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Meeting of the Parties to the Convention on  
Access to Information, Public Participation  
in Decision-making and Access to Justice  
in Environmental Matters

### Compliance Committee

#### Sixty-fifth meeting

Geneva, 4–8 November 2019

Item 9 of the provisional agenda

#### Communications from members of the public

### Findings and recommendations with regard to communication ACCC/C/2013/107 concerning compliance by Ireland

Adopted by the Compliance Committee on 19 August 2019

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## I. Introduction

1. On 11 November 2013, Mr. Kieran Cummins, a member of the public, submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging the failure of Ireland to comply with its obligations under articles 6 and 7 of the Convention.<sup>1</sup>
2. Specifically, the communicant alleges that the Party concerned has failed to comply with articles 6 and 7 of the Convention by failing to ensure public participation in a decision-making procedure to extend the duration of a quarry.<sup>2</sup>
3. On 17 February 2014, the communicant provided additional information.
4. On 21 November 2014, the Committee sent questions to the communicant. The communicant provided his replies to the Committee's questions on 19 December 2014.
5. At its forty-eighth meeting (Geneva, 24–27 March 2015), the Committee determined on a preliminary basis that the communication was admissible.
6. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 29 June 2015 for its response.
7. The Party concerned provided its response to the communication on 27 November 2015.
8. On 14 December 2015, the communicant provided comments on the response of the Party concerned.
9. The Committee held a hearing to discuss the substance of the communication at its fifty-second meeting (Geneva, 8–11 March 2016), with the participation of the communicant and representatives of the Party concerned.
10. During the hearing at its fifty-second meeting, the Committee confirmed that communication ACCC/C/2013/107 was admissible.
11. On 13 September 2016, the Environmental Pillar, a network of Irish national environmental non-governmental organizations, submitted a statement as an observer.
12. On 28 October 2016, the Committee sent questions to the communicant and the Party concerned for their reply by 18 November 2016.
13. The communicant and the Party concerned both provided their replies to the Committee's questions on 18 November 2016.
14. On 28 November 2016, the communicant and the Party concerned provided comments on each other's reply to the Committee's questions. On the same day, the observer, the Environmental Pillar, provided comments on the replies of the communicant and the Party to the questions.
15. On 1 December 2016, the communicant provided comments on the comments submitted by the Party concerned of 28 November 2016.
16. On 1 December 2017, the communicant provided information on recent developments relevant to his communication.
17. On 8 November 2018, the Committee requested additional information from the Party concerned, which the Party concerned provided on 27 November 2018.
18. The Committee completed its draft findings through its electronic decision-making procedure on 26 June 2019.

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<sup>1</sup> The communication and related documentation from the communicant, the Party concerned and the secretariat, are available at [www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/tfwg/envppcc/envppcccom/acccc2013107-ireland.html](http://www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/tfwg/envppcc/envppcccom/acccc2013107-ireland.html).

<sup>2</sup> Communication, p. 1.

19. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and the communicant on 3 July 2019. Both were invited to provide comments by 14 August 2019.

20. On 14 August 2019, the Party concerned and the communicant provided comments on the draft findings. An observer, the Irish Environmental Network, also sent comments on the draft findings on the same date.

21. After taking into account the comments received, the Committee finalized and adopted its findings through its electronic decision-making procedure on 19 August 2019 and agreed that they should be published as a formal pre-session document to its sixty-fifth meeting. It requested the secretariat to send the findings to the Party concerned and the communicant.

## II. Summary of facts, evidence and issues<sup>3</sup>

### A. Legal framework

#### *European Union legislation*

22. Under the European Union Environmental Impact Assessment Directive,<sup>4</sup> a quarrying activity may fall within the scope of annex I, paragraph 19 of the Directive: “Quarries and open-cast mining where the surface of the site exceeds 25 hectares”, or annex II, paragraph 2 (a) of the Directive: “Quarries, open-cast mining and peat extraction (projects not included in annex I)”.

#### *Legislation of the Party concerned*

23. At the time the quarry was originally permitted in 1998, first schedule, part II, section 2 (d) of the European Communities (Environmental Impact Assessment) Regulations, 1989, required that an environmental impact assessment be carried out for “extraction of stone, gravel, sand or clay, where the area involved would be greater than five hectares.”<sup>5</sup>

24. At the time of the permits granted in 2004 and 2010 and the permit extensions granted in 2013, schedule 5, part 2, section 2 (b) of the Planning and Development Regulations, 2001, as amended, provided that “Extraction of stone, gravel, sand or clay, where the area of extraction would be greater than five hectares” is an activity requiring an environment impact statement.<sup>6</sup>

25. With respect to areas of extraction of less than five hectares, at the time of the 2010 permit, article 102 of the Planning and Development Regulations, 2001, as amended, provided that: “Where a planning application for subthreshold development is accompanied by an [environmental impact statement], the application shall be dealt with as if the [environmental impact statement] had been submitted in accordance with section 172 (1) of the Act.”<sup>7</sup> Article 172 (1) of the Planning and Development Act 2000 requires planning applications within its scope to be accompanied by an environment impact statement.

26. Section 42 (1) (a) of the Planning and Development Act 2000, as in force at the time of the granting of the permit extensions at issue in this case, stipulates two alternative conditions under which the extension of duration of a permit shall apply:

<sup>3</sup> This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

<sup>4</sup> Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, *Official Journal of the European Union*, L 26 (2012), pp. 1–21. Directive 2011/92/EU has in the meantime been amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014, *Official Journal of the European Union*, L 124 (2014), pp. 1–18.

<sup>5</sup> Communicant’s reply to the Committee’s questions, 19 December 2014, p. 10.

<sup>6</sup> *Ibid.*, pp. 3, 4 and 11.

<sup>7</sup> Party’s reply to Committee’s request for clarification, 31 May 2019.

