Submission to Northern Ireland Assembly Environment Committee
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Biography: Pat Swords is a Fellow of the Institution of Chemical Engineers and a Chartered Environmentalist, who graduated from University College Dublin in 1986. Pat has been active in the design and development of industrial projects in the chemical, pharmaceutical, food and energy sectors both in Ireland and abroad. For over a decade he helped implement the EU's environmental legislation concerning environmental assessment, industrial pollution control and major accident hazards into the then accession states of Central and Eastern Europe. As such he was responsible for training regulators, industry and, in later years, members of the public and NGOs in the implementation of the Environmental Acquis, the EU legislative framework in the environmental sector.

It was these skills he applied to the EU's and Ireland's renewable programme to fund and install several thousand wind turbines and thousands of kilometres of new high voltage lines into the Irish rural landscape. This lead to a legal case with the legal tribunal at the United Nations Economic Commission for Europe's (UNECE) Aarhus Convention in Geneva, the Compliance Committee ruling that the implementation of the EU's National Renewable Energy Action Plans (NREAPs), particularly in Ireland, was in non-compliance with the requirements of the Convention. The NREAPs having by-passed the mandatory steps in relation to assessment and public participation in decision-making. These findings and recommendations have since been endorsed by the UNECE Meeting of the Parties in July 2014[1], which is the formal Governing Body of the 47 Parties (countries) to the Convention, and are as such a declaration in International Law and binding on Community Law. UNECE are now engaged in formal compliance proceedings with the EU in relation to their recommendation that the NREAPs should be completed in a compliant manner with the active public participation before their adoption, while the matter is also subject to on-going proceedings in the High Court[2].

Pat also helped prepare and present a second case at the Compliance Committee taken by a Community Council in Western Scotland. This lead to the findings by the Compliance Committee in that the UK had failed to comply with the Convention in the manner in which it had adopted its NREAP. These findings were also endorsed by the Meeting of the Parties in July 2014 and currently are part of a Judicial Review, which is on-going in Scotland.

"The state exists for man, not man for the state. The same may be said of science. These are old phrases, coined by people who saw in human individuality the highest human value. I would hesitate to repeat them, were it not for the ever recurring danger that they may be forgotten, especially in these days of organisation and stereotypes." Albert Einstein

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[1] As formally adopted by ECE/MP.PP/2014/CRP.9/Rev.1 on the 2 July 2014: http://www.unece.org/fileadmin/DAM/env/pp/mop5/Documents/Category_I_documents/ECE_MP.PP_2014_L.16_ENG.pdf

[2] http://irishplanningnews.ie/high-court-challenge-to-national-renewable-energy-action-plan/ Proceedings to recommence on the 11th November 2014

1.1 Why Public Participation

Elections are only a 'roll call' to select public representatives and not put 'rulers' into place with unlimited powers by diktat. The environment of N. Ireland does not belong to administrators of the UK or of the EU to do what they want with it, such as filling it with wind turbines and pylons. Instead, the environment of Ireland belongs to its people and they have defined rights in law, which must be respected. History teaches us that populist trends and fashions come and go; as a result that is why a defined legal structure and associated rights have been put in place. This legal structure and associated rights are there for a reason, as part of the necessary checks and balances.

So let's look at those rights and the legal structure, which was put in place to control such matters. Principle 10 of the United Nations Rio Declaration of 1992 spelt it out[3]:

- *Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.*

Information has to be generated and provided, public participation in decision-making has to occur and proper access to justice provided.

In the region of the United Nations Economic Commission for Europe (UNECE), this became the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters[4], in many respects influenced by the unfortunate environmental legacy, which was left behind by the planned economies of Eastern Europe and Central Asia. The EU ratified the Convention in February 2005 in Decision 2005/370 and it became a binding part of Community Law[5]. As the EU clarified in their first National Implementation Report to UNECE[6]:

- *International agreements concluded by the European Community are binding on the institutions of the Community and on Member States. In accordance with the European Court of Justice's case-law, those agreements prevail over provisions of secondary Community legislation. The primacy of international agreements concluded by the Community over provisions of secondary Community legislation also means that such provisions must, so far as is possible, be interpreted and applied in a manner that is consistent with those agreements.*

[3] http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163
[4] http://www.unece.org/env/pp/welcome.html

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

[6] http://ec.europa.eu/environment/aarhus/pdf/sec_2008_556_en.pdf

- *Such provisions constitute rules of Community law directly applicable in the internal legal order of the Member States, which can be relied on by individuals before national courts against public authorities.*

However, the principles behind this are nothing new or radical.

"I not only use all the brains that I have, but all that I can borrow" - Woodrow Wilson, US President, 1913-1921.

