Consultation response to ACCC on

Ireland's Proposed Action Plan to comply with

MoP Decision VII/8i

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Contents

Introduction, overarching remarks and issues with the action plan :

This submission has been prepared by the Environmental Law Officer of the Irish Environmental Network, the coalition on national eNGO's in Ireland. However it does not necessarily reflect the views of the IEN or it's individual members, while they may share them in whole or in part.

Notwithstanding the serious issues raised below with the action plan, I firstly wish to acknowledge the work done by the Irish authorities in preparing this proposed action plan, in response to Decision VII/8i of the Meeting of the Parties to the Aarhus Convention, and for their engagement with the compliance mechanism of the Convention, and the Compliance Committee on this matter – which is most appreciated.

I also wish to very particularly acknowledge what has preceded this action plan in terms of: the many years of engagement of communicants, observers, Ireland as the Party Concerned; and of course the careful assessment and diligent focus of the Compliance Committee of the Aarhus Convention in arriving at its findings and recommendations on the underlying communications, (ACCC); and the assistance to all concerned of the secretariat to the Compliance Committee; and also to the support of the Aarhus Secretariat, and the important oversight of the Parties to the Convention.

It is however therefore most regrettable that the overarching comment of this submission is that there are:

a) Serious issues with the responses implemented in respect of Communication ACCC/C/2013/107 which in my view, render the latest and already implemented legislative response – non-compliant with the Convention,

b) Serious gaps in relation to the details on the changes and actions proposed in respect of ACCC/C/2016/141 and the timeframes for them, and how they are to be developed. The absence of detail undermines the express purpose of this consultation performed on the draft action plan prior to it's submission to the ACCC.

This is all also quite apart from deficiencies in the action pan on other desirable initiatives necessary to really give meaningful effect to any corrections to bring Ireland into full compliance.

propose to be as brief as possible in my outline of the issues here, being conscious of the significant workload the Committee and the Secretariat has in terms of ongoing work on as yet un-determined communications and follow-up on implementation on it's Findings and Recommendations, Decisions of the Meeting of the Parties, and advice to Parties etc – I

I am of course available to expand and clarify where it is useful to the Committee. Indeed I would welcome any enquiries and opportunities to assist Ireland in it's move toward compliance, and to ensure the huge effort expended in highlighting the issues in the underlying communications and findings are at last properly addressed and resolved.

Notwithstanding the brevity that I attempt here in my outline of the issues - please be assured the assertions made here arise out of

i) Very detailed analysis of the entire catalogue of legislative changes made, including the latest changes implemented in September 2021,

ii) Consideration of the decision table from the Party Concerned in response to certain of the issues raised in the submissions made on the draft action plan during a public consultation,

iii) Discussion with legal practitioners to confirm the practical issues being experienced in the field so to speak to give further context to the concerns outlined, and

iv) Years of experience of how these matters play out in Ireland.

Structure:

Following an outline of specific issues with the actions proposed in "Section C Detailed Plan of Action" in respect of each communication, and it's corresponding element of decision VII/8i, some further brief comments on the approach to the development of the action plan are also made in relation to "Section A. Description of the process by which the plan of action has been prepared, and Section B General character of the measures that will be needed to implement the recommendations in the MOP decision"

Re Section C Detailed Plan of Action"

Re Recommendation Para 4(2) (i) of decisions VII/8i

C. Detailed plan of action	
Recommendation: Para. 4 (a) (i) of decision VII/8i	In paragraph 4 (a) (i) of decision VII/8i, the Meeting of the Parties recommends that the Party concerned take: (a) With regard to section 42 (1) (a) (i) and (ii) of the Planning and Development Act 2000: (i) 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;

1. For ease of reference: the above Para 4(a)(i) of decision VII/8i relates to Communication ACCC/C/2013/107. Reference is also provided below to relevant consolidations of the legislative changes made to assist the Committee, and to the actual legislative changes.

2. The Seventh Meeting of the Parties (MoP VII) endorsed the Committee's findings as follows: in Decision VII/8i[1] concerning compliance by Ireland with its obligations under the Convention (emphasis added):

> "1. Endorses the findings of the Committee with respect to communication ACCC/C/2013/107 that:
>
> (a) By failing to provide opportunities for the public to participate in the decisionmaking on the 2013 permits to extend the duration of Trammon quarry**, the Party concerned failed to comply with article 6 (10) of the Convention;**
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> (b) 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;"

3. For convenience of reference, Aarhus Convention Article 6(10) and the paragraph 1 (of Article 6)

[1] ECE/MP.PP/2021/2/Add.1 (unece.org)
https://unece.org/sites/default/files/2022-05/ECE_MP.PP_2021_2_Add.1_E.pdf

referred to in Article 6(10) are provided here: (emphasis added)

> Article 6
>
> "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"
>
> "1. Each Party:
>
> (a) Shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I;
>
> (b) Shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I **which may have a significant effect on the environment.** To this end, Parties shall determine whether such a proposed activity is subject to these provisions; and
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> (c) May decide, on a case-by-case basis if so provided under national law, not to apply the provisions of this article to proposed activities serving national defence purposes, if that Party deems that such application would have an adverse effect on these purposes."