“On application to it in that behalf a planning authority shall, as regards a particular permission, extend the appropriate period by such additional period not exceeding five years as the authority considers requisite to enable the development to which the permission relates to be completed provided that each of the following requirements is complied with:

- (a) either —
  - (i) the authority is satisfied that —
    - (I) the development to which the permission relates was commenced before the expiration of the appropriate period sought to be extended,
    - (II) substantial works were carried out pursuant to the permission during that period, and
    - (III) the development will be completed within a reasonable time,
  - or
  - (ii) the authority is satisfied —
    - (I) that there were considerations of a commercial, economic or technical nature beyond the control of the applicant which substantially militated against either the commencement of development or the carrying out of substantial works pursuant to the planning permission,
    - (II) that there have been no significant changes in the development objectives in the development plan or in regional development objectives in the regional spatial and economic strategy for the area of the planning authority since the date of the permission such that the development would no longer be consistent with the proper planning and sustainable development of the area,
    - (III) that the development would not be inconsistent with the proper planning and sustainable development of the area having regard to any guidelines issued by the Minister under section 28, notwithstanding that they were so issued after the date of the grant of permission in relation to which an application is made under this section, and
    - (IV) where the development has not commenced, that an environmental impact assessment, or an appropriate assessment, or both of those assessments, if required, was or were carried out before the permission was granted.”<sup>8</sup>

27. Section 57 of the Planning and Development (Amendment) Act 2018, which came into force on its enactment on 19 July 2018, amends section 28 (1) of the Planning and Development (Housing) and Residential Tenancies Act 2016, which amends section 42 (1) (a) of the Planning and Development Act, 2000. The amendment, inter alia, will insert an additional criterion to criteria (I)–(III) in section 42 (1) (a) (i) above, namely that “an environmental impact assessment or an appropriate assessment, or both of those assessments, was or were not required before the permission was granted”.<sup>9</sup>

28. The changes to section 42 (1) (a) of the 2000 Act will not take effect until section 28 (1) of the 2016 Act has been commenced.<sup>10</sup>

## B. Facts

29. In late January 1998, the public was informed through a notice in the local newspaper and a notice posted at the site that John Keegan Quarries (“the developer”) intended to apply to develop a new quarry at a then-greenfield site situated at Trammon, Rathmolyon, County

<sup>8</sup> Party’s response to the communication, annex 2, pp. 1 and 2.

<sup>9</sup> Party’s reply to Committee’s request for additional information, 27 November 2018, annex 1, p. 1.

<sup>10</sup> Ibid.

Meath (planning permit reference no. 97/1868) and that the application would be accompanied by an environmental impact statement.<sup>11</sup> On 30 October 1998, the planning authority, Meath County Council, granted a permit for a quarry of 8.5 hectares (the Trammon quarry).<sup>12</sup>

30. On 7 July 2003, Meath County Council issued an enforcement notice for non-compliance with planning permit reference no. 97/1868.<sup>13</sup> By notice in the local newspaper dated 25 August 2003 and a site notice erected on 4 September 2003, the public was informed that the developer had applied for retention, extension and partial modification of the quarry, that the application was accompanied by an environmental impact statement and that the public could submit comments on the application on payment of a fee of €20.<sup>14</sup> On 5 March 2004, Meath County Council granted a permit to the developer (planning reference no. TA/30334) extending Trammon quarry size to a total of 15.88 ha<sup>15</sup> and permitting significantly deeper excavation and stipulating that the permit would expire on 5 August 2013. An appeal by an adjacent quarry operator (Kilsaran Concrete Ltd) to An Bord Pleanála (reference no. PL17.206702), a quasi-judicial body deciding on appeals against planning decisions, was rejected on 5 August 2004.<sup>16</sup>

31. On 13 November 2007, Meath County Council granted a further permit to the developer (planning reference no. TA/60629) including an extension of the quarry area. An appeal to An Bord Pleanála (reference no. PL17.226884) was upheld on 16 January 2009 and the permit was accordingly refused.<sup>17</sup>

32. By notice in the local newspaper dated 17 June 2009 and a site notice erected on the same day, the public was informed that the developer had applied for an extension of the quarry by 2.85 hectares and associated works, and that the public could submit comments on payment of a fee of €20.<sup>18</sup> An environmental impact statement was included with the application.<sup>19</sup> On 7 January 2010, Meath County Council granted a permit to the developer permitting the extension of the quarry by 2.85 hectares (planning reference no. TA/900976). An appeal against the permit was rejected by An Bord Pleanála on 3 August 2010 (reference no. PL 17.235960). An Bord Pleanála set 5 August 2013 as the date when the permit was to expire.<sup>20</sup>

33. On 30 May 2013, the developer submitted applications to extend the duration of the three permits granted in 1998, 2004 and 2010 (reference nos. 97/1868, TA/30334 and TA/900976).<sup>21</sup> The public was not notified of these applications.

34. On 24 July 2013, Meath County Council granted permits to extend the duration of the 1998 and 2004 permits (reference nos. 97/1868 and TA/30334) under section 42 (1) (a) (i) of the Planning and Development Act 2000 (extension of duration reference nos. TA/130399 and TA/130400).<sup>22</sup> The expiry of the extension date was listed as 5 August 2018. On the same day, the request to extend the duration of permit TA/900976 was refused (extension of

<sup>11</sup> See Party's comments on the communicant's reply to the Committee's questions, 28 November 2016, paras. 17–19 and annexes 1a, 1b and 2.

<sup>12</sup> Party's response to the communication, annex 1, p. 1.

<sup>13</sup> Communicant's summary of the communication, 17 February 2014, annex 5a.

<sup>14</sup> Party's comments on the communicant's reply to the Committee's questions, 28 November 2016, paras. 20–22 and annexes 3a–b, 4a–c and 5; and communication, annex 5b.

<sup>15</sup> Party's response to the communication, annex 1, p. 2.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid., p. 6.

<sup>18</sup> Party's comments on the communicant's reply to the Committee's questions, 28 November 2016, paras. 23–25 and annexes 6a–b and 7; Party's comments on Committee's draft findings, 14 August 2019, para. 6.