Gathering opinions and information from interested parties is an essential part of the policy-development process, enhancing its transparency and ensuring that proposed policy is practically workable and legitimate from the point of view of stakeholders. Furthermore, civil society is not without considerably talented people. It is not by any means uncommon that members of the public may be more competent and knowledgeable in the subject matter than designated public officials, in particular where it concerns matters in their locality. A modern democracy is about being inclusive and bringing out the talents of the public, not suppressing them in the manner which George Orwell so aptly described in Animal Farm, where the pigs decide and the animals have to toil building windmills:

- *No one believes more firmly than Comrade Napoleon that all animals are equal. He would be only too happy to let you make your decisions for yourselves. But sometimes you might make the wrong decisions, comrades, and then where should we be?*

1.2 The Principles of Public Participation

As the 'Aarhus Convention: An Implementation Guide'[7] points out in relation to the first pillar on access to information:

- *Under the Convention, access to environmental information ensures that members of the public are able to know and understand what is happening in the environment around them. It also ensures that the public is able to participate in an informed manner.*

Obligations are placed on public authorities not only in relation to providing access to environmental information on request, but also to possessing and updating environmental information which is relevant to their function, ensuring that it is transparent and effectively accessible. The latter relates to the general obligation of the Convention of:

- *Recognizing the importance of fully integrating environmental considerations in governmental decision-making and the consequent need for public authorities to be in possession of accurate, comprehensive and up-to-date environmental information.*

These measures were adopted through Directive 2003/4/EC on public access to environmental information and the N. Ireland Environmental Information Regulations.

As regards the principles of public participation the Implementation Guide further clarifies:

[7] http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

- *Public participation in decision-making is the second "pillar" of the Convention. Public participation cannot be effective without access to information, as provided under the first pillar, nor without the possibility of enforcement, through access to justice under the third pillar.*

- *In its ideal form, public participation involves the activity of members of the public in partnership with public authorities to reach an optimal result in decision-making and policymaking. There is no set formula for public participation, but at a minimum it requires effective notice, adequate information, proper procedures and appropriately taking account of the outcome of the public participation. The level of involvement of the public in a particular process depends on a number of factors, including the expected outcome, its scope, who and how many will be affected, whether the result settles matters on a national, region or local level, and so on. In addition, different persons may have different status in connection with participation on a particular matter.*

- *Those who are most affected by the outcome of the decision-making or policymaking should have a greater chance to influence the outcome. This is behind the distinction between "public" and "public concerned".*

The Convention differentiates between the public participation requirements for permit approvals, such as planning or pollution control, which is Article 6 of the Convention and public participation for plans, programme or policies related to the environment, which is Article 7 of the Convention. At the EU level Article 6 was transposed by updating the Directives on Environmental Impact Assessment (EIA) and Integrated Pollution Prevention and Control (IPPC) legislation. However, Article 7 was never properly transposed. The EU has a 2001 Directive on Strategic Environmental Assessment, which is applicable in certain cases, such as programmes related to energy. While this is more specific in content than Article 7 of the Convention, the UK Parliament's January 2006 briefing paper[8] on the implementation of the Convention was accurate when it pointed out:

- *Implementing the second pillar has been problematic. Given the many discrete policy areas involved and the need to meet EU time limits, the competence for public participation has been split between different legal instruments and thus different government departments.* ***With public participation legislation mainly focusing on EIA, IPPC and planning, it provides insufficient coverage for other areas affected.***

- *Problems have to be highlighted early "**when all options are open and effective participation can take place**". At the moment, however, consultations, which do not have to take account of the opinions given, remain the key instrument used by decision makers.*

This needs some further explanation, if a project is an isolated entity, such as a 'one off' new power station to replace an aging one, it will be assessed at the project level through Article 6 of the convention and the EIA Directive. If instead it is power generation connected to an overall programme, such as a plan related to renewables, then tiered decision making applies and prior assessment of the plan or

[8] Parliamentary Office of Science and Technology- Postnote January 2006 Number 256 (available on internet)

programme should have also occurred to Article 7 of the Convention and the interlinked Directive on Strategic Environmental Assessment.

At the UNECE Meeting of the Parties in July 2014, the Maastricht Recommendations on Public Participation were adopted, which are both highly informative and readable[9]. As regards the 'step by step' procedures in relation to 'when all options are open' and 'taking due account of the public participation', these were clarified in the Maastricht recommendations with respect to the 'case law' of the Convention, in particular:

- *2(b). The "zero option" means the option of not proceeding with the proposed activity, plan or programme at all nor with any of its alternatives.*

- *16. In line with the Convention's requirement for the public to have an opportunity to participate when all options are open,[10] the public should have a possibility to provide comments and to have due account taken of them, together with other valid considerations required by law to be taken into account, at an early stage of decision-making when all options are open, on whether the proposed activity should go ahead at all (the so-called "zero option").[11] This recommendation has special significance if the proposed activity concerns a technology not previously applied in the country and which is considered to be of high risk and/or to have an unknown potential environmental impact. The opportunity for the public to provide input into the decision-making on whether to commence use of such a technology should not be provided only at a stage when there is no realistic possibility not to proceed.[12]*

- *19. Irrespective of how the framework for decision-making is structured, the public should have a possibility to discuss the nature of and need for the proposed activity at all (the zero option, see para.16 above). In order to satisfy the requirements of the Convention and to meet the legitimate expectations of the developer, this possibility should be provided at the earliest stage of the entire decision-making, when it is genuinely still open for the project not to proceed.*

- *78(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.*

Article 6(8) of the Convention requires that:

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

[9] http://www.unece.org/fileadmin/DAM/env/pp/mop5/HLS/ece.mp.pp.2014.crp.7_ece.mp.prtr.2014.crp.1_e_.pdf

[10] Article 6, paragraph 4 of the Convention.

