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Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee
United Nations Economic Commission for Europe
Palais des Nations, Room 429-4
CH-1211 GENEVA 10
Switzerland
By email: aarhus.compliance@un.org

Re. Draft findings and recommendations with regard to communication ACCC/C/2013/107 concerning compliance by Ireland

Dear Ms Marshall,

I am writing to acknowledge your most courteous circulation of the most welcome draft findings on communication ACCC/C/2013/107, in the context of observations made on this matter. Additionally we wish to make some brief remarks related to the draft findings, and more particularly on the recommendations, and Ireland's response to the draft findings on which we were also very graciously cc'd by Ms Joyce, the Party Concerned's National Focal Point.

Acknowledgements and Thanks

In the first instance, we wish to most sincerely thank the Committee for its deliberations on this matter, and the secretariat for their efficiency and effectiveness throughout the process. In the brief exposure I have had on this and other such matters – the level of commitment you collectively demonstrate goes far and above any ordinary call of duty. The ability of the Committee and Secretariat to grapple with the various complexities of so many differing legislative regimes and complex matters of fact, never ceases to amaze me, particularly when executed with such courtesy, endless patience, exactness, and sensitivity.

It will come as no surprise, that the clarity of the finding of non-compliance here in respect of Article 6.10 of the Convention and Article 42(1) of the Planning and Development Act 2000 and as summarised in Paragraph 45 of the Draft Findings, we view as most welcome. Albeit it is a sad situation to be pleased when one's nation is found to be at fault. However, we see the draft finding as a first unfortunately necessary step on the path toward greater compliance by Ireland with it's

obligations under the Convention. We very much welcome the impetus the Committee's draft findings will hopefully add to the resolution of this issue, given the resistance we have observed and experienced to date on this matter.

In that regard, we also wish to warmly thank and acknowledge the communicant, Mr Cummins, for the effort he has expended and the service he has done on this matter in a voluntary capacity. In particular we applaud the generosity of spirit he exhibited to us, when we engaged to share our concerns on section 42, and to assist him in this process, and to keep him appraised of legislative developments, and developments in the courts. Additionally, there are no words to express our thanks to Mr Andriy Andrusevych and Dr Fred Logue for their additional assistance in this matter. We also wish to acknowledge in particular Deputy Eoin O'Broin, for his many valiant efforts to champion issues with s.42 in the Oireachtas including in relation to its compliance with the Aarhus Convention, and the supportive efforts of a number of other Dáil deputies.

We wish also to acknowledge the participation of the Party Concerned, in this important process, and the Departmental officials involved.

In the context, we wish to make a few last observations, albeit it is our understanding that the Committee has made its finding and that only errors on matters of fact in the findings are appropriate to be raised at this point. Our comments in the main therefore concern the response of the Party Concerned to the Draft Findings, and the Committee's recommendations. Please be assured it is not our intention to raise anything new.

The response in general of the Party Concerned to the Draft Findings

1. In the Party Concerned's response to the Draft Findings it "notes" the finding of non-compliance. We encourage Ireland to fully endorse and accept the finding.
2. We both offer and would welcome an opportunity to engage constructively with Ireland to assist us move toward greater compliance by addressing the legislation at issue.
3. We very much welcome that the Party Concerned has clarified and confirmed that it has no objection to the Committee making a recommendation in accordance with paragraph 36(b) of the annex to decision 1/7, where such confirmation was sought in the Committee's covering note to Party Concerned on the draft findings.
4. Therefore we look forward to progress on the remedy which will also serve to minimise the focus on Ireland's failure at the next Meeting of the Parties, and instead hopefully allow us collectively applaud its remedy, and leave the matter of recommendations as somewhat incidental to those proceedings.

Observations in respect of the Recommendations and Ireland's response to them.

5. In the context of paragraphs 1- 5 above, we make these further comments by way of encouraging the committee to be very vigilant and robust on the matter of oversight of the the Party Concerned's response to the recommendations. We wish additionally to encourage Ireland to make a very speedy, constructive and positive response to remedy the identified non-compliance.
6. We are very conscious that Ireland, the Party Concerned, can and does move very swiftly when it so wishes to amend legislation. The Bills office has on occasion been required to

work through the night, alongside those of us seeking to advance of monitor changes to legislation, and Members of the Oireachtas have sat into the late hours as necessary. Albeit we are not necessarily advocating 'cracking a whip' so to speak to advance these matters – we are highlighting the capacity which can be leveraged when the Government wishes it.

