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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. Communication ACCC/C/2013/107 and the Party Concerned's progress toward compliance

Dear Ms Marshall,

I am conscious of the focus there will be in the lead up to the Meeting of the Parties on compliance matters where there have been findings of non-compliance by Parties, and felt obliged to highlight certain matters in respect of Communication ACCC/C/2013/107. I would be grateful if you would bring these observations to the attention of the Committee as appropriate.

I had hoped that there would have been a further update from the Party Concerned which would have meant this was not necessary. But I note as of today, the Conventions website indicates the most recent developments are :

- On 1.10.2020 which appears to be the last correspondence from the Party Concerned ,
- On 31.10.2020m dated 27.10.2020 a comment on that progress from the Communicant

It is now practically 21 months since the finalised findings of the Committee, on 19.08.2019. While it is of course most welcome and commendable that Ireland as the Party Concerned resolved to engage to address the non-compliance, it also now practically 7 months since it set out its progress and intended actions to the Committee in October 2020. Yet in so far as I can ascertain the actions set out have not been addressed. Moreover, I would not be satisfied that they would actually bring Ireland into full compliance, based on the limited nature of considerations the propose to consider triggering a block to extensions of permission, and given the effect of certain other temporary provisions in place up to December of 2021 which act to override the proposed changes for certain development types. Furthermore, there are other provisions where similar issues arise. I set this out below.

In summary in relation to the proposed changes set out by the Party Concerned in October 2021, these included:

- The commencement of certain provisions specifically: 28(1) of the Planning and Development (Housing) and Residential Tenancies Act 2016, as amended by section 57 of the Planning and Development (Amendment) Act 2018; and
- Further amendments to s.42 which the Party Concerned considered were necessary to give effect to the Committee's findings and recommendations.

I think it a fair summary to say the Party Concerned indicated in October 2021 that:

- These changes were imminent once the Department involved received final legal advices;
- They would be made by way of Regulations, using powers under the European Communities Act 1972. Therefore would not necessitate Primary Legislation. This means once decided upon, they can be made simply by the stroke of a Ministerial pen, and do not involve passage through our Oireachtas's legislative procedure for primary legislation.

The current status of the Irish legislation.

In summary some 7 months later:

a) The provisions referred to by Ireland remain un-commenced.
b) Moreover even were they commenced, temporary provisions in place for Housing Developments under s.42(1A), would over-ride them until 31 December 2021, puncturing the purported cure for compliance for certain development types.
c) The further changes promised also have not been addressed.

This is set out in points a-c below in relation to a-c above.

a) In respect of the un-commenced changes in s.28(1):

- S. 42 was amended by s.28(1) of the Planning and Development (Housing) and Residential Tenancies Act, 2016, "the 2016 Act".
- The provision remained un-commenced, so it had no effect.
- That s.28(1) of the 2016 Act, while still un-commenced, was in fact amended by s.57 of the Planning and Development (Amendment) Act 2018, "the 2018 Act".
- s.57 of the 2018 Act was commenced on enactment - so it effected the changes to s.28(1) of the 2016 Act.
- However, even though changed, s.28(1) itself still remained un-commenced.
- It still is un-commenced despite the indication that was imminent in the Party Concerned's letter of October, 2020.

The status of the provision can be seen via the electronic Irish Statute Book for the 2016 Act in the section on "Commencement" outlining the status of sections here . An image of the relevant part taken today is included below, and a full print out appended to this observation.

S. 28(1)		Not yet commenced. Requires commencement order under s. 1(3)(a)
S. 28(2)	9 August 2017	Planning and Development (Housing) and Residential Tenancies Act 2016 (Commencement of Section 28(2)) Order 2017 (S.I. No. 341 of 2017), art. 2

b) The puncturing effect of temporary provisions:

- It is also incredibly important to note that there are additional temporary provisions in place under s.28(2) of the 2016 Act, for a period from the enactment of the 2016 Act until Dec 31 2021. These are in respect of extension of duration of Housing Developments and apply even to allow the resurrection of expired permissions, and these are made "notwithstanding anything provided for in s.42(1)". So even were s.28(1) to be commenced and change s.42(1) – these other temporary provisions would still have effect and allow for extensions of duration of Housing permissions, regardless of EIA or Appropriate Assessment considerations, or any other significant effect on the environment.
- So even were s.28(1) commenced, the provisions of s.28(1) the 2016 Act amending s42(1) have to be read in light of how they will be punctured by s.28(2) and these temporary provisions have been in operation since 23 December 2016 and operate up to 31 Dec 2021.
- While I was inclined to consolidate the relevant provisions for the convenience of the Committee, I thought given how confusing this is, and for the avoidance of any doubt on the implications, that it would be preferable to instead direct the Committee to the Law Reform Commissions, LRC revised version of the 2016 Act here **for both s.28(1) and (2)** , which they will need to read for the potential changes to s.42(1) via s.28(1) and the temporary provisions under s.28(2) together with the remainder of s.42 in the LRC version of the Planning Act here
- I would respectfully note I flagged this as courtesy as a concern in my response to the draft findings in August 2019, and believe the Committee's findings and recommendations are sufficient to encompass this.

c) Further changes promised have not been made.