[11] Compliance with regard to Lithuania, ECE/MP.PP/2008/5/Add.6, para. 74; Compliance with regard to the European Commission, ECE/MP.PP/2008/5/Add.10, para. 51; Compliance with regard to Slovakia, ECE/MP.PP/2011/11/Add.3, ECE/MP.PP/2011/11/Add.3, para. 61 and 63.

[12] Compliance with regard to Lithuania, ECE/MP.PP/2008/5/Add.6, para 74

As the 'Implementation Guide' clarifies: *In its findings on communication ACCC/C/2008/24 (Spain), the Committee found that:*

- *It is quite clear to the Committee that the obligation to take due account in the decision of the outcome of the public participation cannot be considered as a requirement to accept all comments, reservations or opinions submitted. However, while it is impossible to accept in substance all the comments submitted, which may often be conflicting, the relevant authority must still seriously consider all the comments received. The Committee recalls that the obligation to take "due account" under article 6, paragraph 8, should be seen in the light of the obligation of 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". Therefore the obligation to take due account of the outcome of the public participation should be interpreted as the obligation that the written reasoned decision includes a discussion of how the public participation was taken into account. ... 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.*

In a similar fashion the EU's Directive on Environmental Impact Assessment, requires that the following information shall be made available to the public:

- *Having examined the concerns and opinions expressed by the public concerned, the main reasons and considerations on which the decision is based, including information about the public participation process.*

As the case law of the European Court confirms with regard to the Environmental Impact Assessment Directive[13] in that it:

- *Prescribes an assessment of the environmental impact of a public or private project, but does not lay down the substantive rules in relation to the balancing of the environmental effects with other factors or prohibit the completion of projects which are liable to have negative effects on the environment.*

It therefore informs the final decision on a project, rather than directs it, but it must be completed in a 'transparent and fair' manner in accordance with the public participation requirements of the Convention including proper 'reasons and considerations' on which the decision is based.

1.3 The UK and Northern Ireland's Failure to Transpose the Environmental Impact Assessment Directive

The DOE and NIEA's own website on Environmental Impact Assessment state:

- *Environmental Impact Assessment (EIA) is a process undertaken by developers when it is considered that a development proposal may have a significant environmental impact.*

This is not correct; the Environmental Impact Assessment is the responsibility of the competent authority for the planning decision, which he must make available to the

[13] http://ec.europa.eu/environment/eia/pdf/eia_case_law.pdf

public on request as part of the decision-making process. This requirement on the competent authority has been defined in Article 3 of the Environmental Impact Assessment Directive since 1985. To explain, the below taken from the same website is accurate:

- *An Environmental **Statement** (ES) is a developer's assessment of the environmental impact of a project. It will contain suggestions for mitigation (taking protective measures to reduce or remove this impact).*

In addition members of the public through the public participation process can submit their assessments of environmental impact and other observations. This can also be supplemented by other relevant documentation produced public authorities, such as a Strategic Environmental Assessment.

The March 2011 European Court ruling against the Republic of Ireland in case C-50/09 for failure to properly transpose Article 3 of the Environmental Impact Assessment Directive[14], states in Points, 37, 38 and 40:

- *37. "In order to satisfy the obligation imposed on it by Article 3, **the competent environmental authority may not confine itself to identifying and describing a project's direct and indirect effects on certain factors, but must also assess them in an appropriate manner, in the light of each individual case".***

- *38. "That assessment obligation is distinct from the obligations laid down in Articles 4 to 7, 10 and 11 of Directive 85/337, which are, essentially, **obligations to collect and exchange information, consult, publicise and guarantee the possibility of challenge before the courts. They are procedural provisions which do not concern the implementation of the substantial obligation laid down in Article 3 of that directive**".*

- *40. "However, that obligation to take into consideration, at the conclusion of the decision-making process, information gathered by the competent environmental authority must not be confused with the assessment obligation laid down in Article 3 of Directive 85/337. **Indeed, that assessment, which must be carried out before the decision-making process** (Case C-508/03 Commission v United Kingdom [2006] ECR I -3969, paragraph 103**), involves an examination of the substance of the information gathered as well as a consideration of the expediency of supplementing it, if appropriate, with additional data. That competent environmental authority must thus undertake both an investigation and an analysis to reach as complete an assessment as possible of the direct and indirect effects of the project concerned on the factors set out in the first three indents of Article 3 and the interaction between those factors".***

This legal requirement is for *"as complete an assessment as possible of the direct and indirect effects of the project concerned on the facts set out in the first three indents of Article 3 and the interaction between those factors",* where the factors comprise:

(a) human beings, flora and fauna,

[14] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CJ0050:EN:NOT

(b) soil, water, air, climate and the landscape,
(c) material assets and the cultural heritage, and;
(d) the interaction between the factors mentioned in paragraphs (a), (b) and (c).