4. To be clear, in its submitted Action Plan, Ireland as the Party Concerned sets out the legislative changes that it has already enacted and commenced recently to section 42 (s.42) of the Planning and Development Act 2000, (PDA) including in September 2021, and the associated Planning and Development Regulations, 2000.

5. It is submitted at the outset that Ireland's proposed action plan in terms of its reliance on legislation enacted and set out here is inadequate and must be revisited.

6. These changes in September 2021 were purportedly to respond to the non-compliance issue as set out in its Action Plan, albeit in both of the key statutory instruments in 2021, no reference is made at all to the Aarhus Convention, only to EU Directives - see extracts in footnote[2] below. The

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[2] S.I. No. 456/2021 European Union (Planning) (Habitats, Birds and Environmental Impact) Regulations 2021

Notice of the making of this Statutory Instrument was published in

"Iris Oifigiúil" of 10th September, 2021.

I, DARRAGH O'BRIEN, Minister for Housing, Local Government and Heritage, in exercise of the powers conferred on me by section 3 of the European Communities Act 1972 (No. 27 of 1972) and for the purpose of giving further effect to Council Directive 92/43/EEC of 21 May 19921 , Directive 2009/147/EC of the European Parliament and of the Council of 30 November 20092 , Directive 2011/92/EU of the European Parliament and of the Council of 13 December 20113 and Directive 2014/52/EU of the European Parliament and of the Council of 16 April 20144 hereby make the following regulations:

S.I. No. 457/2021 - European Union (Planning) (Habitats, Birds and Environmental Impact) (No. 2) Regulations 2021

Notice of the making of this Statutory Instrument was published in

"Iris Oifigiúil" of 10*th September,* 2021.

I, DARRAGH O' BRIEN, Minister for Housing, Local Government and Heritage, in exercise of the powers conferred on me by section 3 of the European Communities Act 1972 (No. 27 of 1972) and for the purpose of giving further effect to Council Directive 92/43/EEC of 21 May 1992[1] , Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009[2] , Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011[3] and Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014[4] hereby make the following regulations:

specific changes are described in more detail further below.

7. Before moving to some detail - the effect of these changes to s.42 are in summary is that Ireland has chosen to go down a path whereby

a) No extension of duration of a planning permission is permitted in circumstances where an EIA or an AA is required for the outstanding portion of the activity/project which has been "commenced" and is "substantially completed", s42(8) and s. 42(1)(a)(i)(I) and 42(1)(a)(i)(III) of the PDA refer[3] .

b) It uses EIA or AA as a proxy for the activities captured by Article 6(1).

This is clearly not compliant with Article 6(10) or paragraph 1 of Article 6 as referred to in Article 6(10) of the Convention.

8. In short the primary issues with the current set of changes already applied, are that very problematically the provisions now provide that:

a) Only the outstanding portion of the project which is to be completed during the extended duration for the planning permission is considered when determining public participatory obligations.

This is clearly not in compliance with the focus of Aarhus Article 6(10).*

b) Only Environmental Impact Assessment (EIA) and Appropriate Assessment (AA) (the process under Article 6(3) of the EU Habitats Directive) are considered in determining public participation requirements in the context of the updating or reconsideration of a permission by a public authority.

This limit to EIA and AA is insufficient to address the scope of activities which are encompassed by paragraph 1 of Article 6, as referenced in Article 6(10), and in particular Article 6(1)(b) which relates to "proposed activities not listed in annex I which may have a significant effect on the environment". (emphasis added)

c) Notwithstanding the above issues at a) and b), the September 2021 changes are arguably unlawful, having been effected as changes to primary legislation using Statutory Instruments, relying on section 3 of the European Communities Act 1972 (No. 27 of 1972) – which limits the authority of a Minister to change primary legislation via SI to mandatory matters only which are necessary to comply with EU law.

9. Ireland has additionally provided for a temporary set of further changes in s.42B which operate out to 31 December 2023, which also allow for the effective resurrection of expired permissions, and entitles them to become alive again as secure a new period in which they can be effective. It effectively operates to insert up to 31 Dec 2023, a new subsection 1B into s.42. This was purportedly to respond to issues and impacts to development associated with the Covid-19

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[3] The Law Reform Commission's revised version of the Act reflecting these changes is available here and the section numbers are as provided therein https://revisedacts.lawreform.ie/eli/2000/act/30/revised/en/pdf?annotations=true#page=266

pandemic. While no one can be unsympathetic to the difficulties encountered during the pandemic, there is no requirement in the provisions enacted to establish that such impacts were genuinely experienced, nor was there any detailed justification provided to the Houses of the Oireachtas, the Irish Parliament, why these provisions have effect out to 31 December 2023. The same basic approach is followed as outlined above, with consideration only of the portion of works outstanding to be completed within this new permission period falling to be considered in respect of EIA and AA requirements. Specifically the new ss1B(vi) of s.42 allows for the resurrection of expired permissions.

