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6 July 2021

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](mailto:aarhus.compliance@un.org)

**Re. Communication ACCC/C/2013/107 and further update on the Party Concerned's progress toward compliance**

Dear Ms Marshall,

Please convey my thanks to the Committee for its correspondence in respect of its draft report and considerations of progress on the above communication, and I wish to extend my thanks of course also to the secretariat for its assistance in these matters. Public Participation rights in respect of extension of duration of permissions is of serious concern here, and we also wish to particularly acknowledge the engagement with the communicant on this matter, and the engagement of the Party Concerned in this process.

**1. Introduction:**

I wish to ask you to bring the following further update to the attention of the Committee, as I am now in a position to advise on further Primary Legislation which is going through final stages in the Oireachtas this week relevant to the above non-compliance issue. **But sadly I regret to say, the Party Concerned is not taking this as an opportunity to advance compliance in line with the Committee's findings and recommendations of 2019<sup>1</sup>**, and indeed per the Committee's latest draft report, in my respectful view. Indeed this new bill adds to further concerns under s.42 of the Planning and Development Act. However, that is clearly ultimately a matter for the consideration of the Committee.

**To be clear at the outset, I fully appreciate the focus of the Committee will be on the non-compliance issue found in respect of s.42(1), and not the new s.42B introduced by this new bill. However, I do earnestly believe it will be useful for the Committee's overall perspective on this compliance issue to consider the bill, and the approach of the Party Concerned here, and indeed the approach to the amendments being tabled by the opposition to try and address the extant non-compliance issue in s.42(1) and to also limit new ones being implemented, particularly where the new changes could substantially compromise the effect of the improvements the Party Concerned has outlined to the Committee in Oct and June of this year. I would hope the Committee would take this into consideration when it considers the progress and the approach to compliance being pursued by the Party Concerned here, as that is now the matter in focus in terms of progress and how that is viewed and reflected in the Committee's report. I appreciate there will be an opportunity to comment**

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<sup>1</sup> <https://unece.org/fileadmin/DAM/env/pp/compliance/CC-65/ece.mp.pp.c.1.2019.9.e.pdf>

following the meeting tomorrow afternoon, however, as these matters are so current I felt it appropriate to bring them to your attention and to as best I can in the circumstances and time available facilitating the Party Concerned being able to respond, and having a meaningful interchange which can hopefully assist the move toward compliance.

## 2. Current position:

In short, as the Committee, is aware:

- s.42(1)(a) (i) and (ii) of the Planning and Development Act, 2000 allows for extension of the duration of planning permissions, and the Committee has found<sup>2</sup> this to be non-compliant with the Convention in Aug 2019, nearly some 2 years ago now.
- s.42(1A) is a further temporary provision – live until 31 December 2021 which extends the scope of s.42 to certain housing permissions, and also expired permissions. It was introduced in a rather complicated fashion via an amendment in 2017 of a change introduced in a 2016 act to s.42, which was commenced in 2017<sup>3</sup>.

## 3. Status of new Primary Legislation underway and its schedule.

Now a further piece of primary legislation, **The Planning and Development (Amendment) No. 3 Bill**<sup>4</sup>, is underway in our Parliament, which again fails to address the compliance issues, and indeed adds to and compounds them, and is heading in a contrary direction to what the Party Concerned has set out as its proposed approach to changes, in respect of checks on EIA and Appropriate Assessment, as is set out further below.

The following outlines the very current history of this recent bill **in 2021**, in light of the Party Concerned's latest update of 10 June to the Committee.

- The Department sought to waive pre-legislative scrutiny on the Bill, and succeeded.
- June 16<sup>th</sup> The Bill was initiated, and second stage commenced on the 18<sup>th</sup> June.
- Mon 28<sup>th</sup> June: It was fast-tracked in the Seanad, completing the important stages relevant for amendment in Committee and all other remaining stages in the Seanad in a matter of hours.
- Only Government amendments were accepted and passed, and these in part addressed some structural ambiguities on other sections which I had pointed out to the Department on the Bill. However they failed to bring forward amendments to deal with the Aarhus Compliance issue which I had additionally highlighted earlier by email on June 25<sup>th</sup> to the Department as being needed.
- June 29<sup>th</sup>: The Bill moved the next day to the Dáil, after passage in the Seanad. Here second stage commenced.
- Explicit reference was made to the extant non-compliance of s.42 with the Aarhus Convention by members of the opposition (Deputy Eoin O'Broin) in his address to the Minister and the House on the Bill, [here](#), and the Deputy's concern the new provisions would also be non-compliant.
- Wednesday 7<sup>th</sup> July, tomorrow afternoon, as the Compliance Committee will be deliberating on