However, if we consider the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2012[15], which is similar to other UK regulations, there is a requirement in Section 4 that:

- *The Department or the Commission, as the case may require, shall not grant planning permission or subsequent consent pursuant to an application to which this regulation applies unless they have first taken the environmental information into consideration, and they shall state in their decision that they have done so.*

This is important, Northern Ireland planning decisions are based solely on a very weak obligation to take environmental information into consideration. The more stringent obligation on the decision maker to properly assess the impacts of the development on human beings, as to what the climate change impacts are, what the landscape impacts are, etc. and to take ownership and responsibility for them in justifying the decision to the public is simply by-passed.

1.4 The Systematic Failures of Northern Ireland Planning to comply with the legal framework when approving wind farms

In the Planning Appeals Commission decision on Case 2013/A0169 on the Drumadarragh Windfarm in Point 14 it is stated:

- *Performance of Wind Turbines: General criticisms of wind power in general were raised by objectors. However, such criticisms are inappropriate for consideration in the context of this individual appeal. For example, the question of whether wind turbines are more or less efficient or cost effective relative to other power sources is a matter of national and regional policy review. General concerns about wind farms; 'green credentials' and carbon release impacts are similarly beyond the scope of this appeal. The economic viability of the proposal is a matter of the developer.*

This has to be considered quite remarkable given the legal context previously outlined '*of effective public participation when all options are open'* and the requirement of the competent authority for the planning decision to actually produce an assessment of the impact on climate, i.e. what the alleged benefits of the development were. Naturally the public should be entitled to see a demonstration that those alleged benefits actually outweigh the considerable known and documented negative impacts of the wind farm.

If we go back to the origin of this, the EU failed to evaluate what exactly was to be built in each Member State, where it was to be built, what its costs and benefits would be, what were the alternatives to the programme, etc. It therefore reached the position that its 20% renewable energy by 2020 target had to be implemented in the following manner, as described in Recital 15 of the 2009/28/EC Directive[16]:

[15] http://www.legislation.gov.uk/nisr/2012/59/contents/made
[16] http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32009L0028

- *The starting point, the renewable energy potential and the energy mix of each Member State vary. It is therefore necessary to translate the Community 20 % target into individual targets for each Member State, with due regard to a fair and adequate allocation taking account of Member States' different starting points and potentials, including the existing level of energy from renewable sources and the energy mix. It is appropriate to do this by sharing the required total increase in the use of energy from renewable sources between Member States on the basis of an equal increase in each Member State's share weighted by their GDP, modulated to reflect their starting points, and by accounting in terms of gross final consumption of energy, with account being taken of Member States' past efforts with regard to the use of energy from renewable sources.*

In other words, the 20% renewable energy target was 'dished out' to the Member States based on what level of renewable energy resources they already had, some like Sweden having considerable existing hydro sources, and a 'fudge factor' based on GDP. Neither were the proper public participation procedures followed in the development of this Directive, as not only was there an absence of environmental information on what was to be built, why it was to be built and where it was to be built, but also the public concerned were not contacted and provided with an opportunity to participate in this decision-making.

This completely dysfunctional and legally non-compliant approach, evident in the development of the 20% renewable energy programme and the associated Directive 2009/8/EC, continued throughout its implementation. Member States were given little more than a year to adopt a National Renewable Energy Action Plan (NREAP) defining how their allocated National Target would be met. However, EU legislation which implements Article 7 of the Aarhus Convention[17] requires that such plans or programmes related to Energy, which lead to future development consent of projects regulated by the Environmental Impact Assessment Directive, must undergo a Strategic Environmental Assessment before adoption.

This did not happen, not only in the UK and Ireland, but also in the other Member States. The NREAPs were adopted by by-passing the Strategic Environmental Assessment and associated public participation. As a result the assessment of the objectives of the plan, the alternatives to reach those objectives, the likely state of the environment without implementation of the plan, the significant environmental impacts of the plan, the necessary mitigation measures, the monitoring for unforeseen adverse environmental impacts, all of this was bypassed and ignored.

Really it's not in the least bit surprising that UNECE has issued two rulings against both the EU and the UK for the implementation of the NREAPs being non-compliant with Article 7 of the Convention.

The same renewables Directive provides at Recital 44 that:

- *"The coherence between the objectives of this Directive and the Community's other environmental legislation should be ensured. In particular, during the assessment, planning or licensing procedures for renewable energy installations, Member States should take account of all Community*

[17] See Section on Article 7 in EU Implementation Report to UNECE: http://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_ir_2008_EC_e.pdf

environmental legislation and the contribution made by renewable energy sources towards meeting environmental and climate change objectives, in particular when compared to non-renewable energy installations."

In further provides at Recital 90 that:

- *"The implementation of this Directive should reflect, where relevant, the provisions of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, in particular as implemented through Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information."*

As regards to Northern Ireland, the planning decision referred to previously provides in Point 7 reference to the UK's renewable energy target of 15% and the document "First Steps Towards Sustainability – a Sustainable Development Strategy for Northern Ireland (SDS)"[18]. The latter set in 2006 a 40% target beyond 2025 of all electricity consumed in Northern Ireland being obtained from indigenous renewable energy resources.

