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19 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

Re. Communication ACCC/C/2016/141 and further comment on the Party Concerned's progress toward compliance

Dear Ms Marshall,

Further to the Committee's correspondence of 4th July and the wide discussion on progress which had been envisaged to take place on July 8th, 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 it's draft report during it's meeting on July 8th. 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 championing of this matter which is of great public service, and I note the engagement of the Party Concerned in this process.

Evaluation of Progress:

1. In considering progress – I would first like to take a step back and reflect on what is fundamentally at issue in the Committee's findings, and what needs to be done to address that, and to then consider to what extent there is, or is not progress, in respect of that.

2. It is noted that while the Findings of the Committee once finalised are immutable, the Recommendations of the Committee however are less absolute, and might be regarded as informed suggestions on a compliance response, based on it's examination of the communication.

3. The wording of the Committee's Findings[1] focus on the **failures to put in place measures** to ensure the OCEI and Courts decide appeals re environmental information requests in a timely manner, and in **maintaining a system** which generates outcomes contrary to those required in respect of

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

adequate and effective remedies. This is quoted below for ease of reference: (my emphasis)

> "**A. Main findings with regard to non-compliance** [2]
>
> 133. The Committee finds that:
>
> (a) By **failing to put in place measures to ensure that the OCEI and the courts decide appeals** regarding environmental information requests in a timely manner, the Party concerned fails to comply with the requirement in article 9 (4) of the Convention to ensure timely procedures for the review of environmental information requests;
>
> (b) **By maintaining a system whereby courts** may rule that information requests fall within the scope of the AIE Regulations **without issuing any directions** for their adequate and effective resolution thereafter, the Party concerned fails to comply with the requirement in article 9 (4) of the Convention to ensure **adequate and effective remedies** for the review of environmental information requests."

4. **The Committee's recommendations need to be looked at in the context of the findings – and I submit that the Party Concerned's response to them is overly narrow and limited and fails to consider the breath of measures required and/or available to it to bring itself into compliance. This is in addition to the Party Concerned's narrow approach to the legislative and other regulatory measures the Committee refers to in its Recommendations.**

5. Ireland's response of 21 Oct 2010 to the draft findings, and it's update of 21 May 2021, on progress on the finalised finding, and its further update today, 19 July 2021, indicate a sole and exclusive focus on a future version of regulations and a legislative approach. They **also fail to address the findings in a credibly comprehensive way capable of bringing Ireland in a position where the reviews will be compliant with the specified characteristics of Article 9(4) of the Convention as detailed in the Findings.**

6. Of additional concern is that the Party Concerned's response appears to be limited to the timeliness issue it seems, and do not appear to clearly address the issues identified in the finding in total – in respect of the adequacy and effectiveness of the Court's determinations in AIE reviews.

7. This is I submit entirely at odds with the spirit and practicality of it's welcome commitment to address progress in advance of the Meeting of the Parties.

8. The specification of a duty of timeliness or expeditiousness for the Courts, or a specific timeframe for the OCEI will **not** on it's own deliver an appeal which is decided in a timely manner.

9. **Most importantly, the term "timely" connotes a relevant, meaningful timeframe to the requestor. It is not something which is relevant to the OCEI or the Court as a deadline or timeline they simply have to fall within. Thus in the first instance the proposals Ireland are making have entirely failed to consider this fundamental issue adequately.**

10. **This arguably might require consideration of the compatibility or lack thereof of AIE timescales with the timescales for participation or access to justice – if true inter-operability of the pillars is to be facilitated and the compatibility between the pillars supported – which is essential if the threshold of timely is to be achieved and indeed the adequacy and effectiveness of remedies. In short there is a total failure to focus on Article 3(1) as the critical underlining obligation in how the response to implementing the specified characteristics of Article 9(4) of the Convention which Ireland has been found in breach of in this communication in respect of AIE appeals by the OCEI and reviews by the Courts on AIE decisions. While the provisions of Article 3(1) need no rehersal**

[2] Ibid

for the Committee, for the record they are highlighted here:

"Article 3.
1. Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention."

11. If Ireland is to meaningfully deliver on for example the timeliness characteristic of Article 9(4) – it also needs to be implementing a way to assess it is delivering on it, and addressing how it can enforce this.