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<sup>2</sup> Ibid

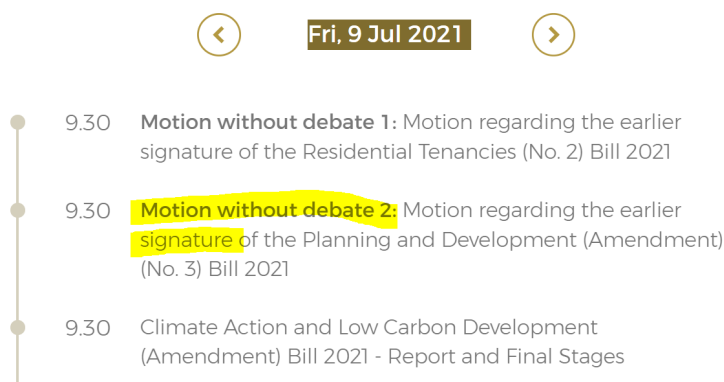
<sup>3</sup> The [LRC revised action contains a note c54](#) detailing the section as it should be read/construed and the amendment chronology is as follows: "Section construed (23.12.2016 (date of enactment) for period to 31.12.2021) by Planning and Development (Housing) and Residential Tenancies Act 2016 (17/2016), s. 28(2)(a), S.I. No. 341 of 2017, as substituted (19.07.2017) by Planning and Development (Amendment) Act 2017 (20/2017), s. 1, commenced on enactment; and further construed (23.12.2016 (date of enactment) for period to 31.12.2021) by Planning and Development (Housing) and Residential Tenancies Act 2016 (17/2016), s. 28(2)(b), (c), S.I. No. 341 of 2017"

<sup>4</sup> The Bill as initiated is [here](#) and as passed by Seanad Éireann is [here](#) However no changes were made to the s.7 of concern here. It is at time of writing before Dáil Éireann.

this matter, the bill is scheduled to be fast-tracked to complete Committee and all further remaining Dáil stages.

- Wed 9<sup>th</sup> it is scheduled to return to the Seanad, after which it will be passed to the President for consideration and signature etc.
- I suggest it is safe to assume, the Government envisage accepting **no** amendments, as the Bill is scheduled for just technical acceptance in the Seanad where it must return after the Dáil phase, ( Because it was initiated in the Seanad and if there were changes effected in the Dáil, then it would have to be considered again in the Seanad. However, as no time has been allocated to that as is evident from the image of the schedule below, it is clear the Government plan to accept no amendments.)

## Seanad Éireann schedule



- The mere administrative scheduling of the Seanad stage is significant as we have engaged with members of the opposition in the Dáil to alert them to the Aarhus Convention concerns.
- Consequently, certain members of the opposition in the Dáil have tabled amendments for the Bill stages tomorrow, to attempt to address certain of the non-compliance issues as is set out further below – targeting the existing s.42(1) specifically, (given the Act is open and the section is being amended), and also endeavouring to limit the non-compliance of the new s.42B proposed in the Bill. We very much welcome their focus on assisting Ireland with a move toward greater compliance, and to avoid further issues emerging on the statute book. We understand that time will be extraordinarily tight for the Bill stages.

#### 4. What The Planning and Development(Amendment) No. 3 Bill, 2021, proposes to do.

Again, while I appreciate the focus of the Committee will be on s.42(1) and not the new s.42B – I do earnestly believe it will be useful for the Committee’s overall perspective on this compliance issue to consider the bill and the approach of the Party Concerned here and in relation to the amendments proposed, in considering how to reflect progress.

s.7 of the Planning and Development(Amendment) No. 3 Bill, 2021 proposes another temporary provision via a new s.42B. This new section in effect allows for the following:

From when the section is commenced until 31 December **2023**, **Any planning permission, which cannot be completed with the period of its planning permission ( the appropriate period)** may apply to a Local Authority for an extension of duration of the planning permission (in the language of the legislation - an extension of duration of the appropriate period)

The planning authority is obliged to extend the duration where the conditions specified are met, and for up to 2 years, or until 31 December 2023, whichever first occurs.