So here we had a classic example in 2006 of what the UK Parliamentary was 'calling foul' about, namely rushing in plans and programmes without the necessary public participation. Article 7 of the Convention is clear in that the 'necessary information' has to be provided to the public, in which 'necessary' is understood within the context of effective public participation. Yet when at a 'downstream' project approval stage, i.e. the next tier in the tiered decision making, when members of the public appealing a decision raise fundamental questions that there is an absence of critical environmental information to support the basis of the project, they are told to essentially 'feck off'. We have our plan and if you don't like it take us to Court.

However, as any environmental lawyer will point out, the clear intent of Recitals 44 and 90 of the Renewables Directive, taken together, is that implementation of the Directive (including preparation of the NREAP) should allow for public participation in the process of preparing the NREAP, and for the NREAP itself to be based on information which is up to date and accurate, and which considers the contribution made by renewable energy sources towards meeting environmental and climate change objectives, in particular when compared to non-renewable energy installations. Such contribution cannot be assessed in the absence of reliable environmental data verifying the expected CO_2 reductions from wind power as compared with fossil fuels. In failing to subject the NREAP to proper public consultation the United Kingdom denied interested parties the opportunity to comment on or query such matters as the extent to which claimed savings in CO_2 emissions associated with wind power were substantiated by the available "up to date and accurate" information relating to claimed CO_2 savings. It follows that planning decisions taken to assist the achievement of renewables targets should be taken in pursuance of planning policies, which have themselves been promulgated pursuant to the NREAP, and pursuant to public consultation based upon up to date and accurate environmental information.

Furthermore, in accordance with established case law in the European Court, the fact that Northern Ireland has allocated considerable resources to its 40% electricity target from 2006 above, means that it engaged the legal requirement in the 2001 Strategic Environmental Impact Assessment Directive, which required a detailed

[18] http://www.doeni.gov.uk/index/epd_about_us.htm

environmental report and public participation before that programme could be adopted. However, all of this was by-passed. So not only is there no information on the justification of this programme in terms of CO_2 savings, but there was also no proper consideration of alternatives, assessment of impact on human beings, monitoring for unforeseen adverse environmental impacts, etc.

In the planning appeal mentioned, on the basis of considerable scientific evidence presented by the appellant in relation to the adverse impacts of noise, the development in question was refused. However, the appellant shouldn't have had to go to that level of detail; it is not his responsibility to prove a negative, but the authorities to prove a positive. This they had failed to do, they had never assessed the 40% Northern Ireland renewable programme in terms of impact on population and human health, plus once the programme was adopted completed the monitoring for unforeseen adverse environmental impacts.

Take your pick; 'don't know',' don't care', 'an entitlement to act ultra vires'; but either way from a legal perspective, it is a god awful mess.

1.5 How the EU's Renewable Targets won't be met, particularly by the UK

Not only are there serious legal issues related to the validity of the EU's renewable Directive, but because it was conceived in such a dysfunctional manner, is it no wonder it is going completely off the rails, as can be seen below:

The EU Commission published a "Renewable energy progress report COM(2013) 175 final" in March 2013[19]. It also published a Staff Working Document accompanying this report, entitled SWD(2013) 102 final[20]. As the latter pointed out:

- *These findings are based on data from the period 2008-2010. Since then, as set out in the Report mentioned above, the economic climate has changed significantly and, as a result, the overall prospects of Member States meeting their targets for 2020 are less evident.*

It then further pointed out:

- *In the **electricity sector**, 12 Member States (Belgium, Bulgaria, the Czech Republic, Estonia, Finland, Germany, Hungary, Italy, the Netherlands, Romania, Spain and Sweden) exceeded their planned targets for renewable energy electricity in 2010, whilst the remaining 15 missed their targets. The "planned" targets for 2010 were also the indicative targets for the share of renewable energy in the electricity mix as submitted by Member States under Directive 2001/77/EC. Thus 15 Member States failed to meet their legally agreed indicative 2010 targets.*

- *The Commission has also undertaken a qualitative assessment of Member States' policies and measures described in their progress reports of 2011 and made a comparison with the commitments contained in the national renewable energy action plans ("Plans"). This assessment indicates that few*