Additionally, contrary to the indication in it update of October 2020, that a further change was also proposed by Ireland to check for EIA and Appropriate Assessment needs arising the time of the application for an extension – there is no further change in that regard or at all reflected since 2017.

The following table is an extract from the amendments detailed on the electronic Irish Statute Book website for section 42 of the Planning and Development Act. These reflect the changes but the status of commencement sometimes requires a further level of inspection. However it seems clear from this no further changes have been introduced since 2017, let alone commenced. Such further changes are acknowledged by Ireland as necessary, to check at the point of the application for an extension of duration if the development would have an effect now on the environment. Regrettably it seems from its letter of October 2020, Ireland proposes to limit to only consider EIA and Appropriate Assessment. I address the consequences of that limitation as a further issue in respect of the proposed resolution later below.

S. 42 applied	S.I. No. 600 of 2001, regs. 2, 207
s. 42 application period & procedure specified	S.I. No. 600 of 2001, regs. 2(2), pt. 4, ch. 3
S. 42 fee prescribed	S.I. No. 600 of 2001, regs. 2(2), 170 & sch. 10
S. 42 substituted	30/2010, ss. 1(3), 28
S. 42(1) amended	17/2016, ss. 1(3)(a), 28(1)(a)(i)
S. 42(1) applied with modifications	17/2016, ss. 1(3)(a), 28(2)(a) (see also 20/2017, s. 1)
S. 42(1)(a)(ii) amended	17/2016, ss. 1(3)(a), 28(1)(a)(ii)
S. 42(1)(a)(ii)(II) amended	1/2014, ss. 1(22), 5(7), sch. 2 pt. 4, ref. 77
S. 42(1)(aa) inserted	17/2016, ss. 1(3)(a), 28(1)(a)(iii)`
S. 42(2) applied with modifications	17/2016, ss. 1(3)(a), 28(2)(b)
S. 42(4) applied with modifications	17/2016, ss. 1(3)(a), 28(2)(c)
S. 42(8) inserted	17/2016, ss. 1(3)(a), 28(1)(b)

I would flag that this list is not ideal as it does not reflect the effect of the operation of the temporary provisions of s.42(1A) inserted by s.28(2)(a) in the 2016 Act, and serves to show how difficult it is for the public and even practitioners to get to grips with the legsislation.

To further evidence the current status of the legislation, I provide the following also detail on the legislation as it stands. Acts are not provided in consolidated form showing the effect of changes on the e-ISB. However the Law Reform Commission does provide an invaluable offering of revised acts reflecting consolidation for some acts, albeit caveated in terms of liability etc. The revised annotated version of the Planning and Development Act 2000, at this link here which brings you directly to s.42. The front page of the document indicates it has been updated to reflect changes up to 30 April 2021. The text of the section needs to be read with the related c notes and for example note c54 refers to the temporary provisions to overlay the reading temporarily to insert a new subsection 1A.

I would also highlight that since the Party Concerned's correspondence last October – multiple pieces of primary legislation opening the relevant Planning and Development Act, 2000 have been commenced and effectively concluded, which provided ample opportunity to address in a robust manner further changes needed above and beyond those which can be addressed by statutory instrument / regulation only outside of primary legislation. I would also add they would have allowed for the making of provisions which were clearer and more comprehensible to the wider public and practitioners alike.

On the adequacy of the changes proposed.

On the compliance with Article 6(10) for activities subject to Article 6 of the Convention:

I would draw the Committee's attention to the comments I submitted on 14.08.2019 in respect of the Draft Findings and Recommendations – including point 13 therein which makes clear that s.28(1) even if commenced will not resolve the non-compliance in my view.

I am conscious that much of consideration of the communication included consideration of the various timings and phases and consents involved and how they fell within the EIA Directive and Annex I of the Convention. However as the Committee's findings and Recommendations reflect the issue is one of compliance with Article 6.10 in the context of activities falling within the scope of Article 6.

I am conscious of the scope of the Committee's "findings" in this regard and I consider that to be the pre-eminent matter, as opposed to the "recommendations". I include both relevant paragraphs below for convenience of reference, and the emphasis below is mine.