12. However even at a more basic level of response - a comprehensive approach to credibly reducing the timescales would mean not just a transposition style approach, but would also include i.a.:

a) Undertaking steps which would operate to **assist** the speedier determination of appeals by the OCEI and reviews by the Courts.
b) Taking steps to **reducing the volume AIE appeals arising and the consequential burdens** on the OCEI and Courts – thus freeing up the available resources to process a smaller volume within a shorter space of time from when there are received, instead of at the end of a long backlog of cases.
c) Taking steps to reduce the existing backlog through greater resourcing of the OCEI and Courts
d) Engagement with public authorities to re-evaluate their position on requests under appeal or review, where it is clearly flawed.

13. Better implementation and enforcement of existing basic obligations already under the AIE regulations, and indeed directly effective obligations under the AIE Directive, should have and could still be focused upon immediately to drive a regime which would assist the OCEI and the Courts as in a) and b) above and importantly provide immediate benefit to requestors and indeed the public at large – for example a selection of existing AIE provisions are highlighted below by way of example:

a) Article 14(3) re. better identification by the Minister of public authorities, avoiding appeals to a large extent on such basic issues – where the existing Article 14(3) of the AIE Regulations already provides:

> "(3) In addition to the guidelines referred to in sub-article (1), the Minister shall ensure that an indicative list of public authorities is publicly available in electronic format"

b) Article 5(1) re. dissemination obligations including properly reviewed specification of registers of environmental information held by the public authority and relating to its functions which provides:

> "Article 5(1)
> "A public authority shall -
> ……
> (b) **make all reasonable efforts to maintain environmental information held by or for it in a manner that is readily reproducible and accessible by information technology or by other electronic means,**
> (c) ensure that environmental
> information compiled by or for it, is up-to-date,
> accurate and comparable,
> (d) maintain registers or lists of the environmental information held by the authority and designate an information officer for such purposes or provide an information point to give clear indications of where such information can be found.

c) Updates could have been done to the guidelines to which Public Authorities should have regard to given the existing regulations provide in Article 14(2) where:

"(2) A public authority shall, in the performance of its functions under
These Regulations, have regard to any guidelines published by the Minister under sub-article(1).

d) Use of circulars and training updates, to ensure basic issues and errors are reduced / eliminated – for example on the requirement to give reasons under the Regulations, and given the issue of the adequacy of those reasons which has been highlighted by the Courts – could be and should be communicated to public authorities.

e) Any outstanding directly effective elements of the AIE Directive Article.

14. It is interesting to note, the submission[3] from the OCEI's office to the consultation on the AIE Regulations in (Mar 8th – April 16th 2021) makes similar, and indeed many more, similar suggestions.

15. **The OCEI submission, is similar to my points above, at pains to emphasise the timeliness of its decisions simply cannot be effected by putting a timeline in the regulations. It highlights the need for complementary measures to enable delivery of timely decisions – which will deliver compliance with the obligation, and not just be words on a page of a legal instrument.**

16. Moreover, the OCEI submission[4] also emphasises that many of the **essential complementary measures needed for it to be able to comply, could be effected by leveraging and implementing more effectively already extant elements of the regulations.** It emphasises clarification of which bodies fall within the definition of public authorities – a duty falling on the Minister, the duty to give reasons for example, and many other eminently practical sensible matters which could be addressed largely through the existing regulations, coupled with an innovative approach to updated guidance and use of circulars to brief authorities as is expanded upon further below.

17. Many of these suggestions I would support, and indeed feel a lot more could be done than is suggested if a truly "can-do must-do" approach was driving the agenda. (I must note respectfully. that some of the further legislative changes proposed in the OCEI's response across a whole range of matters and changes proposed in the regulations would benefit from further discussion, consideration and refinements.)

18. However, the core point here is that in Ireland is simply not engaging in a "can-do must do" response to these findings.

19. For example - many Department's use a mechanism knows as circular letters to provide emphasis and focus to various public authorities on certain matters, be it policy, or legislation, or judgments which need to be taken into consideration and highlighted. The Party Concerned's approach to the findings of the Committee has been entirely wanting in this regard, and such a circular or circulars could have been prepared and deployed to generate immediate positive focus and effect around i.a. organisation of records, the identification of public authorities, the need to give adequate reasons, the obligation to prepare and maintain registers of the environmental information held by the public body, proactive dissemination of information etc.

20. The Party Concerned could have taken steps immediately to address root causes, bringing some level of immediate improvement with such basic steps entirely within the control of the Department.