[19] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0175&from=EN

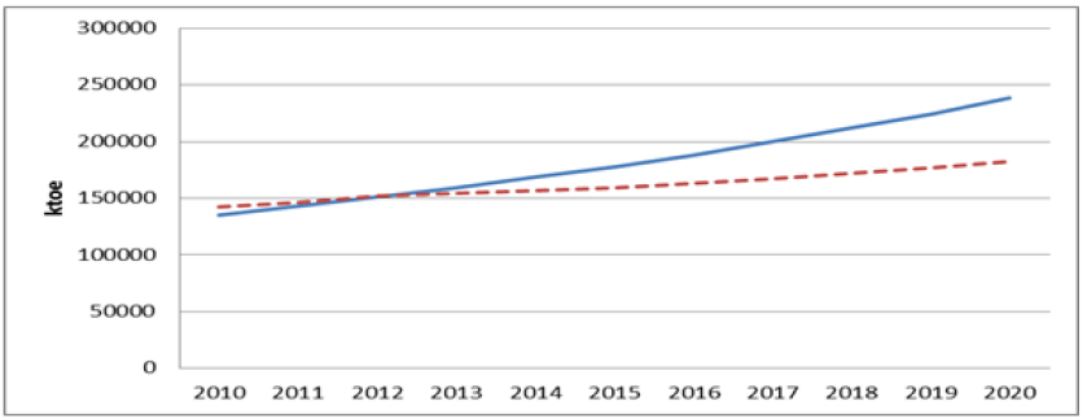
[20] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013SC0102&from=EN

Member States have vigorously implemented their planned short term measures and many have not honoured their commitments.

- *In addition, modelling-based analysis was undertaken for the Commission, considering the current and planned policy initiatives of Member States, their current implementation rates and the various barriers to renewable energy development. This conservative analysis points to the possibility of an even less optimistic outlook for 2020.*

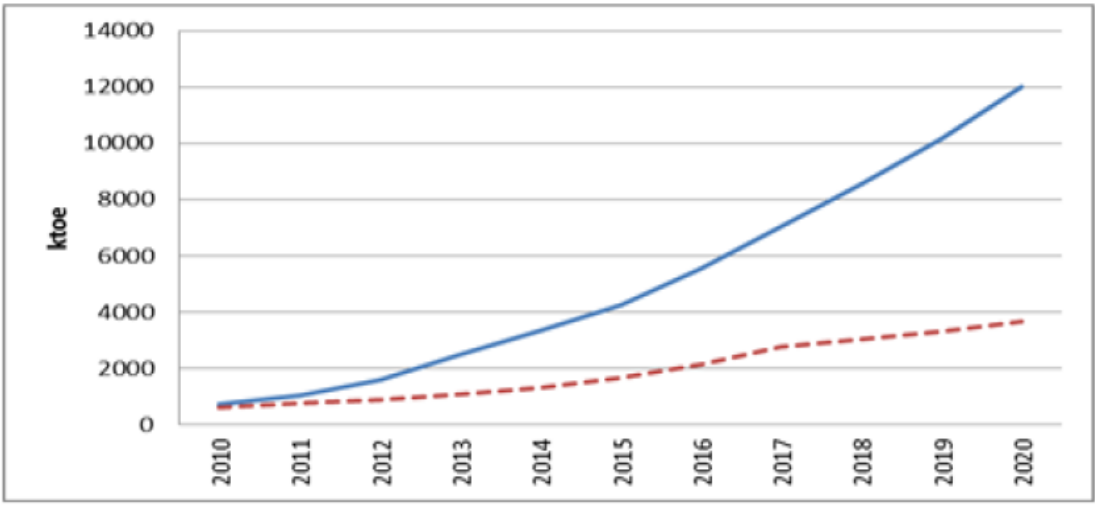
- *In the majority of countries, currently implemented renewable energy policies appear insufficient to trigger the required renewable energy deployment, at least under such conservative assumption. Generally this reflects the inadequacy of both the current, existing measures necessary to mitigate the non-economic barriers that hinder renewable energy growth and support. The financial crisis also affects these developments more than was anticipated by Member States in their national renewable energy action plans; EU countries face a different financial risk rating today and that has had a further negative impact on investments in renewable energy.*

If we consider the main “Renewable energy progress report” itself, the same issues are to be seen. Indeed as presented in the following graphs



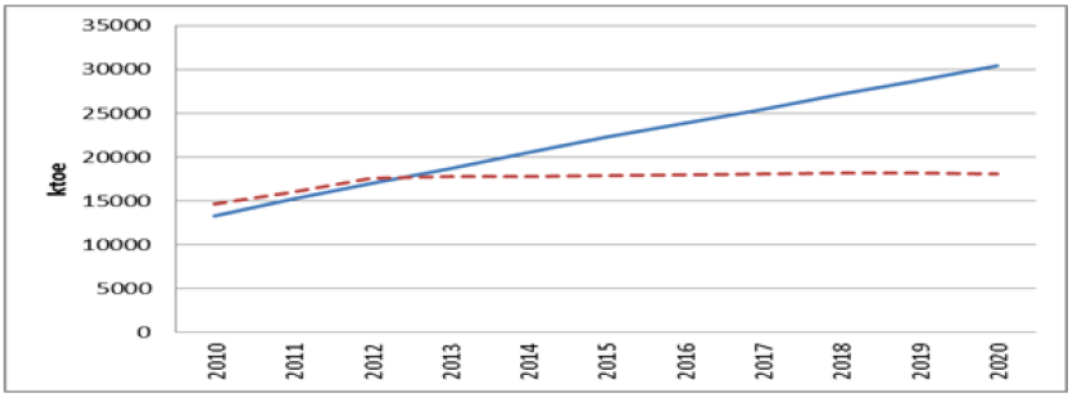
Planned (blue) versus estimated (red/dotted) trend in EU renewable energy