> "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.
>
> 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"

I remain concerned about the adequacy of Ireland's proposed response which limits the considerations to just Environmental Impact Assessment and Appropriate Assessment when determining whether it is possible to use s.42 or not, to extend the duration of a permission. Clearly Ireland in addressing s.42 has to consider two matters, compliance with the Conventions' public participation requirements and also other EU law requirements binding on it. It has chosen to prevent the use of s.42 where EIA and AA considerations arise. While this is welcome, in short there are many other situations and considerations where as is set out in Article 6(1)b, there are public participation obligations to be considered in respect of "decisions on proposed activities not listed in annex I which may have a significant effect on the environment."

All such activities are not necessarily all going to be captured by a check on whether Appropriate Assessment was required back at the time of the original consent, or is required now when the extension is being applied for. In short, Appropriate Assessment provides for a specific set of considerations limited to sites protected under specific provisions of the EU Birds Directive[1] and the EU Habitats Directive[2]. However, I would argue that it is clearly obvious and incontrovertible that significant effects on the environment can arise outside of the Natura 2000 network. Consider for example impacts on species who are listed under Annex IVa and subject to the strictest level of protection the Habitats Directive affords as provided for by Articles 12-16. These are species which together with their breeding and resting places are subject to strict protection wherever they arise.

[1] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds
[2] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora

If a development was to wipe out a number of these species, and devastate their habitat that would be a significant effect on the environment. In fact given the strictness of protection each occurrence of the species is entitled to a much lower threshold is required to necessitate public participation, and the threshold test in the convention is "may" in respect of the effect. Consider, also for example a project which could have significant implications for Green House Gas Emissions in the context of the climate change crisis – but which might be no where near a Natura 2000 site, and thus be screened out for the purposes of Appropriate Assessment, and could be sub-threshold on not captured for EIA – or hotly contested like major deforestation and reforestation projects. Consider also a small project which may be outputting into a water body, but where the capacity of that water body to deal with those incremental emissions into it is at a tipping or breaking point. That is exactly why public participation is needed.

In short there is a need to screen in accordance with Article 6(1) – for both for of its parts (a) and (b) to determine the matter and the obligations which arise consequent on Article 6(10) of the Convention. Ireland's proposed solution does not accord with that.

Further provisions at issue:

Finally, I would also add that there are other aspects of the Planning and Development Act 2000, which allow for extensions to duration of permission and indeed other changes to the permission/consent etc. which don't comply with Article 6.10 of the Convention, for example s.146B which can be examined here.

In brief s.146B is concerned with alterations to the terms of a strategic infrastructure development the subject of a planning permission, approval or other consent granted under the Act.

While s.146B(2) does allow the Board (i.e. An Bord Pleanála as the competent authority) discretion to determine if it wishes to invite submissions from "a person or class of person as the Board considers appropriate (which class may comprise the public.." before it makes a determination under the section – there is no test linked to the Aarhus Conventions requirements of Article 6(1). It is entirely discretionary, and opaque on what basis the Board will make such a determination.

Further, section 146B(3) then requires the Board to determine whether the alteration constitutes a material alteration of the terms of the development concerned.

If the Board determines it is not a material alteration then no participation arises, and it is obliged to proceed to make the alterations.

This is not adequate for the participatory considerations encompassed by Article 6(1) and particularly 6(1) (b) of the Convention. In fact it operates to insert a condition or test on the materiality of the alteration which is not reflected in the Convention article 6, which compromises the operation of it's article 6(10).

It is only if the Board determines it is a material alteration then the Board can request information if that has not already been provided, and the potential for participation arises.

The considerations set out in s.146B(3)(b)(i) clearly reflect a particular focus on EIA related informational requirements only. (eg an Environmental Impact Assessment report, or the information required under schedule 7A of the Planning and Development Regulations, 2001, which is the information required to support screening for EIA)

In fairness, it is important to acknowledge that section 146B(3A) does provide for at least the consideration of likely effects on the environment in the context of other Union legislation other than the EIA, but this provision will **not** be reached at all if the Board hasn't determined there to be a material alteration in the first instance under s.146(3).

Similarly the remaining provisions in the section on which the Party Concerned might try to rely are blocked by the determination on material variation, and will not be arrived at.

The fundamental tests for participation under Article 6 are not properly addressed here.

It is also clear from recent cases – that the passage of time is not sufficiently prescribed in these provisions or envisioned by the competent authorities involved, and of course that should be a significant consideration to be evaluated in respect of the effect of an extension of permission, even where no changes to the specification of the project arise.

In a recent matter involving section 146B for a Liquefied Natural Gas Project, Shannon LNG, there was no changes to the project specification and to simplify a complex case the change concerned an extension of duration. The Board determined this was not a material change.