7. Even in the context of other elements of the section 42 legislation which featured in passing in this communication, amending legislation was initiated and enacted in a matter of 15 days, [1] and during the period in which the committee was investigating this communication.
8. In short, procedural and structural legislative issues are not an obstacle, when the Government has an appetite to move legislation, and to leverage powers afforded to it.
9. We submit that the support of both Houses of the Oireachtas could be sought and secured by Government, when the matter concerns Ireland's international law commitments and international reputation, in order to assist the speedy and smooth progress of legislation properly configured to address these issues, and not in a piecemeal and confusing manner.
10. A swift response is all the more necessary when one reflects that in discussing issues with section 42 in the Oireachtas in July 2017, the Minister responsible, indicated that certain EU law issues with section 42 were known of as far back as **2014** at least, according to the responsible Minister Eoghan Murphy who reported this to the House on July 13 2017[2]:

    > "We became aware of the need to be in compliance or more in synch with EU law at the end of 2014 and the beginning of 2015."

11. While we appreciate that remedying EU law matters isn't the direct concern of this communication – we wish to highlight our concern about how problematic and slow Ireland's response can be, and without question in our view the EU law and Aarhus matter both now so long outstanding should be rectified fully and properly as a priority.
12. The section to purportedly correct the EU law issue to which the Minister was referring in the July 2017 debate was s.28(1) of the Planning and Development (Housing) and Residential Tenancies Act.
13. **To be clear, s.28(1) if ever commenced will not remedy the Aarhus non- compliance issue found in this communication by the Committee, nor indeed the EU law issues with section 42 in full, but it would be a step**. But even this small step Ireland has consistently failed to take. So we feel obliged to highlight this in order to urge vigilance in the Committee in respect of the recommendations, and to encourage a more robust approach to those recommendations and their oversight.
14. In relation to the reluctance exhibited, it is worth noting in several debates in the Dáil in **2017**, the Minister reflected the expectation that changes which were purported to remedy the EU law failure (ie via this section 28(1) were expected to be commenced by the end of that year - 2017.
15. We are now mid-August 2019, over 2 years since those statements were made, and heading for 5 years since 2014 when the issue was identified to the Government.
16. The Party Concerned has acknowledged in its response to the Committee of 27.11.2018 that the section hasn't been commenced. (see annex in footnote 3 below) . It has set out for the committee how section 28(1) while in limbo, was itself further amended by s.57 of the

[1] The Planning and Development (Amendment) Act, 2017 was initiated on 4July 2017 and completed passage on 19th of July 2017, per Oireachtas Website: https://www.oireachtas.ie/en/bills/bill/2017/91/?tab=bill-text
[2] https://www.oireachtas.ie/en/debates/debate/dail/2017-07-13/38/

Planning and Development (Amendment) Act 2018. But ultimately the resulting changes to the primary act remain un-commenced.[3]

17. This is in the context of obligations under the EIA and Habitats Directives which arose effectively over 2 decades ago.
18. What is of particular concern in the Party Concerned's response of 27.11.2018 is that it refers in the annex with the legislation to the status of "The text below is a version of section 42 of the Planning and Development Act 2000, as if the amendments referenced above were in effect." However it has either in error or perhaps quite significantly, failed to reflect the insertion of a new subsection "1A" . This is significant because it is a a temporary provision which operates for a limited period from it was commenced on 9th August 2017 until 31 December 2021. This might in fairness be explained as an oversight. However, we fear that is not the case for the following reason.

    a. Section 28(1) when/if ever commenced will additionally amend section 42(4).
    b. It will then overwrite the reference in s.42(4) as amended by the 2016 Act[4] to the new sub-section 1A as far as we can ascertain.
    c. The altogether chilling implication from this is that it suggests very strongly to us that Government do not intend to commence s.28(1) until the operation of the temporary section 1A ceases, namely after 31 December 2021, at which point in time the reference in s.42(4) to ss 1A is no longer required, and hence why it isn't included in the version of s. 42(4) which section 28(1) will introduce.

19. There can be no acceptable justification for a delay in responding to the Committee's findings, when that delay is expended at the cost of the exercise of Human Rights to which Ireland has committed to.
20. Any delay and offence to those rights is compounded by the failure to give due consideration to the environmental consequences of an extension of duration in the context of any application to extend it.
21. The final injury to the public and our economy at large is that any such delay only serves to increase the profit margin for developers, and incentivise them to sit on permissions and not complete them until the market conditions are optimal. As they can simply seek to extend permissions with minimal consequences or cost to them, but at the expense of those seeking to buy those developments.
22. The nature of the process provided in Irish law and the practical difficulties anyone seeking to challenge it in the courts as evidenced in the Friends of the Irish Environment Airport Case , are implications which the Committee's draft findings readily reflected in paragraph 88.
23. These are all the more chilling when the Minister's comments in July 2017 – spoke so clearly only of his concern about being sued by Developers with deep and full Pockets, by stating in