The conditions – are of particular concern and can be considered in the attached copy of the Bill as initiated [here](#), and as passed by the Seanad [here](#) ( s.7 is the same in both)

In short in respect of the public participation considerations for an extension of duration – there are none, save for a check if an EIA or Appropriate Assessment is required **“in relation to the proposed extension of the appropriate period”** in which instance an extension is not permitted.

This in itself is clearly concerning as:

- a) The legislation does **not** require the Planning Authority to check the EIA or Appropriate Assessment requirements in respect of the original permission, and the adequacy of the execution and compliance with said requirements;
- b) At the time the extension is sought, the Planning Authority is not required to consider the requirements of any intervening extensions, and very problematically
- c) It appears to indicate the EIA and AA are to be considered in respect of the proposed extension only – not the project as a whole as extended, a matter which was considered recently by the Irish High Court, and the bills approach is contrary; and
- d) Activities which do not fall within either EIA and/or AA but which still may have a likely significant effect on the environment, and thus fall within Article 6(1)b – do not trigger public participation on the extension of duration decision.

It is only in case c) – where an EIA or AA is required for the extended period that there is a bar on the extension, assuming other further technical considerations specified are met relating to the assessed potential to complete the works, the status of works etc as laid out in the new s 1B(b) (i) –(vi). This approach is contrary to what the Party Concerned has outlined in respect of the limited changes it proposes for s.42(1) and which the Committee has welcomed as progress and a step in the right direction. It is also contrary to what the Committee has outlined in para 26-27 of its draft report.

**More significantly in respect of the instant communication issue, it is however important to note and consider, that if the Party Concerned were to finally make the changes it proposed to the Committee, the changes would be in effect largely be set at nought by virtue of this new s.42B, in a large number of instances while this new s42B would be in operation – ie from commencement up to 31 Dec 2023, and the alternative pathway it would provide for extensions of duration to that in s.42(1).**

It is also important to bear in mind this new s42B provision also facilitates an explicit over-ride of the previous limit on the number of extensions of duration which could be availed of as imposed under subsection (4) of section 42.

In terms of justification, it is also worth noting, there is no guidance or criteria justifying the basis for this extraordinary provision, notwithstanding that:

- a) the section is entitled *“Modification to operation of section 42 of the Act of 2000 having regard to Covid-19”*
- b) The Committee have made clear in their [statement](#)<sup>5</sup> the pandemic does not exempt parties from their obligations under the Convention,
- c) While everyone is reasonable and considerate of the impacts for the economy and business, consequent on the pandemic:
  - i. No consideration is required under these provisions in respect of the nature and extent of impact which arose on the development consequent on Covid-19, or the evidence base required on same;
  - ii. Certain developments continued to operate during the pandemic lockdowns, and no distinction is made in respect of these versus those who were really impacted by the pandemic restrictions;
  - iii. Accommodation for the needs of certain actors should not be made at the expense of

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<sup>5</sup> [https://unece.org/DAM/env/pp/compliance/CC-67/ece.mp.pp.c.1.2020.5.add.1\\_advance\\_unedited.pdf](https://unece.org/DAM/env/pp/compliance/CC-67/ece.mp.pp.c.1.2020.5.add.1_advance_unedited.pdf)

others and public participation obligations.

Further, these extensions under s.42B can be applied to expired permissions, as provided by s. 7 of the Bill which inserts a s42B (a) inserting: (1B)(b)(vi) (I) and (II).

So a permission could have been extended to the limit under the original s.42, expired, then resurrected under s,42(1A) – now be running out of time, and further extended now under s.42B – all without public participation.

The Oireachtas (Irish Parliament) debates on the Bill to date and in the future can be found [here](#).

The debate on the bill mentioned above, referencing concerns on the Aarhus Convention can be found [here](#).

## **5. Amendments Proposed by members of the opposition concerned with the non-compliance with EU law and Aarhus Convention**

Given the Government failed to bring forward amendments to its own bill to address the non-compliance issue as flagged at the Seanad stage, the amendments tabled by the opposition can be found [here](#) for the Dáil stage.