- *The failure to comply with national plans is most evident in the **wind sector**. According to Member State plans, wind capacity is expected to reach 213 GW in 2020 (169 GW onshore and 44 GW offshore). Electricity generation from offshore capacity is planned to reach 140 TWh (roughly 12 Mtoe). However, according to the Commission's analysis, it may only reach 43 TWh (3.7 Mtoe) due to reduced national efforts and infrastructure difficulties.*



Planned (blue) versus estimated (red/dotted) trend in EU offshore wind energy

- *Despite the recent strong growth in the onshore wind industry of recent years, Member States' plans for onshore wind production 354 TWh may fall short. Further efforts will be needed to reinforce measures and improve infrastructure, or only an estimated 210 TWh might be achieved.*



Planned (blue) versus estimated (red/dotted) trend in EU onshore wind energy

- *Total wind generation may therefore fall short of expectations. Whereas Member State plans foresee wind generation of almost 500 TWh, current trends point to the risk of achieving only half of it, i.e. 253 TWh.*

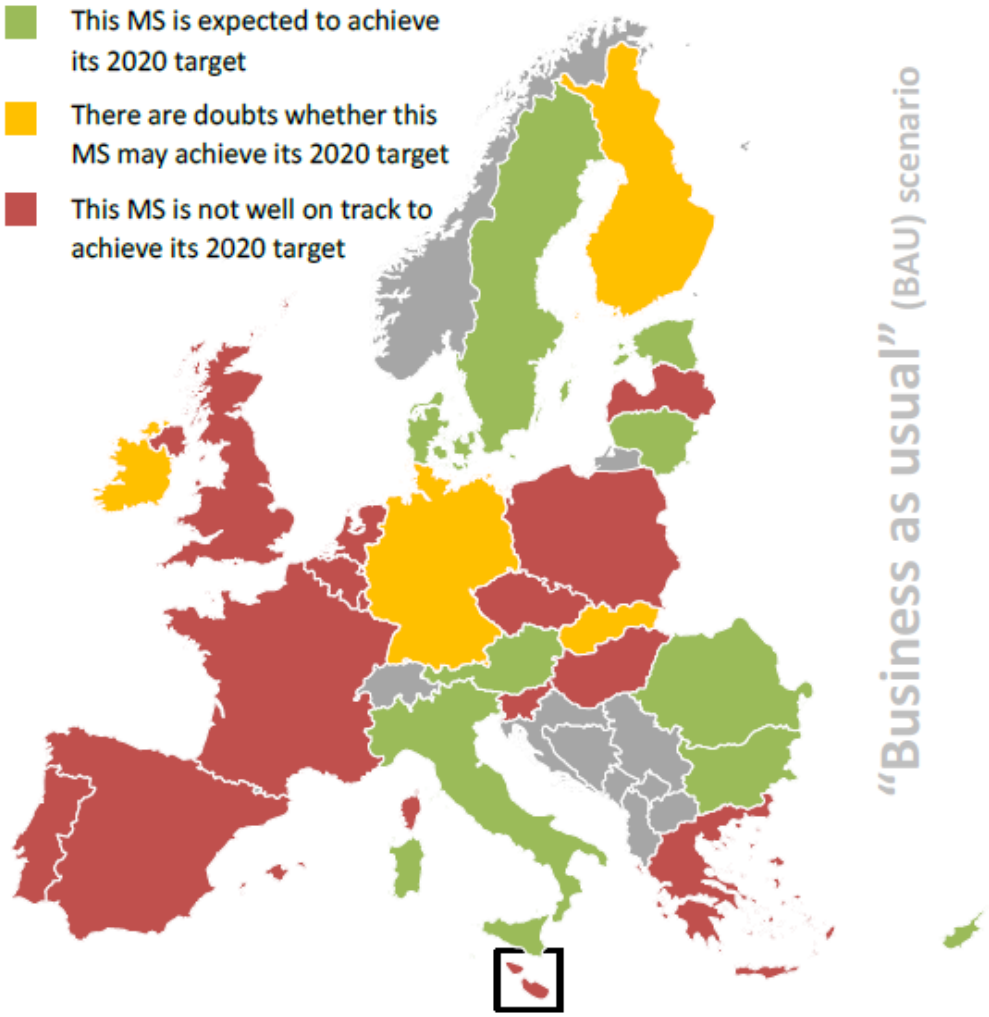
There is a website funded by the EU's Intelligent Energy Europe Programme 'Keep on Track[21]', whose function is to track the progress towards the EU's 20% renewable energy by 2020 programme, namely the implementation of Directive 2009/28/EC. It is therefore considerably more up to date than the latest EU Commission's documentation of March 2013 above. Indeed, the website's press release of 6th October 2014 couldn't be clearer: "*14 EU Member States will fail to meet their 20% renewables target by 2020, as progress stands today*[22]".