<sup>19</sup> Party's response to the communication, annex 1, p. 6.

<sup>20</sup> Communicant's reply to Committee's questions, 19 December 2014, annex 2, p. 3.

<sup>21</sup> Communicant's summary of the communication, 17 February 2014, annex 2a.

<sup>22</sup> Ibid., annexes 3a and 3b.

duration reference no. TA/130401) because the applicant did not demonstrate that significant works had been carried out.<sup>23</sup>

35. On 13 September 2013, while searching the website of the planning authority for an unrelated file, the communicant became aware of the permit extensions.

36. On 5 November 2013, a permit extension was granted for the 2010 permit TA/900976 under section 42 (1) (a) (ii) instead (extension of duration reference no. TA/130581).<sup>24</sup> The expiry date of the extension was listed as 5 August 2018.

### C. Domestic remedies

37. The communicant submits that judicial review is not in practice accessible to the public in the Party concerned, as such proceedings require large financial resources in the region of hundreds of thousands of euros and thus cannot be considered as a real remedy.<sup>25</sup> The communicant supported his submission with several examples, including from his own experience.<sup>26</sup> The observer the Environmental Pillar provided a lengthy submission in support of his assessment.<sup>27</sup>

38. The communicant further submits that, as a private citizen, he would have been unlikely to have been granted standing by the court to bring judicial review of the permit extensions because he, as a member of the public, was not a party to the decisions or planning applications.<sup>28</sup> Moreover, the court is bound by legislation, in this case the Planning and Development Act 2000, and it is almost certain that the courts would not have been in a position to overturn the permit extensions in this case, as they were rooted in that legislation. Thus, he would have had to challenge the legislation itself, which would likely have required a challenge to the Supreme Court, which is unreasonable to expect from a private citizen.<sup>29</sup>

39. The communicant also submits that, even if the foregoing hurdles were to be overcome and he was able to bring successful judicial review proceedings, there was no guarantee of an adequate remedy because the matter would simply be sent back to the planning authority, whereupon the developer would file a new planning application, this time with the required public participation, during which the planning authority would merely have to “have regard to” the submissions received. He submits that it is not reasonable to expect a private citizen to risk his or her personal assets by engaging in risky and costly court proceedings just so that he or she could have his or her say.<sup>30</sup>

40. The communicant states that references by the Party concerned to earlier opportunities to participate (see para. 46 below) relate to an entirely different planning process and are therefore irrelevant. He also states that there were issues with the granting of the 2004 permit, which contradicted the assertion by the Party concerned that extensive opportunities to participate were provided.<sup>31</sup>

41. In his update of 1 December 2017, the communicant referred the Committee to the High Court judgment in *Merriman and others v. Fingal County Council; Friends of the Irish Environment v. Fingal County Council*<sup>32</sup> dated 21 November 2017. He submits that this

<sup>23</sup> Party’s response to the communication, para. 32.

<sup>24</sup> Communicant’s summary of the communication, 17 February 2014, annex 3c; Party’s response to the communication, para. 33.

<sup>25</sup> Communicant’s comments on preliminary admissibility, 27 March 2015, p. 3.

<sup>26</sup> Communicant’s reply to the Committee’s questions, 18 November 2016, paras. 9–11.

<sup>27</sup> See the Environmental Pillar’s letter, 13 September 2016, including annexes, and its comments on the communicant’s and the Party’s replies to the Committee’s questions, 28 November 2016.

<sup>28</sup> Communicant’s reply to the Committee’s questions, 18 November 2016, para. 15.

<sup>29</sup> *Ibid.*, para. 16.

<sup>30</sup> *Ibid.*, para. 17.

<sup>31</sup> Communicant’s comments on Party’s response to the communication, 14 December 2015, paras. 3 and 4.

<sup>32</sup> Irish High Court, *Merriman and others v. Fingal County Council; Friends of the Irish Environment v. Fingal County Council*, Case No. [2017] IEHC 695, Judgment, 21 November 2017.

judgment, *inter alia*, made clear that, in the view of the Irish courts, decisions under section 42 do not come within the scope of article 6 of the Convention. It also made clear that the possibility of judicial review is severely constrained by standing issues and by an extremely narrow scope for judicial review given the “limited prescribed discretion” of the public authority decision maker.<sup>33</sup>

42. The observer the Environmental Pillar points out that the public was not informed of the decisions to extend the permits at issue in this case or of the possibility to appeal to An Bord Pleanála.<sup>34</sup>

43. The Party concerned submits that the communicant has failed to exhaust domestic remedies and the communication should therefore be found inadmissible in accordance with paragraph 21 of the annex to decision I/7. It contends that a permit for a quarry was granted in 2004, to expire in 2013, and a permit for an extension to the quarry was granted in 2010, also to expire in 2013. According to the Party concerned, both permits were the subject of environmental impact assessment procedures and full public consultation, a right to appeal to An Bord Pleanála and the right to seek access to justice by means of a judicial review to the High Court to challenge the substantive or procedural legality of the decisions. However, no such judicial review was initiated.<sup>35</sup>

44. The Party concerned moreover contends that, while not subject to an appeal before An Bord Pleanála,<sup>36</sup> the 2013 decisions to extend the duration of the permits by five years, up to 2018 (see paras. 34 and 36 above) could have been subjected to judicial review before the High Court but the communicant failed to do so.<sup>37</sup> The Party concerned states that this review before the High Court would have been limited to assessing whether the developer had complied with the strict and technical statutory conditions for the grant of an extension of the duration of the permit<sup>38</sup> and to assessing whether the decision-maker acted reasonably and rationally on the basis of the evidence before it.<sup>39</sup>

45. The Party concerned submits that the communicant’s claim that a challenge in the High Court would have been beyond his financial capability is an argument introduced at a late stage, not adequately grounded and no defence against a failure to exhaust domestic remedies.<sup>40</sup> It also submits that this claim is not the basis of the present communication. The Party concerned provides an assessment of factors to be taken into account when calculating the costs of judicial review proceedings noting, however, that any concrete figure would necessarily be arbitrary and hypothetical.<sup>41</sup>

46. The Party concerned further submits that extensive opportunities were afforded to members of the public to participate in statutory consultations and appeals with regard to the 1998–2010 permitting procedures regarding the quarry and that on three occasions members of the public had appealed to An Bord Pleanála with regard to these procedures.<sup>42</sup>

<sup>33</sup> Communicant’s update on developments, 1 December 2017, pp. 2 and 3.

