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

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

Dear Ms Marshall,

Further to the Committee's correspondence of 4<sup>th</sup> July and the discussion on progress which had been envisaged to take place on July 8<sup>th</sup>, regarding the above communication and progress thereon please find the following comments. I would be grateful if you could bring them to the Committee's attention.

Please additionally convey my thanks to the Committee for its correspondence and draft report on progress, and very particularly the opportunity it had tried to facilitate for discussion on progress and its draft report during its meeting on July 8<sup>th</sup>. Naturally, I also wish to extend my thanks of course to the secretariat for its assistance in these matters. I also wish to particularly acknowledge the engagement with the communicant on this matter and to thank them again for their focus on this matter, and I note the engagement of the Party Concerned in this process.

1. The Committee's Draft report on the progress of the Party Concerned in this matter was most welcome, which acknowledged rather generously and encouragingly the proposals of the Party Concerned to make some changes via regulation (Statutory Instrument), as welcome steps. Very importantly however it made clear these steps while welcome would not be sufficient to bring the Party Concerned into compliance in respect of the Committee's Findings in this communication. The Committee's comments in paragraphs 26 and \*\*\* were particularly welcome in that regard. Regrettably based on the information currently in the public domain, events have moved swiftly in a very contrary direction since the 9<sup>th</sup> of June 2021.
2. In light of these and the update below the Committee may wish to significantly re-evaluate its assessment on progress and update its commentary.
3. This update builds on the further observation and update I provided to the Committee on the 6<sup>th</sup> of June, and outlined briefly during the public session discussion with the Committee in its meeting on the 8<sup>th</sup> of July, and sets out certain other matters which I have been able to clarify and ascertain in the meantime.
4. It is important to note in the context, as is set out below that:
  - in the updates to the Committee, the Party Concerned indicates the Attorney General was involved in the proposals being made to the Committee, and

- on the Dáil record, the Minister for Housing Local Government and Heritage, HLGH indicated the \*\*\* the recent contrary updates to the Planning Act.

This latter clarification by the Minister was made in direct response to concerns raised by Deputies during the debate on the problematic new legislation – the Planning and Development (Amendment) No. 3 Bill, 2021, which was subsequently passed.

5. On the 10<sup>th</sup> of June the Party Concerned wrote to the Committee, once again outlining the same approach it had outlined on the 1st October 2020, namely that it:
  - Would Commence s.28(1) of the Planning and Development (Housing) and Residential Tenancies Act, 2016
  - Is finalising proposals for supplementary amendments to section 42(1) to prohibit extensions of duration where a development requires an Environmental Impact Assessment (EIA) and/or Appropriate Assessment (AA) at the point of application for such an extension.
6. This was particularly disappointing given the inadequacies of this approach even for deminimis correction of the impugned sections of the Planning act which the Committee had found to be non-compliant, had been highlighted to the Party Concerned, including:
  - At a meeting with the then Aarhus Focal Point, and
  - in an observation I had provided earlier on the 29<sup>th</sup> of May.
7. However, what is very concerning, is on the 9<sup>th</sup> of June, the day before the Party Concerned's update to the Committee of 10<sup>th</sup> of June, the Minister for Housing Local Government and Heritage, HLGH, had written to two Parliamentary Committee's requesting they waive pre-legislative scrutiny of legislation the Government wished to enact quickly. For reference the Parliamentary Committees were:
  - a. The Business Committee of the Dáil and
  - b. The Joint Oireachtas Committee which focuses on the work of the Dept Housing Local Government and Heritage, HLGH,
8. The changes proposed included temporary changes impacting directly on the effect of s.42(1) which is of concern to the Committee in this communication, as they are framed to be notwithstanding anything in section 42(1), 1A and 4.
 

“(1B) Notwithstanding anything to the contrary in subsection (1), (1A) or (4) a planning authority shall—..”

So in effect, they

- over-ride section 42(1), and
  - will operate to nullify any of the proposed changes the Party Concerned had outlined in its proposals to the Committee, for the period when these are in operation.
9. They are temporary provisions having effect for the date of their commencement to \*\*,
  10. They are as follows:
  11. Section 7 of the legislation, (which has since been enacted and is called [The Planning and Development \(Amendment\) Act, 2021](#)), :
  12. It inserts a new s.42B into the Planning and Development Act 2000, which inserts a new subsection 1B with provisions which are of specified limited duration – out however to 31 December 2023. ( An extract just of this section is provided for convenience in Annex 1)
  13. They allow for extension of duration of permissions, without the checks the Party Concerned had outlined in its proposals to the Committee
  14. They also encompass expired permissions falling within a certain window, and
  15. Over-ride the limitation on extension of Duration provided for in s.42(4), this is given the “notwithstanding” provision
  16. The effect of these provisions means as far as I can see is, that notwithstanding anything the party concerned proposed to the Committee to remedy the non-compliance issue, that once commenced s. 7 opens an alternative pathway for permissions to extend their duration via this new subsection

1B – which doesn't provide for public participation in accordance with Article 6 (10) and 6(1) a) and b) of the Convention.