[3] OCEI's submission to the consultation on the AIE Regulations appended here for convenience of reference.
[4] https://unece.org/sites/default/files/2021-05/frCommC141_27.05.2021_Annex4.PDF

21. Given the failure todate – it would have been welcome if the Party Concerned had committed to doing such circular(s) in the next number of weeks.

22. It could have additionally considered and advanced moves, or outlined commitments to addressing clearly obvious deficiencies in its training for public authorities, and in its monitoring and oversight of the environmental information pillar.

23. It is also important to note that the very de minimis response Ireland has outlined – for example on the timelines for the OCEI's office decision, the response outlined could be addressed immediately with the stroke of a Minister's pen,– such changes to regulations very arguably lie within the discretion of the Minister and are not subject to the Oireachtas process for primary legislation.

24. Instead 4 months after the findings were finalised, and 7 months after the draft findings were issued, **the Party Concerned has only initiated a review of the regulations**.

25. This was done in a very unconsidered and unsupported manner – with no supporting background analysis or considerations or change proposals against which could be considered, or for there to be something to be consulted upon.

26. In fact on 25 March this year during the consultation, I felt obliged to write to the Department[5] to prompt them to provide details on i.a. this communication for the consultation webpage – as it was merely referred to with:

    - No explanation of what the Aarhus Convention Compliance Committee was or the significance of it making a finding against Ireland,

    - No explanation to the substance of the findings and recommendations, or even a link to the Findings or communication,

    - No link to the Convention and a buried link to the AIE Directive[6] – as the key underpinning legislation against which the adequacy of the AIE regulations needed to be evaluated, a

    - No link even to the unofficial consolidation of the AIE regulations – just links to 4 different sets of regulations which un-initiated members of the public were presumably expected to navigate and understand how to consolidate.

27. I do acknowledge and welcome that on the 29th of March the Department responded to the de minimis requirements I set out. But I am regretfully obliged to reflect here that yet again even the approach to the consultation does not reflect well on the Party Concerned's focus on progress on these findings.

28. Additionally now it must be noted that the Party Concerned has had 3 months now to reflect on the 33 submissions it received since the consultation concluded on 16 April 2021, many of them very short. So with roughly 65 working days since the consultation concluded to day – that is effectively 2 days to consider each submission. Yet no result is extant, nor is any date or progress on the exercise communicated today by the Party concerned.

29. It is further noted that in stark contrast, the communicant completed and submitted a highlevel analysis of the submissions after they were made public to the Committee by the 10th of June, over a month ago now.

[5] Email correspondence attached.

[6] DIRECTIVE 2003/4/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC

30. The really fundamental issues with the failures to hold data in an appropriate fashion which does not result in errors and delays in responding to requests is really set out very clearly in a very recent decision of 8 July 2021 on an appeal [7] to the OCEI in respect of a request to the Department of Agriculture, Food and Marine. This is a major Government Department with huge responsibilities and functions in respect of many environmental matters. The approach to it's information handling is set out in stark terms by the OCEI as follows.

31. The request concerned access to records relating to the development of a key protocol purportedly developed between the Department and the key service for nature – the NPWS on a protected bird species, our smallest bird of prey – Merlin, *Falco columbarius* where Ireland's failuresin respect of this bird have been the subject of judgments of the Court of Justice, c-418/04 and the records concern the development of a protocol to mitigate against negative impacts to the bird from forestry projects, in sites which are supposed to be designated under the EU Birds Directive and subject to appropriate assessment under the EU Habitats Directive.

32. Notwithstanding the obvious importance of such records – how the Department has seen fit to manage the information was outlined as follows by the OCEI's decision:

> *"12. The Department stated that physical records are stored at all Department locations across the country, with electronic servers also in place at those locations. It stated that all personnel have their own area on the electronic servers to save material, to which other users do not have access, and that there are also shared folders for each division, to which other divisions do not have or have very limited access. It also outlined that there are no specific folders on the shared area where records relating to merlin policy are stored.*
>
> *13. The Department noted that the records sought would likely be electronic in nature and maintained in emails or in the form of word documents, spreadsheets, and pdf documents etc. It outlined that it does not retain emails that are more than two years old and emails that are not deliberately saved by users to electronic file folders are automatically deleted. It further stated that it would be unlikely that any physical records were created or stored in the development of the Merlin Protocol, however personnel familiar with the matter would be aware of such records, should they exist.*
>
> *14. The Department explained that it consulted personnel in the Forestry Inspectorate Division and asked them to carry out searches of their electronic records. It stated that it would have expected them to carry out searches using the keyword "merlin" or other appropriate keywords, with which they would be familiar, e.g. "protocol."*