<sup>34</sup> Comments by the Environmental Pillar on the communicant’s and the Party’s replies to the Committee’s questions, 28 November 2016, paras. 23 and 24.

<sup>35</sup> Party’s comments on preliminary admissibility, 27 March 2015, p. 2.

<sup>36</sup> Party’s reply to the Committee’s questions, 18 November 2016, para. 17.

<sup>37</sup> *Ibid.*, para. 18, and Party’s comments on preliminary admissibility, 27 March 2015, p. 2.

<sup>38</sup> Party’s reply to the Committee’s questions, 18 November 2016, paras. 19 and 27.

<sup>39</sup> *Ibid.*, paras. 29 and 31.

<sup>40</sup> Party’s response to the communication, 27 November 2015, footnote 1.

<sup>41</sup> Party’s reply to the Committee’s questions, 18 November 2016, paras. 43–66.

<sup>42</sup> Party’s response to the communication, 27 November 2015, paras. 5 and 6.

## D. Substantive issues

### Applicability of article 6 (1) (a) of the Convention

#### *Paragraph 16 of annex I to the Convention*

47. The communicant submits that the area of the quarry at issue in this case is well in excess of the threshold of 25 hectares set out in paragraph 16 of annex I to the Convention and is thus subject to article 6 (1) (a) of the Convention. He submits that, while the active quarry-related land is approximately 22 hectares, the land being used to stockpile waste spoil and adjoining lands under the ownership and control of the developer brings the total area to 37.773 hectares. He further notes that there is another quarry on adjoining lands and operated by a different entity (Kilsaran Concrete Ltd., see para. 30 above) with a surface area of 43.4 hectares. He submits that the two quarries should not be considered in isolation and that, cumulatively, the quarries consist of approximately 65 ha.<sup>43</sup>

48. The Party concerned claims that none of the development activities referenced in the communication (i.e. Meath County Council planning reference numbers: 97/1868, TA/30334 and TA/900976) come within article 6 (1) (a) of the Convention because they do not concern quarries where the surface of the site exceeds the threshold of 25 hectares set in paragraph 16 of annex I to the Convention. The Party concerned submits that the surface area of the interrelated permitted sites owned by the developer equates to a total quarrying area of 16.79 hectares, while the quarrying area is itself situated within a larger overall development site totalling 22.145 hectares, neither of which fulfil the threshold in article 6 (1) (a) of the Convention.<sup>44</sup>

#### *Paragraph 20 of annex I to the Convention*

49. The communicant submits that, in accordance with the legislation of the Party concerned referred to in paragraphs 23 and 24 above, an environmental impact assessment is required for all quarries over five hectares.<sup>45</sup>

50. The Party concerned agrees that, pursuant to its legislation, quarry developments over five hectares are subject to environmental impact assessment at the time that they are originally permitted. It submits, however, that the permit to extend the duration of a planning permission does not require an environmental impact assessment under either European Union or national law and that, therefore, paragraph 20 of annex I to the Convention does not apply.<sup>46</sup> The Party concerned submits that the original decisions were subject to public participation and environmental impact assessment and it is not within the remit of the Committee to consider the absence of an environmental impact assessment regarding the extension of the quarry's duration.<sup>47</sup>

51. The Party concerned moreover submits that the 2013 permits are not decisions to permit in the sense of article 6 (1) (a) of the Convention and, in so far as the decisions extend an existing permit, the extension is a decision of "minor or peripheral importance", referring in this regard to paragraph 41 of the Committee's findings on communication ACCC/C/2006/17 (European Union), and in particular:<sup>48</sup>

“...even within the environment-related permitting decisions that might be required before a given activity may proceed, there may be large variations in their significance and/or environmental relevance. Some such decisions might be of minor or peripheral

<sup>43</sup> Communicant's reply to the Committee's questions, 19 December 2014, pp. 1 and 2.

<sup>44</sup> Party's response to the communication, para. 10.

<sup>45</sup> Communicant's reply to the Committee's questions, 19 December 2014, pp. 2 and 3.

<sup>46</sup> Party's response to the communication, paras. 35 and 36.

<sup>47</sup> Ibid., para. 37.

<sup>48</sup> Party's response to the communication, paras. 13 and 14; Party's opening statement for the hearing at the Committee's fifty-second meeting, 9 March 2016, para. 15.



importance, or be of limited environmental relevance, therefore not meriting a full-scale public participation procedure".<sup>49</sup>

### **Applicability of article 6 (10) of the Convention**

52. The communicant contends that the extension of duration procedure in section 42 (1) (a) of the Planning and Development Act 2000 was never intended to be used in relation to quarry permits. He claims that the planning authority has failed in its obligations to ensure that an environmental impact assessment and an appropriate assessment were carried out, as well as to provide for public participation in the context of the extension of the quarry's duration.<sup>50</sup>

53. The Party concerned submits that section 42 (1) (a) (i) and (ii) of the Planning and Development Act 2000 is to be distinguished from article 6 (10) of the Convention as, under the former, the operating conditions of a permitted development are not being reconsidered or updated. Rather, the permitted development is only being given so much additional time as is deemed necessary and reasonable to complete the permitted development within the parameters of permitted development and environmental impact and mitigation established in the original substantive planning consultation and consent stage.<sup>51</sup> This additional period to be added is not open-ended, as it must be specified as a single period not exceeding five years and shall relate to a period that is considered necessary to complete the permitted development.<sup>52</sup> The extension may, furthermore, only be applied once, except in certain circumstances as set out in section 42 (7) of the Planning and Development Act 2000.<sup>53</sup>