I do not wish to overly burden the Committee here, but further to a Judicial Review challenge, a preliminary reference was made to the EU Court of Justice. In summary, the Board had failed to consider the obligations of Article 6(3) of the Habitats Directive and the Appropriate Assessment considerations on sites protected under the Birds and Habitats Directives of the EU, and the likely significant effects of the extension on them, and the questions referred concerned i.a. whether a requirement to revisit those obligations arose when extending the duration of a project, but where no changes to the specification occurred. The matter was further complicated as Ireland had failed to designate the sites in time in accordance with its obligations, and had failed to address the Habitats Directive Article 6(3) obligations therefore at the time of the original consent for the LNG Terminal.

The judgment of the EU Court of Justice, CJEU in this case c-254/19[3] *Friends of the Irish Environment and An Bord Pleanála* can be found here .

The following extracts from it may interest the Committee:

"55However, the taking into account of such previous assessments when granting a consent extending the construction period for a project, such as the consent at issue in the main proceedings, cannot rule out the risk that it will have significant effects on the protected site unless those assessments contain complete, precise and definitive conclusions capable of removing all reasonable scientific doubt as to the effects of the works, and provided that there are no changes in the relevant environmental and scientific data, no changes to the project and no other plans or projects that must be taken into account.

56 It follows that it is for the competent authority to assess whether a consent such as the consent at issue in the main proceedings, which extends the period originally set in a first consent for carrying out a project for the construction of a liquefied natural gas regasification terminal, must be preceded by the appropriate assessment of its implications under the first sentence of Article 6(3) of the Habitats Directive and, if so, whether that assessment must relate to the entire project or part thereof, taking into account, inter alia, previous assessments that may have been

[3] JUDGMENT OF THE COURT (First Chamber), 9 September 2020, Case C-254/19 EU:C:2020:680

carried out and changes in the relevant environmental and scientific data as well as changes to the project and the existence of other plans or projects."

I would additionally rely on the judgment of the CJEU case c-243/15[4] in respect of the public participatory obligations in respect of Article 6(3) of the Habitats Directive.

The Irish High Court subsequently quashed the Shannon LNG Terminal permission to extend duration as unlawful. However it serves to clearly demonstrate the inadequacies and vulnerabilities of s.146B in considering likely significant effects adequately, and to thus be able to safely trigger public participation.

I would further highlight that the regulations transposing the Birds and Habitats Directive - S.I. No. 477/2011 - European Communities (Birds and Natural Habitats) Regulations 2011. (note that is an unconsolidated version) do not provide for public participation in the context of the Article 6(3) Habitats or indeed the Article 16 derogations for species subject to the strict protection provisions of the Habitats Directive, and similar issues arise in respect of derogations under the Birds Directive also. So while these raise other issues in respect of Article 6(1) of the convention which are not relevant to this particular communication, in the context of this communication and the concerns in relation to Article 6(10) there is nothing in SI 477/2011 which can be relied upon to trigger participation separately and independently for extension of duration of permission provisions such as s.42 for s.146B, or where other changes when a consent or permission is revisited.

I would also add that under s.146B even where a material alteration is identified and it is additionally determined project to have likely significant effects on the environment, further issues arise in respect of the processes which flow from that into s.146C.

Further s.146D is relevant to changes to railway orders and relies on the provisions set out in s.146B etc. Thus it falls foul of the same issues.

However, ultimately here I just wish to simply highlight here that there are other provisions such as those set out above, which are vulnerable to the same issues as s.42 of the Planning Act, in respect of the Convention's obligations under Article 6(10) for projects captured within the scope of it's Article 6(1). In that regard I wish to reflect on the scope of Article 6(10) which is as follows, and is of course not limited to temporal changes either:

> "10. Each Party shall ensure that, when a public authority reconsiders or updates the operating conditions for an activity referred to in paragraph 1, the provisions of paragraphs 2 to 9 of this article are applied mutatis mutandis, and where appropriate."

Therefore to be truly in the spirit of addressing compliance and not the narrowest of narrow responses – I would encourage the Party Concerned to address at least those areas set out above, and to scrupulously identify compliance with the public participatory obligations across provisions where Article 6.10 of the convention is relevant.

I hope the above and appended is of use to the Committee and to the Party Concerned and the Communicant in advancing Ireland toward compliance.

[4] JUDGMENT OF THE COURT (Grand Chamber), 8 November 2020, Case C-243/15 EU:C:2016:838

In addition to the commencement details for the 2016 act mentioned above, I have additionally appended to this observation for ease of reference:

- An extract of s.28 of the 2016 Act as amended by the 2018 act from the LRC version of the revised act.
- An extract of s.42 of the Planning and Development Act, 2000 from the LRC version of the revised act

I thank the Committee and the secretariat for their assistance and diligence in this matter and for the courtesy of considering these further observations, which I had earnestly hoped would not have been necessary.

Yours sincerely

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