### ***Correction to the original s.42(1).***

Amendment 15, has been proposed to the original s.42(1) to add in further paragraphs which would in effect ensure no extension of duration of permission, under s.42(1) would be possible where:

- an EIA or Appropriate Assessment, or both such assessments were required when the consent was originally granted or where they were inadequately complied with, and/or where
- an EIA or Appropriate Assessment, or both such assessments are required when the extension or any prior extensions were sought.

That would at least deal with some of the Public Participation issues, and certain EU Directive requirements.

Additionally, the amendment includes a screening determination which would encompass the wider considerations triggered by Article 6(1)b of the Convention – for projects which may have a likely significant effect on the environment, but which may not involve either EIA or Appropriate Assessment, and provided that public participation should be provided for such decisions on the extension of duration.

In this regard, we very much welcome the Committee's acknowledgement of the importance of the fact Article 6(1) clearly encompasses more than EIA and Appropriate Assessment, given the scope of Article 6(1)b in particular.

### ***Correction to the proposed new temporary s.42B.***

Amendment 16 puts in place checks to ensure no extension is permitted where

- There was a requirement for EIA and/or AA at the time of the original permission, or any subsequent extension,
- There is a requirement for EIA and/or AA at the time of the instant extension.
- Where neither such requirements occur, but where there may be likely significant effects on the environment, in accordance with Article 6(1)b and Art 6(1) of the Convention, that public participation is facilitated and that i.a. due account taken of it in the decision on the extension, and the prescribed consultees are consulted, and conditions can be updated to address

improved environmental protection.

Other changes not immediately relevant here include i.a. further checks in respect of the impact of the Covid-19 pandemic, that the works undertaken are not merely incidental and executed to secure an extension.

It is important to note, that another amendment ( No 18) has been tabled which would serve to weaken the checks in the new s.42B – but are not specifically related to the Aarhus Convention considerations of concern to the Committee.

## 6. Conclusions:

Notwithstanding the Committee's warm welcome of the proposals the Party Concerned has made as constituting some improvement, albeit not sufficient to bring Ireland into compliance, I am obliged to highlight the following:

- In October 2020, the Party Concerned indicated it would be a matter of weeks to bring forward the changes it planned.
- On May 28<sup>th</sup> I provided an update to the Committee.
- On June 10<sup>th</sup>, the Party Concerned again refer to a commitment to bring forward changes it envisages, which are clearly inadequate to bring s.42(1) into compliance, and entirely failed to engage on the issue of changes needed to s.42(1) to bring it into compliance with Article 6, and particularly Article 6(1)b, focusing only on EIA and AA as a limitation to extensions of duration under s.42(1).
- As I write this on the evening of Tuesday 6<sup>th</sup> July – no statutory instrument has been brought forward to reflect the changes promised within weeks of the letter of 10<sup>th</sup> June 2021 or the letter of 1st October 2020.
- I further note according the electronic Irish Statute Book website [here](#) s.28(1) of the Planning and Development ( Housing) and Residential Tenancies Act, 2016 still remains un-commenced:

S. 28(1)

Not yet commenced. Requires commencement order under s. 1(3)(a)

- However at time of writing: Primary and secondary legislation has been enacted since, without such changes, specifically:
  - In 2020 since the Party Concerned's letter of 1 October 2020:
    - 2 Statutory Instruments for the Planning and Development Act were brought forward
    - 1 piece of primary legislation was enacted amending the Planning and Development Act
  - In 2021 to date:
    - 7 other Statutory Instruments have been brought forward in respect of the Planning and Development Act in 2021.
    - 1 piece of primary legislation has been enacted amending the Planning and Development Act in 2021
    - 7 other Bills amending the Planning and Development Act are underway before the Oireachtas, which seem to be private members bills largely.
    - 1 further piece of legislation is underway amending the Planning and Development Act in 2021 in relation to s.42 problematically as described above