54. The Party concerned submits that, under section 42 (1) (a), the planning authority (in this case, Meath County Council) does not take a substantive decision with a significant effect on the environment but is bound to grant a five year extension if the requirements therein have been fulfilled.<sup>54</sup> No conditions may be attached to the extension and no environmental impact assessment is carried out in this context. It submits that since the parameters of the permitted development and the environmental impact are established at the stage of the original planning consultation and consent, there is therefore no need for further public participation.<sup>55</sup> It states that, under the Planning and Development Act 2000, the original permit thus carries with it an automatic right and entitlement to an extension for a further period of five years provided certain specified requirements are met.<sup>56</sup> The planning authority may only attach additional conditions requiring the giving of adequate security for the satisfactory completion of the proposed development.<sup>57</sup>

### **Compliance with article 6 of the Convention**

55. The communicant alleges a complete absence of public notice and participation prior to the decision of Meath County Council to grant the 2013 permit extensions. The communicant asserts that he and the local community were aware that the permits for the Trammon quarry were set to expire in August 2013 and that, because of the developer's extensive noncompliance with its permit conditions, the local community was anxious to address these issues in any application to extend the activities of the quarry. Prior to the permits' expiry date they had thus been watching the quarry site for notice of a planning application; however, there was none.<sup>58</sup> He further states that when the Council's attention

<sup>49</sup> ECE/MP.PP/2008/5/Add.10, para. 41.

<sup>50</sup> Communication, para. 22.

<sup>51</sup> Party's opening statement for the hearing at the Committee's fifty-second meeting, 9 March 2016, paras. 27 and 30.

<sup>52</sup> Party's response to the communication, paras. 18, 23 and 28.

<sup>53</sup> Ibid., footnotes 8 and 11.

<sup>54</sup> Ibid., paras. 23 and 28.

<sup>55</sup> Party's opening statement for the hearing at the Committee's fifty-second meeting, 9 March 2016, paras. 29 and 30.

<sup>56</sup> Party's response to the communication, para. 18.

<sup>57</sup> Ibid., para. 25.

<sup>58</sup> Communicant's reply to the Committee's questions, 18 November 2016, para. 4.

was drawn to the need for public participation in the process, he was informed that there was no right under the legislation for the public to make submissions.<sup>59</sup>

56. The communicant and the observer the Environmental Pillar submit that references by the Party concerned to the public participation and appeal procedures regarding the earlier quarry permits (see paras. 43 and 46 above and para. 57 below) are irrelevant,<sup>60</sup> and moreover, do not take into account the possibility that persons may have moved to the area after the previous decisions were taken.<sup>61</sup>

57. The Party concerned submits that, while in its view article 6 is not applicable to the decision to extend the duration of Trammon quarry, the quarry had been subject to comprehensive public participation. The Party concerned refers in that regard to the public participation procedures carried out in 1997, 2004 and 2010 regarding permits reference nos. 97/1868, TA/30334, and TA/900976 and to the appeals to An Bord Pleanála regarding those permits (see paras. 29, 30 and 32 above).<sup>62</sup> The Party concerned also refers to An Bord Pleanála's refusal of a fourth permit (reference no. TA/60629, see para. 31 above) following an appeal by third parties, which the Party concerned submits is a clear indication of the successful application of public participation in decisions on specific activities.<sup>63</sup>

58. With respect to the 2010 permit, the Party concerned submits that an environmental impact statement was included with the permit application and, as it was a subthreshold development, article 102 of the Planning and Development Regulations, 2001, as amended, applied (see para. 25 above).<sup>64</sup>

#### **Applicability of article 7 of the Convention**

59. The communicant alleges that the 2013 permission to extend the duration of the quarry is a plan and as such all planning permissions in Ireland are governed by the Planning and Development Act 2000. He states that section 32 of that Act imposes a general obligation to obtain permission.<sup>65</sup>

60. The Party concerned points out that the subject matter of the communication relates to the extension of the duration of a permitted development activity (in this case, quarrying activity) under section 42 of the Planning and Development Act 2000. It submits that the extension clearly does not relate to the preparation of plans, programmes and policies relating to the environment as envisaged in article 7 of the Convention. The Party concerned submits that the communicant's allegation under article 7 of the Convention is therefore manifestly unfounded.<sup>66</sup>

### **III. Consideration and evaluation by the Committee**

61. Ireland deposited its instrument of ratification of the Convention on 20 June 2012, meaning that the Convention entered into force for the Party concerned on 18 September 2012, i.e. ninety days after the date of deposit of the instrument of ratification.

<sup>59</sup> Communicant's summary of the communication, 17 February 2014, para. 5 (a).

<sup>60</sup> Further comments of the communicant, 1 December 2016, para. 13; comments by the Environmental Pillar on the communicant's and Party's reply to the Committee's questions, 28 November 2016, para. 40.

<sup>61</sup> Communicant's comments on Party's reply to the Committee's questions, 28 November 2016, para. 31; comments by the Environmental Pillar on the communicant's and Party's replies to the Committee's questions, 28 November 2016, para. 41.

<sup>62</sup> Party's response to the communication, paras. 39 and 40.

<sup>63</sup> *Ibid.*, para. 41.

<sup>64</sup> Party's reply to the Committee's request for clarification, 31 May 2019.

<sup>65</sup> Communicant's reply to the Committee's questions, 19 December 2014, p. 3.

<sup>66</sup> Party's response to the communication, para. 44.

### Admissibility and exhaustion of domestic remedies

62. The Party concerned submits that the communication should be found to be inadmissible, in accordance with paragraphs 20 and 21 of the annex to decision I/7 for failure to exhaust domestic remedies. It asserts that the communicant had two windows to exhaust domestic remedies but used neither. First, he could have challenged the permits granted in 2004 and 2010 (which had each been subject to environmental impact assessment and public participation) at the time they were granted. Second, he could have challenged the 2013 decisions to extend the duration of the earlier permits.