17. In fact it is only substantially more problematic as subsection 1B(b) (i) only checks for EIA and Appropriate Assessment, AA in respect of the proposed extension period. The further checks set out are not directly relevant for the instant matter, and I focus on the EIA and AA requirement to highlight how contrary the approach here is to that being proposed to the Committee in response to the Findings.
18. So the new provisions do not check for EIA or AA at the time of the original consent, do not check for EIA or AA during any intervening extensions of duration, and limits the consideration to only the extended period, rather than allowing the competent authority to determine properly if they need to consider the project as whole with the extended period, or the extended period. This is directly contrary to what the National Courts highlighted recently in the Shannon LNG case in respect of AA.  
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19. To be clear, the effect means that projects which normally would have had some level of public participation during the consideration of their original permission, which normally lasts 5 years, and could have their duration extended multiple times – and be now extended to a duration of 17 years without further public participation.
20. Even in the context of the very narrow and inadequate approach the party concerned has taken to projects encompassed by Article 6(1)a and particularly 6(1)(b), The implications here in the context of the Party Concerned delayed implementation of designation of sites under the Birds and Habitats Directive are of additional particular concern, given the inadequacies of assessments undertaken along the way, and indeed its delayed and flawed approach to EIA which is a matter of public record.
21. It is very clear from the parliamentary record there is intense pressure and focus for these provisions which is being driven on the back of the effect of lockdown consequent on the Covid-19 pandemic. But as was highlighted in the Parliamentary Debate – they provisions are not specific or selective, and do not the public authority when deciding on an extension request to consider the real impact on the project from the lockdown on a case by case basis.
22. While we are of course sympathetic to the issues for industry, as the Committee's statement has clarified – the obligations under the Convention still stand. In short, the need to extend durations of permissions cannot and should not trespass upon public participatory rights under the Convention.
23. To be clear, the need for the new provisions to take into consideration the existing issues with s.42(1) were highlighted to the Department in an emails I sent to the Department, together with highlighting a number of other structural issues and ambiguities in the bill as originally proposed. Certain of the latter were addressed, and I was advised the Attorney General was involved.
24. However, the amendments brought forward by Government to it's own Bill, did not address the issues with the extension of permission.
25. Therefore after the bill completed the Seanad stage and moved to the Dáil stage, Deputies concerned about the issues which I had highlighted to them, proposed amendments to address the issues in the section 7 and its new section 42B, and to also remedy the situation in s.42(1) which is at issue in this communication.
26. They also specifically raised concern and issue with the compliance with the Aarhus Convention as is set out in Annex II during the debate, and the Minister's response was that the Attorney General was personally involved – see quote from the Minister in Annex II in response to the concerns raised.

27. The constructive amendments – link in Annex II also, were not given any adequate consideration by the Government, in a session which was scheduled for only 30 minutes in the end, being “guillotined” at the end of the allotted period imposed by the will of Government on the Dáil schedule.
28. When last checked s. 7 was not commenced of this new Act
29. When last checked the changes proposed by the Party Concerned had not been effected.
30. In light of the above – I would ask the Committee to update it’s draft report on progress to reflect these developments and associated concerns.
31. I would also reflect in the context of the commitment to engage in advance of the MoP the proposal to request an updated timeline by July 2022 might be reconsidered to bring that forward
32. I am at a disadvantage of course in this – the Party Concerned not having engaged in the discussion on the 8<sup>th</sup> of July - which was disappointing as it would have been helpful to have understood their perspective on all of the above, where I have endeavoured to engage constructively in this with the Departments, the Oireachtas and the compliance mechanism.

Yours sincerely

Attracta Uí Bhroin, Environmental Law Officer, IEN.

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Annex 1 Extract of s. 7 of the Planning and Development (Amendment) Act 2021

Annex II – Extract from Dáil Debates relating to Aarhus & links to amendments proposed.