- I appreciate the scope of the communication and findings, but I still feel obliged to say, in my respectful view that is the Party Concerned was acting truly in the spirit of Art 3(1) of the Convention, it would be moving to amend s.42(1A) also, and other non-compliant sections referred to in my update of May 28<sup>th</sup>. But I appreciate the Committee's comments in relation to same in its draft report.
- However the matter is now being further compounded by the new s.42B which would puncture the proposed limited improvement envisaged by the Party Concerned, as it would provide an alternative non-compliant pathway for extension of durations for potentially a large number of permissions, out to December 31 2023.
- The Party Concerned has made no reference to the Planning and Development (Amendment) No 3 Bill, which was initiated in the Seanad 4 days after the Party Concerned's letter of June 10<sup>th</sup> to the Committee.
- In respect of the proposed amendments, the Government could if it wished, have scheduled the debate so that a gap would arise between Committee and Report stage which would have allowed for dialog and for the Oireachtas to do it's work in bringing forward any refined version of the amendments proposed to assist with bringing Ireland into compliance.
- However, despite a major bill<sup>6</sup> on Marine Consents being dropped from the Oireachtas schedule this Wednesday, given difficulties in the relevant section of the Housing Local Government and Heritage Department in bringing forward that legislation, the same Department has failed entirely to either separately, or given the further scheduling opportunity to avail of the opportunity to resolve the issues in s.42 leveraging the fact primary legislation opening the Act and dealing with the section was in front of the Oireachtas.
- To be clear, I fully expect it will be argued later that to make the further amendments in respect of the wider scope of Article 6(1)b, that that can't be done by Statutory Instrument, and that primary legislation will be needed. In the interim, Ireland will continue to be in breach of the Convention, where it could clearly have moved to substantially close that issue. It is also important to note that on 14<sup>th</sup> July, Ireland's Dáil rises for the summer recess, and is not likely to return until mid-September.

Finally, it is with great sadness I am obliged to impart this status update. We had welcomed that Ireland, as the Party Concerned had moved to advance progress on compliance on this matter in advance of the Meeting of the Parties, this October 2021.

But equally I was also conscious of our wider experience of Ireland on the matter of Compliance, and the glacial pace at which it moves, which is in stark contrast to the speedy pace at which it moves to accommodate Developer interest as can be testified by practically every piece of environmental legislation which has passed particularly under the current administration.

I was also minded to reflect on the observation of Advocate General Pitruzzella of the Court of Justice of the European Union, CJEU in [case c-261/18 Commission v Ireland](#)<sup>7</sup> This case involved the Commission bringing Ireland back to Court for fines, for failure to comply with the second part of a judgment in an earlier and very high profile case involving the [Derrybrien Windfarm in case c-215/06](#)<sup>8</sup> some 11 years earlier. The Advocate General was moved in paragraph 63 to describe Ireland's position over those 11 years as "as in a game of snakes and ladders". The Advocate General meticulously set out what Ireland had committed to do, and then who it changed its position endlessly over the 11 years in paragraphs 7-19, right up to the eve of the hearing, and then

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<sup>6</sup> The Maritime Area Planning Bill, 2021

<sup>7</sup> Judgment of the Court, 12 Nov 2019, c-c261/18, EU:C:2019:955, Commission v Ireland, where the opinion of the Advocate General is: 13 June 2019, EU:C:2019:493

<sup>8</sup> Judgment of the Court, 3 July 2008, c-215/06, EU:C:2008:380 Commission v Ireland

again outlines as it becomes clear from the arguments in the further hearing, within that Hearing. As I write the fines imposed for non-compliance with the further judgment since Nov 2019, stand at €14,045,000, which is not an insignificant amount in the context of Ireland today.

My plea therefore is for the Committee to be particularly vigilant and cognisant of the contrary direction which Ireland is travelling in here, and/or the lack of coherence emerging on these issues. and the extent to which Ireland is acting to effectively expand the scope of application of s.42 in terms of the permissions to which it can be applied, and how it has done this since the communication was lodged in 2013, a communication which it fought. The bona fides of the communication in this matter are clear, as are the wider concerns of the public disenfranchised of their rights, and the environment of its voice.

I had hoped that there would have been a further update from the Party Concerned which would have meant this update was not necessary, and/or that when I got sight today of the full set of amendments tabled for the Dáil stage of the Planning and Development (Amendment) No. 3 Bill, 2021 that the Government would have brought forward amendments to improve the compliance of s.42(1) at least, and to improve its new s.42B.

I look forward to engaging with the Committee and the Party Concerned and the Communicant tomorrow with a view to assisting Ireland move toward compliance, and ensuring the interests and rights of the public under the Convention are properly observed.

Yours sincerely

Attracta Uí Bhroin, Environmental Law Officer, IEN.

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Copies of the Planning and Development (Amendment) No 3 Bill as initiated and as completed in the Seanad, s. 7 being the same in each.

Copy of the amendments scheduled for the Dáil stage as referred to.