63. The Committee notes that the Party concerned has provided no evidence that, at the time of the public participation procedures on the permits granted in 2004 and 2010, the public were notified that the duration of those permits might, in fact, expire in August 2018, rather than August 2013 as those permits state. The Committee thus considers the argument of the Party concerned that the communication should be found to be inadmissible because the communicant did not challenge the permits granted in 2004 and 2010 at the time to be both logically flawed and unsubstantiated.

64. The Committee next examines the submission of the Party concerned that the communication should be found to be inadmissible because the communicant did not seek judicial review of the 2013 permit extensions. The Party concerned concedes that if such a challenge had been brought, the High Court would have been limited to assessing whether the permit holder had complied with the strict and technical statutory conditions for the grant of an extension of time<sup>67</sup> and whether the decision-maker had acted reasonably and rationally on the basis of the evidence before it.<sup>68</sup> The Party concerned refers to the judgment of the High Court in *Lackagh Quarries Ltd v. Galway City Council*<sup>69</sup> in this regard. With respect to review of a section 42 decision, that judgment states that:

“The planning authority has very little discretion in relation to its decision, and its role appears to be confined to satisfying itself as to whether the applicant has complied with the statutory conditions for the grant of an extension of time and the legislation makes no provision for third party participation of any nature. All of these factors tend to suggest that the role of the planning authority on a s.42 application is an administrative decision, thus limiting the circumstances in which judicial review is available as a remedy.”

65. The above judgment was also cited by the High Court in its November 2017 judgment in *Merriman and others v. Fingal County Council; Friends of the Irish Environment v. Fingal County Council*<sup>70</sup>, which rejected an application for judicial review of a section 42 decision extending planning permission for a new runway at Dublin airport.<sup>71</sup> In its November 2017 judgment, the High Court examined more than thirty years of Irish jurisprudence on applications for judicial review on permit extensions. That jurisprudence makes it very clear that the public has no right to be notified or consulted prior to the grant of section 42 decisions.<sup>72</sup> Moreover, the jurisprudence shows that, when deciding an application for judicial review of a section 42 decision, the court’s role is strictly limited to ensuring that the statutory criteria in section 42 are met, and the court is not entitled to take account of any other considerations, including environmental considerations.<sup>73</sup>

<sup>67</sup> Party’s reply to the Committee’s questions, 18 November 2016, paras. 19 and 27.

<sup>68</sup> *Ibid.*, paras. 29 and 31.

<sup>69</sup> Irish High Court, *Lackagh Quarries Ltd v. Galway City Council*, Case No. [2010] IEHC 479, Judgment, 21 December 2010.

<sup>70</sup> Irish High Court, *Merriman and others v. Fingal County Council; Friends of the Irish Environment v. Fingal County Council*.

<sup>71</sup> Party’s reply to the Committee’s request for information, 27 November 2018, annex 2.

<sup>72</sup> See for example, Irish High Court, *Merriman and others v. Fingal County Council; Friends of the Irish Environment v. Fingal County Council*, paras. 50 and 82; and Irish High Court, *Coll v. Donegal County Council*, Case No. [2005] IEHC 231, Judgment, 7 July 2005.

<sup>73</sup> See, for example, Irish High Court, *State (McCoy) v. Dun Laoghaire Corporation* [1985] I.L.R.M. 533, 537, Judgment, 1 June 1984; and Irish High Court, *Lackagh Quarries Ltd v. Galway City Council*, paras. 56 and 66.

66. Based on the jurisprudence of the Party concerned, the Committee concludes that there was little or no prospect for the communicant to successfully challenge the 2013 permit extensions through judicial review.

67. Under paragraph 21 of the annex to decision I/7, the Committee should at all relevant stages take into account any available domestic remedy unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress.

68. In the light of the jurisprudence examined by the High Court in its November 2017 judgment in *Merriman and others v Fingal County Council; Friends of the Irish Environment v. Fingal County Council*, the Committee considers that it is indeed obvious that judicial review, the only available domestic remedy, does not provide an effective and sufficient means of redress for members of the public to challenge section 42 decisions such as the 2013 permit extensions. The Committee thus finds the communication to be admissible.

### **Scope of considerations**

69. The Committee will not consider any alleged breaches of European Union legislation such as the Environmental Impact Assessment Directive because the communicant has not substantiated how any such alleged breaches could amount to non-compliance with the Convention in this case.

### **Applicability of article 6 to the 1998, 2004 and 2010 quarry permits**

70. It is common ground between the parties that, at the time the three quarry permits were granted to Keegan Quarries Limited in 1998, 2004 and 2010, the legislation of the Party concerned required a quarry development over five hectares to undergo an environmental impact assessment (see paras. 23 and 24 above).

#### *1998 quarry permit*

71. On 30 October 1998, Meath County Council granted permit 97/1868 to Mr. John Keegan to develop a quarry of 8.5 ha.<sup>74</sup> The size of the permitted quarry development was above the threshold of five hectares requiring a mandatory environmental impact assessment. An environmental impact assessment procedure, including public participation, was carried out (see paras. 23, 29 and 57 above). In the light of the above, the Committee considers that permit 97/1868 was a decision to permit an activity subject to an environmental impact assessment procedure, including public participation, in accordance with national law as envisaged in paragraph 20 of annex I of the Convention, and therefore, an activity subject to article 6 (1) (a) of the Convention.

72. Having found in paragraph 71 above that the original 1998 permit was an activity within the scope of paragraph 20 of annex I of the Convention and thus a decision to permit an activity under article 6 (1) (a) of the Convention, the Committee does not consider it necessary to examine the communicant's claim that the 1998 quarry permit was also an activity within paragraph 16 of annex I to the Convention.