33. There are further concerning aspects of the information handling and what was asserted and relied upon in the context in subsequent appeals on forestry licences – but I will not trouble the Committee with these here. Suffice to say this is a key protocol, pertaining to an important species, and key EU obligations and the information is not required to be manged or maintained in a way in which it can be searched, retrieved or disseminated. All of which led to a situation where the initially extra time to respond to the request was availed of by the Department and then it returned a decision that no records could be found – in circumstances where the OCEI determined such a decision be annulled.

34. To be clear – if Article 5(1) of the Regulations was being effectively implemented – the appeal might not have arisen, and even if it had – the OCEI would have been in a position to determine it much more quickly if the information wasn't to put it mildly – properly managed and maintained in

[7] Appeal OCE-102377-Q2D7P2, Mr. X and Department of Agriculture, Food and the Marine (the Department) https://www.ocei.ie/decisions/mr.-x-and-department-of-a/index.xml

accordance with the existing AIE Regulations which provide i.a. (my emphasis)

> Article 5(1)
> "A public authority shall -
> ……
> (b) **make all reasonable efforts to maintain environmental information held by or for it in a manner that is readily reproducible and accessible by information technology or by other electronic means,**
> (c) ensure that environmental information compiled by or for it, is up-to-date, accurate and comparable,
> (d) maintain registers or lists of the environmental information held by the authority and designate an information officer for such purposes or provide an information point to give clear indications of where such information can be found."

35. Thus the organisation of information is key to facilitating the OCEI being able to determine a matter quickly, and also possibly avoiding an appeal arising in the first instance, providing the additional benefit of a reduced workload and potential backlog – again facilitating the OCEI being able to deal with appeals quickly.

36. To be clear, I do also welcome a wider review of the AIE regulations which Ireland initiated in March, if it is to drive constructive and positive changes of the Irish rules and enhace compliance. But it cannot be used to obfuscate and delay however indirectly the response on the really critical matters at the heart of this communication. That is now a very real concern in respect of this communication and the response to it, where there is no clear commitment to prioritise those elements. Instead what is feared by some, is that any focus on more timely appeals will be accompanied by a number of other changes to the regulations to offset the effect, and which make the regime even less friendly in other respects, lest the more timely appeal drive real access.

37. As I have stated consistently throughout this process, the issues with delays in appeals and reviews has served to undermine the credibility and efficacy of the environmental information pillar of the convention, and it is of course fundamental to supporting effective decisions by the public and eNGOs on their interest in engaging in environmental decision-making and in participating effectively and in seeking access to justice where it is important and necessary for them to.

38. However, notwithstanding the inadequacy of the Party Concerned's limited transposition-style response to the issue of timeliness – it would have been at least some progress, if it had addressed this or even specified the language.

39. To be entirely clear, if Ireland had wanted to address at least some level of progress on the timeliness on the findings in respect of the OCEI appeal – it could have very arguably done so literally immediately through a change to the AIE regulation, which can be addressed at the stoke of a Minister's pen.

40. It is worth recollecting that Ireland moved swiftly to update the AIE Regulations to introduce changes which operate to restrict access in 2018. This is in respect of the amendment of Regulation 3 to exclude, it would seem unlawfully in an Irish context, the President, and certain other specified bodies from the definition of public authorities in the regulations.[8]

41. At the session during the meeting of the Committee on 8th July 2021, which the Committee had

[8] S.I. No. 309/2018 - European Communities (Access to Information on the Environment) (Amendment) Regulations 2018 http://www.irishstatutebook.ie/eli/2018/si/309/made/en/print

organised a public session to facilitate a discussion on progress, the Party Concerned reserved it's position, and simply pointed to it's earlier updates to the Committee including that of May 5th 2021.

42. While naturally, I respect their right to reserve their position, this was in truth deeply disappointing, even in terms of sharing differing views and perspectives. But that now together with today's update which indicates absolutely nothing further in terms of progress, is deeply, deeply disappointing.

