

To: Secretary to the Aarhus Convention Compliance Committee
From: Pat Swords, Neil Van Dokkum, David Malone
Re: Response to Committee's Draft Findings on Communication ACCC/C/2014/112
Date: 23 July 2021

Dear Fiona

Many thanks to the Committee and Secretariat for the draft findings on Communication C-112 and the opportunity to comment on these, which is limited to following, structured in line with the three pillars of the Convention.

Access to Information

The Communicants agree with the 'Main Findings' (Point 166) and 'Recommendations' (Point 167). These will complement the similar findings and recommendations already finalised on Communication C-141,¹ while access to cost-benefit studies will facilitate better public participation.

Public Participation

In many respect the key argument in this regard is summarised in Points 147 to 149:

- *147 Moreover, there is nothing in the Convention that requires public participation on options that were rejected at an earlier stage of tiered decision-making, provided that public participation took place at that earlier stage. The communicants submit that no such public participation indeed took place previously, and this and the related article 6(4) allegations seem to be the core of the communication.*
- *148 The Committee does not rule out that if these allegations, that the earlier decision-making occurred without proper public participation, were substantiated and had taken place when the Convention was in force for the Party concerned, a failure to "cure" such defects in the downstream decision-making would have amounted to noncompliance with article 6(8).*
- *149 However, the Party concerned had at the time of those events assumed no obligations under the Convention, and thus there can be no underlying breach which needed to be cured in the downstream decision-making process. Accordingly, the Committee does not find the Party concerned to be in noncompliance with article 6(8) of the Convention in the present case.*

In reality, as Communication C-54 demonstrated, no such prior public participation had taken place, which was a failure in EU law, binding also on the Party. However, the obligations in International Law between the EU and its Member States are complex and only emerging, as clarified by Points 148 and 149.

Access to Justice

As regards Article 9(4) and appeals related to access to information, the findings and recommendations in Points 166 and 167 in relation to 'timely' are welcome.

With respect to Point 161 and the 'Swords' litigation, that each side paid their own was only acknowledged by the Court in the final judgement, and despite requests at

¹ https://unece.org/sites/default/files/2021-04/ece_mp.pp_c.1_2021_8_eng.pdf

previous stages in these lengthy proceedings, there was a refusal to do so. Furthermore, the Court never acknowledged the validity of Articles 9(3) and 9(4) to these proceedings.² Instead, it decided it didn't have to decide. However, the basis for this conclusion was that some aspects of the proceedings were related to the Strategic Environmental Assessment Directive and the Irish cost rules applicable to legal proceedings in this regard.³ In reality, as this High Court Judgement shows, matters related to Articles 7 and 9 of the Convention dominated the proceedings, which are outside the narrow scope of those cost rules defined in Irish legislation.

Indeed, the Court studiously avoided making any precedent in this regard relating to Article 7 of the Convention and to this date, no Irish legislation is in place providing for cost protection in matters related to the wider scope of Article 7 of the Convention, while neither does any jurisprudence exist. This is neither 'fair nor equitable' and it has a decidedly chilling effect. Indeed, this formed the reasoning as to why an appeal on this High Court judgement was not taken, as the risk of exposure to the costs of the State was simply too high and the Court had established no legal basis for cost protection for a case of this nature.

Finally, we would again like to thank the Committee and Secretariat for their hard work in this matter and hope the points above have been of use.

² See Points 74 to 88 of the High Court Judgement: https://unece.org/DAM/env/pp/compliance/C2014-112_Ireland/frComm_C112_12.08.2016_att1_High_Court_Judgement_12.08.2016.pdf

³ See Points 89 to 93 of the High Court Judgement.