#### *2004 quarry permit*

73. On 5 March 2004, Meath County Council granted permit TA/30334 to Keegan Quarries Ltd, permitting the extension of the original quarry to an overall area of 15.88 ha.<sup>75</sup> Permit TA/30334 accordingly extended the area of the original quarry authorized by permit 97/1868 by an additional 7.33 hectares. Since an extension of 7.33 hectares is above the five hectare threshold laid down in Irish law for a mandatory environmental impact assessment, the Committee considers that, in accordance with paragraph 22 of annex I to the Convention, permit TA/30334 was an extension of an activity where the extension itself meets the

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<sup>74</sup> Party's response to the communication, annex 1, p. 1.

<sup>75</sup> *Ibid.*, p. 2.

threshold set out in paragraph 20 of annex I to the Convention. Permit TA/30334 was thus also a decision that permitted an activity subject to article 6 (1) (a) of the Convention.

#### *2010 quarry permit*

74. On 7 January 2010, Meath County Council granted permit TA/900976 to Keegan Quarries Ltd permitting the extension of the above quarry by an additional 2.85 ha.<sup>76</sup> Although the extension fell below the threshold prescribed in national law for a mandatory environmental impact assessment to be carried out, an environmental impact assessment, including public participation, was carried out prior to the grant of the permit. Accordingly, the Committee considers that permit TA/900976 was a decision to permit an activity subject to an environmental impact assessment procedure, including public participation, in accordance with national law as set out in paragraph 20 of annex I, and therefore, an activity subject to article 6 (1) (a) of the Convention.

### **Applicability of article 6 to the 2013 extension of duration decisions:**

#### **Article 6 (1) (a) and paragraph 20 of annex I**

75. The parties differ over whether an environmental impact assessment was required under national law for the 2013 permits to extend the duration of the quarry. As the Party concerned correctly points out, it is not for the Committee to determine whether or not an environmental impact assessment was required under national law. Following on from this, since the communicant has not demonstrated that an environmental impact assessment was indeed required under national law with respect to the permits to extend the quarry's duration, the Committee finds that the 2013 permits to extend the duration of the quarry are not within the scope of paragraph 20 of annex I to the Convention.

#### **Article 6 (10)**

76. Having found in paragraphs 71, 73 and 74 above that the 1998, 2004 and 2010 quarry permits were each a decision subject to the requirements of article 6 of the Convention, the Committee turns to examine whether the three permits granted in 2013 to extend the duration of the 1998, 2004 and 2010 permits were reconsiderations or updates of the operating conditions of those permits within the meaning of article 6 (10) of the Convention.

77. As a preliminary point, the Committee notes that there is nothing in the wording of article 6 (10) to limit its application only to reconsiderations or updates that are themselves subject to environmental impact assessment. Rather, it is clear to the Committee that article 6 (10) of the Convention applies to a reconsideration or update of the operating conditions for an activity subject to article 6 of the Convention, irrespective of whether the reconsideration or updating process is itself required to undergo an environmental impact assessment.<sup>77</sup>

#### *Reconsideration or update of the operating conditions of the 1998, 2004 and 2010 permits*

78. The Committee notes that if an application is made under section 42 (1) (a) of the Planning and Development Act 2000 the planning authority is obliged to extend the "period" (duration) of the permit for up to five years if the requirements set out in that provision are met.

79. As the Committee held in its findings on communication ACCC/C/2014/104 (Netherlands): "The Committee considers that the permitted duration of an activity is clearly an operating condition for that activity, and an important one at that. Accordingly, any change to the permitted duration of an activity, be it a reduction or an extension, is a reconsideration or update of that activity's operating conditions."<sup>78</sup>

<sup>76</sup> Ibid., pp. 6 and 7, and Party's comments on Committee's draft findings, 14 August 2019, para. 6.

<sup>77</sup> See, for example, ECE/MP.PP/C.1/2019/3, paras. 29 and 66.

<sup>78</sup> ECE/MP.PP/C.1/2019/3, para. 65.

80. Based on the above, the Committee considers that the three permits granted in 2013 to extend the duration of the 1998, 2004 and 2010 permits amounted to reconsiderations or updates of the operating conditions of the quarrying activity within the meaning of article 6 (10) of the Convention. The Committee examines below whether the requirements of article 6 (10) were in fact met with respect to the 2013 permits.

*Mutatis mutandis, and where appropriate*

81. Pursuant to article 6, paragraph 10, a Party concerned is obliged to ensure that the provisions of article 6, paragraphs 2 to 9, are applied “mutatis mutandis, and where appropriate”.

(i) *Mutatis mutandis*

82. As the Committee held in its findings on communication ACCC/C/2014/104 (Netherlands):

“The reference in paragraph 10 to ‘mutatis mutandis’ simply means ‘with the necessary changes’. In other words, when applying the provisions of paragraphs 2 to 9 of article 6 to a reconsideration or an update of the operating conditions for an article 6 activity, the public authority applies those paragraphs with the necessary changes.”<sup>79</sup>

(ii) *Where appropriate*

83. With respect to “where appropriate”, the Committee recalls that, in its findings on communication ACCC/C/2009/41 (Slovakia), it held that, although each Party had some discretion under article 6 (10), that did not imply complete discretion for the Party concerned to determine whether or not it was appropriate to provide for public participation.<sup>80</sup> In its findings on communication ACCC/C/2013/99 (Spain), the Committee stated that the discretion as to the “appropriateness” of the application of the provisions of paragraphs 2 to 9 of article 6 of the Convention had to be considered to be even more limited if the update in the operating conditions might itself have a significant effect on the environment.<sup>81</sup> In its findings on communication ACCC/C/2014/104 (Netherlands), the Committee made clear that: “except in cases where a change to the permitted duration is for a minimal time and obviously would have insignificant or no effects on the environment, it is appropriate for extensions of duration to be subject to the provisions of article 6.”<sup>82</sup>

84. It is clear to the Committee that an extension of an activity’s duration by five years is by no means minimal.<sup>83</sup> In this regard, the Committee cannot agree with the submission by the Party concerned that no change in the operating conditions of the quarry took place and that, therefore, there was no need for further public participation.