43. The Party Concerned has in summary:

- Outlined a very narrow transposition style approach to only part of the findings in respect of timeliness,

- Failed to really clarify how it intends to deal with the adequacy and effectiveness of remedies in the court procedure.

- Not addressed obvious and essential complementary measures which it could address immediately leveraging the existing regulations which would substantially contribute to the issue of timeliness.

- Not leveraged well established mechanisms such as circulars to support more effective implementation on those complementary measures.

- Not provided sufficient additional resources to the OCEI's office to clear the backlog.

- Not engaged in a really credible consultation exercise, or analysis to support the diagnosis of all the changes needed or indeed proposed.

- Not even consulted on the language for the deminimis changes it proposed. This begs the question as to why the wording intended for the regulations on timeliness which Ireland envisaged as its response back in August of last year and which it apparently remains committed to today July 19th 2021 wasn't even included in the consultation so it could be consulted upon and commented on, yet Ireland says it would welcome the views of the Committee on it, but is unclear as to when such wording would be available a year later. Consulting consultation on such legislative proposals through the Committee's processes and compliance mechanism – is hardly consistent with Article 8 of the Convention and the engagement with the wider public.

44. The key timelines relative to the Committee's findings are for convenience outlined below:

a. 7th Aug 2020 - The draft Findings and Recommendation were issued
b. 21 Oct 2020 - the Party Concerned's letter indicated a transposition style response in respect of timeframes and took issue with the findings in respect of adequacy and effectiveness of court decisions on AIE cases.
c. 9th Nov 2020 – The finalised findings and recommendations were issued
d. 8th March 2021 – four months later a very perfunctory consultation on the AIE regulations was initiated – running to April 16th 2021.
e. 5th May 2021 The Party Concerned submitted an update, outlining the dates of the consultation and referring in paragraph 2 and 5 back to its proposed changes on the draft finding to proposals only on the timeliness issue for the OCEI appeal and Courts – and thus not to the adequacy and effectiveness of the Court review in AIE cases.
f. 8th July 2021 – ACCC meeting session to discuss progress – Ireland reserved it's position and referred to its earlier responses.

g. 19th July 2021 – despite the consultation and further input from the Communicant – Ireland's position remains unchanged
h. 19th July 2021 – the AIE Regulations remain unchanged and essential extant provisions which would act as complementary measures on the issue of timeliness have not gained further focus.

45. In summary – I very regretfully submit that Ireland's progress here has not been as progressive as one might have hoped, and that if this process of engaging pre-MoP and this review of progress is to be meaningful – the Committee must reflect this honestly in its report to the Parties.

46. Further, as reflected in the committee's meeting on 8th July, the proposal in paragraph 26 of the draft report for a timeline of 2022 – is really disappointing and entirely inconsistent with the level of imperative needed here, given this issue effectively undermines all pillars of the convention and leaves us in the dark on the information we need, until it is too late, on the most important thing we need to fulfil our Article 1 rights.

47. I am very cognisant of the serious issues which the Committee is grappling with across parties, and the urgency with which many of those compliance issues must be addressed. However, once again I would strongly urge the Committee to reconsider the message it is sending out with this proposal for an outline plan by 2022 in paragraph 26, and the general lack of reflection on the lack of progress which is in reality the situation here regrettably.

48. As flagged on the 8th of July in my commentary in respect of communication ACCC/C/2013/107, Ireland can move at a glacial pace on compliance issues when it suits it. This is even when it is encountering fines now totally €14,240.000 in the context of the judgment of the EU Court of Justice in case c-261/18[9] in respect of fines imposed in Nov 2019 for failures to comply with an earlier judgment some 11 years previously in case c-215/06[10].

49. Therefore, while the extraordinary focus and commitment of the committee and the secretariat throughout this process is so appreciated, maintaining pressure and sharp focus on the reality of the lack of progress is at this key moment and in its draft report, is essential now for the credibility of the compliance mechanism to communicants, and to hopefully assist us collectively move Ireland towards compliance.

50. I thank the Committee for its consideration of these remarks and look forward to engaging with the Committee and the Party Concerned and the Communicant further, 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.

Enc.
Copy of correspondence with the Department on concerns on the consultation.

[9] Judgement of the Court, 12 Nov 2018, case c-261/18, EU:C:2019:955
[10] Judgement of the Court, 3 July 2008, case c-215/06, EU:C:2019:955