[3] Annex I of Party Concerned's response to the committee on 27.11.2018 https://www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/tfwg/envppcc/envppcccom/acccc2013107-ireland.html

[4] Planning and Development (Housing) and Residential Tenancies Act 2016 s, 28(2) c – which was untouched by the changes to s.28(2) from the Planning and Development (Amendment) Act 2017 – does the following to section 42(4) : "(c) as if in subsection (4) there were substituted "Except where subsection (1A) applies, a decision" for "A decision"."

response to Deputy Eamon Ryan's concern about the failure to bring the extension of duration process in line with EU law: -

> "The risk is that the legal challenge might be to us, were we not to give enough time to people in this situation to be aware of the changes that were coming meaning that they would then need new permission in that circumstance."

24. We consider this all the more objectionable in the context of the length of time compliance with EU law has been outstanding and known to be outstanding – as acknowledged, and where no legitimate expectation of the right to an extension can be substantiated in the context of the EU law obligations pertaining.
25. We consider that there is also an opportunity now through in order to address this compliance issue, and infact a need to simply the provisions. This is given the layering of changes which have occurred since November 2016, involving some 3 Acts and consideration of some 21 statutory instruments, and in the context where many struggle with understanding the status of the law, and we have serious concerns even with the accuracy of the Law Reform Commission's consolidation up to July 2019, and have communicated to them in that regard.
26. While we appreciate that the Committee is concerned primarily with the simple matter of the correction of the non-compliance, it is important that the law can be clear so the public concerned can leverage it, and public authorities can easily comply with it. Supporting and clarifying communications on the change should also therefore be made, and we would be encouraging Ireland to adopt a holistic approach to the change.

Consistency of approach to compliance with Aarhus Article 6.10

27. Finally, the communication concerned in essence the then extant provisions of section 42(1) and the two circumstances for extension of duration of permissions provided for therein. However, during the course of this committee's investigation a further circumstance related to Housing developments was added by a new subsection "1A"to section 42 and this was commenced 9th August 2017[5].
28. The same failure to comply with Aarhus Article 6.10 is manifest in this new provision.
29. Again while we appreciate the Committee's scope, we do address a comment to the Party Concerned that it would be regrettable and embarrassing if the same non-compliance issue wasn't also rectified by the Party Concerned.
30. This further correction is all the more urgent as there is pressure to use this section 42(1A) provision, and it exists only for a limited window of time up to 31 December 2021.
31. It would be a travesty if it were seen to be necessary to raise a further communication on this matter in order to secure its compliance.

Corrections:

32. We are conscious that the Party Concerned in their response dated 14th August 2019, indicate a correction in respect of the size. In seeking this correction the Party Concerned state clearly in paragraph 6:

[5] Statutory Instrument SI 341/2017, commenced all parts of s.28**(2**) on 9th August 2017.

> "Whilst we do not consider this affects the Committee's conclusions, and noting that the size of the extension has not at any time been in dispute, Ireland observes that these statements are incorrect and requests that the findings be amended to reflect the correct figures."

33. In the context of the Party Concerned indicating their view this change is immaterial from the point of view of not affecting the Committee's findings – we do not feel at this juncture that it is necessary to air anything further in relation to this.

We note the Committee directed its request in relation to the draft finding to the Party Concerned and the Communicant.

However in the spirit of assisting all concerned with a clear representation of the facts – albeit we are limited in the amount of time we can expend on a detailed review – we do note that the details reflected in respect of the history of applications in paragraphs , rely to a large extent on the submission from the Party Concerned of 28/11/206 and the associated annexes exhibiting various notices. In that regard we note that the footnote 5 for example for paragraph 20 refer to the year 2003 but the notices are named in terms of 2004, and so on and the nomenclature is preserved on the convention website. In time this may be confusing for those looking back over the matter. Perhaps we are in error in our haste to complete our comments today – if so we earnestly apologise to all concerned.

Finally as a courtesy to Mr Cummins, the Committee might add a file to the website whose filename reflects that it details the Committee's reason for not including the redacted information on costs which was the subject of some intense correspondence between the communicant and the Party Concerned and the committee. The implications for those not privy to the matter of the matter no longer being displayed is Mr Cummins was in error, and it is clear he robustly disputes this. The Committee has fortunately indicated it was not necessary to consider that in the covering note to on the Draft Findings – but many may not view that particular cover note. So a more clear document approrpriately in the list of documents might be more appropriate in the context, reflecting the committee's decision on the matter. We invite the committee to consider this. Unfortunately we have not been able to ascertain if this is a matter of concern to Mr Cummins given various timing conflicts.

We thank you for your consideration of our observations and would be happy to clarify anything as required.

Yours sincerely

Attracta Uí Bhroin