85. Moreover, the Committee does not find tenable the argument put forward by the Party concerned that the public could have submitted its views on the possible impact on the environment of an extension of the activity’s duration at the time of the public participation procedures in 1997, 2004 and 2010 (see paras. 43, 46 and 57 above). The Party concerned has provided no evidence that prior to the grant of the quarry permits in 1998, 2004 and 2010 the public was notified of a possibility that, in 2013, the permits might be extended for a further period of five years. The Committee thus finds the argument of the Party concerned to be unsubstantiated.

86. Based on the above, the Committee concludes that it was “appropriate”, and thus required, to apply the provisions of article 6 (2)–(9) to the decision-making on the 2013

<sup>79</sup> Ibid., para. 70.

<sup>80</sup> ECE/MP.PP/2011/11/Add.3, para. 55.

<sup>81</sup> ECE/MP.PP/C.1/2017/17, para. 85.

<sup>82</sup> ECE/MP.PP/C.1/2019/3, para. 71.

<sup>83</sup> A similar view was expressed by the Implementation Committee under the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) in its findings and recommendations further to a Committee initiative concerning Ukraine (EIA/IC/CI/4), ECE/MP.EIA/IC/2014/2, annex, paras. 42, 44 and 45.

permits.<sup>84</sup> The Committee accordingly finds that, by failing to provide opportunities for the public to participate in the decision-making on the 2013 permits to extend the duration of the Trammon quarry, the Party concerned has failed to comply with article 6 (10) of the Convention.

#### *Legal framework of the Party concerned*

87. The present communication concerns the extension under section 42 of the “appropriate period” (duration) of three permits regarding the Trammon quarry. The 1998 and 2004 permits were extended under section 42 (1) (a) (i) of the Planning and Development Act 2000 (see para. 34 above), and the 2010 permit was extended under section 42 (1) (a) (ii) (see para. 36 above).

88. Having found in paragraph 86 above that the Party concerned failed to comply with article 6 (10) of the Convention with respect to the grant of these three permit extensions, the Committee next turns to consider section 42 of the Planning and Development Act 2000 itself. The November 2017 judgment in *Merriman and others v. Fingal County Council; Friends of the Irish Environment v. Fingal County Council*,<sup>85</sup> and the jurisprudence examined by the High Court therein, are again highly instructive in this regard. That judgment makes it very clear that, when deciding on applications for extensions of the appropriate period for a permit under section 42, the competent authority is not entitled to notify or consult the public prior to granting the requested extensions, even if it might have been minded to do so.<sup>86</sup> If in fact an authority did decide to notify or consult the public, under Irish law the authority would be acting *ultra vires*.<sup>87</sup>

89. As evidenced by the permit extensions in the present case, section 42 (1) (a) applies, inter alia, to applications to extend the duration of activities within the scope of article 6 of the Convention. This means that, by virtue of section 42 (1) (a), the duration of activities within the scope of article 6 of the Convention can be extended for a period of up to five years without any opportunity for the public to participate.

90. In paragraphs 83–86 above, the Committee made clear that, save in exceptional circumstances such as an extension of only very minimal duration, when extending the duration of a permit subject to article 6, it is “appropriate”, and thus required, to provide for public participation. The Committee also made clear that an extension of an activity’s duration by five years is by no means minimal.

91. In the light of the above, the Committee finds that, by providing mechanisms through which permits for activities subject to article 6 of the Convention may be extended for a period of up to five years without any opportunity for the public to participate in the decision to grant the extension, section 42 (1) (a) (i) and (ii) of the Planning and Development Act 2000 do not meet the requirements of article 6 (10) and thus the Party concerned fails to comply with article 6 (10) of the Convention.

#### **Article 7**

92. With respect to the communicant’s allegation that the 2013 permits should be considered a plan relating to the environment under article 7 of the Convention, the Committee considers that the communicant has provided no evidence to substantiate that the 2013 permits, either individually or considered collectively with the 1998, 2004 and 2010 permits, would constitute a plan or programme under article 7 of the Convention. The Committee therefore finds this allegation to be unsubstantiated.

<sup>84</sup> See ECE/MP.PP/C.1/2019/3, para. 71.

<sup>85</sup> Irish High Court, *Merriman and others v. Fingal County Council; Friends of the Irish Environment v. Fingal County Council*.

<sup>86</sup> See for example, Irish High Court, *Merriman and others v. Fingal County Council; Friends of the Irish Environment v. Fingal County Council*, paras. 50 (12) and 82; and Irish High Court, *Coll v. Donegal County Council*.

<sup>87</sup> *State (McCoy) v. Dun Laoghaire Corporation* [1985] ILRM 533, at 537.

## **IV. Conclusions and recommendations**

93. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

### **A. Main findings with regard to non-compliance**

94. The Committee finds that, by failing to provide opportunities for the public to participate in the decision-making on the 2013 permits to extend the duration of Trammon quarry, the Party concerned has failed to comply with article 6 (10) of the Convention. Moreover, the Committee finds that, by providing mechanisms through which permits for activities subject to article 6 of the Convention may be extended for a period of up to five years without any opportunity for the public to participate in the decision to grant the extension, section 42 (1) (a) (i) and (ii) of the Planning and Development Act 2000 do not meet the requirements of article 6 (10) and thus the Party concerned fails to comply with article 6 (10) of the Convention.

### **B. Recommendations**

95. The Committee, pursuant to paragraph 36 (b) of the annex to decision I/7 of the Meeting of the Parties, and noting the agreement of the Party concerned that the Committee take the measures requested in paragraph 37 (b) of the annex to decision I/7, recommends that, with regard to section 42 (1) (a) (i) and (ii) of the Planning and Development Act 2000, the Party concerned:

(a) Take the necessary legislative measures to ensure that permits for activities subject to article 6 of the Convention cannot be extended, except for a minimal duration, without ensuring opportunities for the public to participate in the decision to grant that extension in accordance with article 6 (2)–(9) of the Convention;

(b) Take the necessary steps to ensure the prompt enactment of the measures to fulfil the recommendation in paragraph (a) above.

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