[21] http://www.keepontrack.eu/

[22] http://www.keepontrack.eu/contents/mediapressreleases/scenario-2020-press-release.pdf

- *According to the 2020 RES (Renewable Energy Sources) Scenarios for Europe Report, as it stands today, 14 Member States will fail to meet their 2020 RES targets and there are doubts about 4 other Member States reaching their target.*

Consideration of this report[23] shows the results in the figure below of the quantitative analysis of a Member State's ability to meet its 2020 target given the current 'business as usual' scenario:



Note: The traffic light colours of the figure on the left hand-side show an achievement or shortfall of 2020 RES targets by Member State after possible adjustments through RES cooperation.

An examination Member State by Member State then follows in the report, some points to note being:

France is not well on track with respect to its 2020 RES target.

[23] http://www.keepontrack.eu/contents/publicationsscenarioreport/kot--2020-res-scenarios-for-europe.pdf

For Germany it can be expected that the given 2020 RES target (18%) can be achieved under baseline conditions, i.e. if currently implemented RES policy measures are kept in place and framework conditions may not change to the worse in forthcoming years. Note: Not included in this report was the reform of Germany's renewable supports (EEG) in August 2014, which reduced significantly the previous generous renewable subsidies, given soaring electricity prices amounting to a doubling of electricity rates, since these renewable supports were introduced in 2000.

Poland is a Member State where the achievement of its 2020 RES target cannot be expected under baseline conditions. Note the report predicts a renewable energy share of 12.1% under the business as usual case versus a target of 15% set in the EU Directive. 90% of Poland's electricity comes from coal and the Polish Prime Minister Donald Tusk has it made it clear that the Polish economy will continue to be based on coal[24]. Poland has never implemented generous support schemes for renewables.

In terms of stagnating RES deployment in previous years Spain is expected to fail in achieving its 2020 RES target under baseline conditions. Note the report predicts a renewable energy share of 15.6% under the business as usual case versus a target of 20% set in the EU Directive. Generous renewable energy subsidies in Spain had to be slashed due to soaring electricity costs and worsening economic conditions.

For the UK it is not expected that its 2020 RES target can be achieved under baseline conditions. Note the report predicts a renewable energy share of 7.8% under the business as usual case versus a target of 15% set in the EU Directive.

It is also necessary to point out that the 20% renewable energy by 2020 Directive (2009/28/EC) contained a target that at least 10 % of the final consumption of energy in transport in a Member State had to come from renewable sources. As a consequence, this lead to a massive roll out of biofuels with associated seriously adverse impacts in relation to global food prices and biodiversity. As a result, the situation was reached in summer 2014, where the EU Energy Ministers have had to agree the 10% renewable target in transportation should now be capped[25]. As Oxfam are quite rightly putting it, such biofuels are a:

- "*Brazen assault on common sense. In a starving world, phasing out the use of food for fuel is the only sensible thing to do*".

The European Environment Agency has also had to call a 'spade a spade'[26]:

- *"The overambitious 10 % biofuel target is an experiment, whose unintended effects are difficult to predict and difficult to control. Therefore the Scientific Committee recommends suspending the 10 % goal; carrying out a new, comprehensive scientific study on the environmental risks and benefits of biofuels; and setting a new and more moderate long-term target, if sustainability cannot be guaranteed".*

[24] http://www.thenews.pl/1/12/Artykul/146850,-Poland-will-stick-with-coal-PM-pledges

[25] http://www.reuters.com/article/2014/06/13/us-eu-biofuels-idUSKBN0EO14L20140613

[26] http://www.eea.europa.eu/highlights/suspend-10-percent-biofuels-target-says-eeas-scientific-advisory-body

1.6 The Lawyers move in

Currently in the High Court in Dublin there are seven Judicial Reviews in relation to approvals of renewable projects, plus one case in relation to the validity of the Irish NREAP. The Access to Justice Pillar of the Convention, Article (9), bestows the right of "access to administrative or judicial procedures to challenge acts and omissions of private persons and public authorities, which contravene provisions of its national law related to the environment". These procedures must be fair, equitable, timely and not prohibitively expensive. In addition, the Charter of Fundamental Rights of the Lisbon Treaty make binding the Right to Good Administration and the Right to have damages made good. In areas of Community legal order, such as failures of a Member State or an institution of the EU, there is legal liability.

This is an established part of case law of the European Court since 1991, when Senor Francovich won his case, in relation to Italy failing to implement EU legislation for the protection of employees in the event of insolvency of the employer. The European Court found the Italian State liable to financially compensating the workers for the breach in legislation. This principle of Member State liability has been well established in further cases since taken. Indeed, the EU Commission has seen it as an effective mechanism for the public to themselves enforce Community law in the Member States. They have published a specific guidance document on the case law concerning damages in relation to breaches of EU law by Member States[27].

The current legal cases in relation to validity of planning decisions, will undoubtedly be followed in time by claims for damages, owing to a breach in rights and a causal relationship between those rights and the damage caused, such as in relation to unacceptable noise impacts and loss of residential amenity.

[27] http://ec.europa.eu/eu_law/infringements/infringements_dommages_en.htm