to calm weather, while both are distributed over large geographically areas. The transboundary electrical interconnectors forming the Projects of Common Interest (PCIs) under the TEN-E Regulation are thus a pipe dream, ignoring that when surges of renewable energy occur in one country, they will also be occurring in the neighbouring country. While when renewable energy is in short supply, such as during calm weather or when the sun is low or absent, the same situation will arise in neighbouring countries.

The same 'EU energy in figures: Statistical pocketbook 2021' provides the following significant price evolution for domestic electricity (including taxation) in the EU27, based on Euros relative to 2020.

€/100 kWh	2009	2010	2015	2018	2019	2020
EU27_2020	16.77	17.77	20.89	21.46	21.70	21.34

Over the same period, industrial gas consumers, gas being widely used for electricity generation, experienced little change.

€/GJ (GCV)	2009	2010	2015	2018	2019	2020
EU27_2020	8.61	9.42	9.53	8.77	8.53	7.74

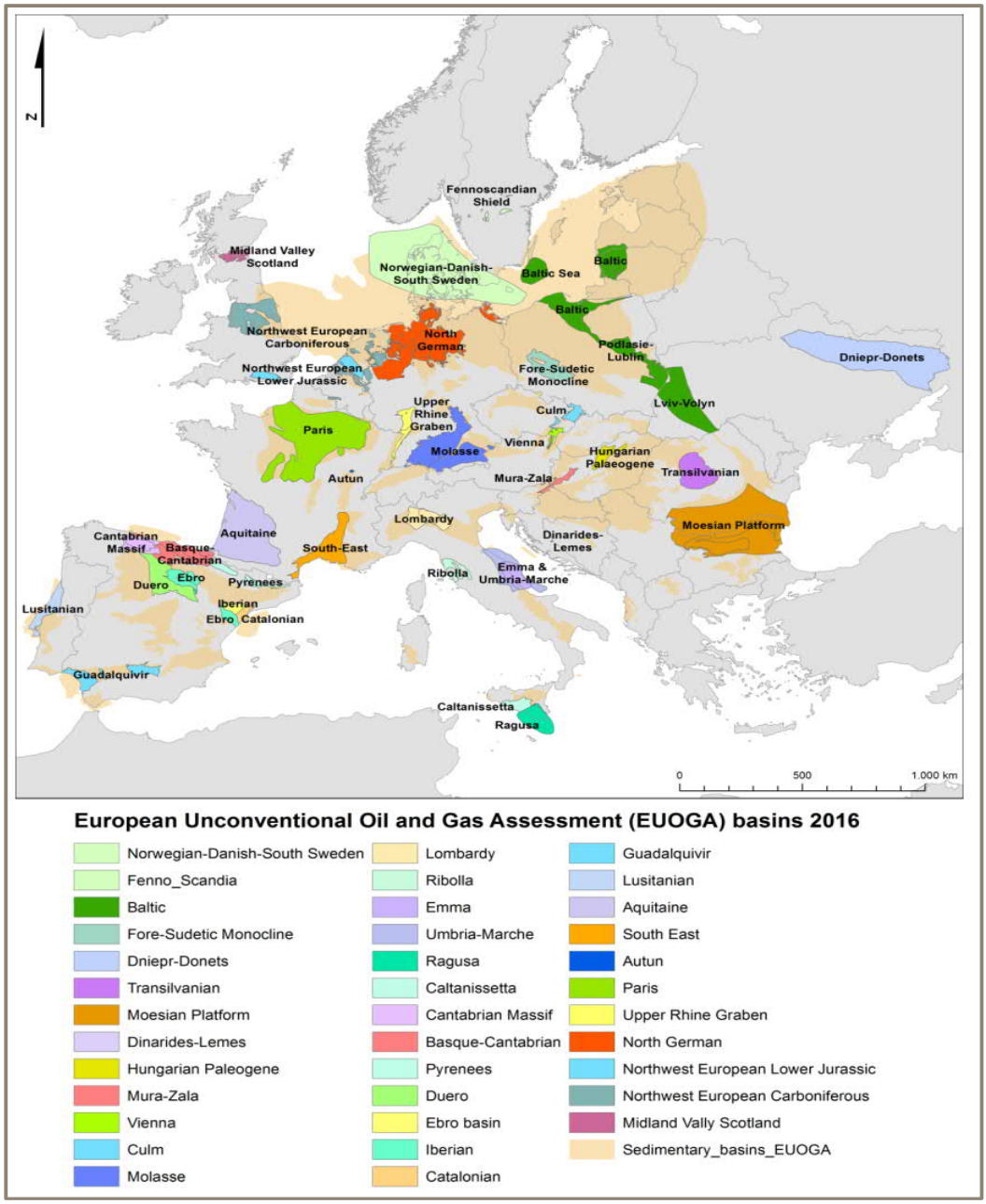
While, as previously highlighted, the USA, which instead of installing such a huge number of wind turbines and solar panels, replaced older coal fired generation with modern gas turbines. It achieved the same 27% reduction in carbon emissions as the EU, but has electricity at half the price paid in the EU.

As the previously referenced book documents, the known oil and gas reserves with current technological solutions exceed 50 years, while known coal reserves are at least 150 years and France in 2000 was already generating 78% of its electricity with a nuclear technology that a hundred years previously nobody had a clue existed.

The 'Resource estimation of shale gas and shale oil in Europe (February 2017)',[48] a report of the Joint Research Centre (JRC) of the EU Commission, concluded that the

[48] https://aglaw.psu.edu/wp-content/uploads/2020/05/t7_resource_estimation_of_shale_gas_and_shale_oil_in_europe.pdf

total estimated resource potential for all assessed countries within the EU is 89,235 billion cubic meters (bcm) of gas and 31.4 billion barrels of oil. To put this in context, the EU's annual consumption of gas is currently about 500 bcm and that of oil about 4.1 billion barrels.



Nuclear energy has been successful for several decades and will continue to improve, while uranium and thorium deposits are near unlimited and not being utilised for anything other than nuclear fission. In simple terms, there is no energy or environmental crisis, only a political crisis fuelled by incompetency and illegalities, and we would be far better off, if we had not built all this wind and solar energy infrastructure.