10. The above issues detailed in (8) above are considered in more detail now below.

11. I hope the following may be helpful to see all the changes the Committee will be aware of, including those detailed in the Action Plan in context.

a) The Committee will be aware of the somewhat torturous series of problematic legislative changes Ireland has made to the aforementioned section 42 (s.42) of the Planning and Development Act 2000, (PDA), and impacting upon it, over the period while this communication was being considered by the Committee, and indeed following the findings of the Committee.

b) It is not intended to rehearse these here as they are set out in the various observations I have made over the process, but to simply summarise them here, as these have been combined with but largely overtaken by the problematic effect of further changes made since in September 2021 in SI 456/2021 and SI 457/2021.

c) As enacted s. 28 of The Planning and Development (Housing) and Residential Tenancies Act 2016, (PDHRTA) proposed two sets of substantial changes to section 42.

d) Neither set of changes as originally enacted were commenced, and both sets were changed by subsequent acts, before they were commenced. This led to a lot of confusion to put it mildly which I will not elaborate on here. In summary what happened was as follows:

- PDHRTA s.28(1) made changes to s.42 which while unsatisfactory, were more in line with a move toward compliance. However the change was left un-commenced. That un-commenced s28(1) was then itself amended by s.57 of the Planning and Development (Amendment) Act 2018, but the amended version of s.28(1) was not commenced until 9th Sep **2021** via S.I. No. 455/2021 - Planning and Development (Housing) and Residential Tenancies Act 2016 (Commencement) Order 2021

  So the changes to s.42 associated with compliance were not commenced until 9th Sep 2021

- PDHRTA s.28(2) was left un-commenced, but was amended much earlier by s.1 of a specific and bespoke Act the Planning and Development (Amendment) Act 2017 (20/2017), Planning and commenced on 9th August 2017, four years earlier, via S.I. No. 341/2017 - Planning and Development (Housing) and Residential Tenancies Act 2016 (Commencement of Section 28(2)) Order 2017.

  So the changes to s.42 associated with housing development were commenced 4 years earlier on 9th Aug 2017.

e) It is important to reflect that the expedited s.28(2) changes updated and commenced in 2017 were concerned with allowing extension of duration for certain housing developments, whereas the delayed s.28(1) which was updated in 2018, but not commenced until 2021, was more concerned with the compliance issue at the heart of the communication.

f) The issues with the disparity in approach have been highlighted in observations I've made on these matter already, and it is not intended to rehearse these here. I wish to merely remind the Committee of the selective and delayed approach Ireland has taken to addressing moves, however unsatisfactory they were toward compliance, whereas it can move at pace to respond to development requirements.

g) Then in September 2021, as the revised version of s.28(1) of the PDHRTA had it's effect finally on s.42, further changes were visited upon those changes and also to s.42 via SI 456/2021, and further associated changes to the Planning and Development Regulations 2000 via SI 457/2021.

h) As an important aside I note an issue may arise as to the status of changes, as SI 456/2021 was making changes to s.42 as changed by s.28(1) of the PDHRTA – but both were commenced on the same day, 9th Sep 2021, however the wording in SI 456/2021 which makes clear it is amending s.42 as amended by s.28(1) of the PDHRTA may suffice.

i) The critical change in my view was that SI 456 altered the approach in s.28(1) of the PDHRTA on the scope of project in focus when considering changes to extension of duration from the entire project, to only the outstanding portion of works.

As can be seen in the Law Reform Commissions consolidation of the changes made to the PDHRTA here - further to s.28(1) – s.42(1)(a)(i)(II) operated to exclude extensions of duration where:

> "an environmental impact assessment or an appropriate assessment, or both of those assessments, was or were not required before the permission was granted,"

While this version of s.42 failed to also assess the requirement at the time of extension of duration was being applied for EIA/AA or more correctly if the activity may have significant effects on the environment, and also limited the consideration of environmental significance to EIA and AA, it was arguably considerably better than the change then immediately made by SI 456/2021 on the same day, which expressly deleted the above clause[4], and instead inserted a new ss (8) into s. 42.

j) This new ss (8) has a considerably more limited and deeply problematic check which only considers the outstanding portion of the project as follows: (emphasis added)

> "(8) A planning authority shall not extend the appropriate period under this section in relation to a permission if an environmental impact assessment or an appropriate assessment would be required in relation to the proposed extension concerned.".

k) It is entirely clear when one considers the associated changes to the Planning and Development Regulations in SI 457/2021 made also on the same 9th Sep 2021, that it is only the outstanding portion of the project which is screened to determine environmental effects and which then under the proposed Irish regime will operate to prevent an extension if there is a positive EIA or AA screening. This is further underlined in the decision table responding to the issues raised on

[4] SI 456/2021 https://www.irishstatutebook.ie/eli/2021/si/456/made/en/print

> "2. Section 42 (amended by subsection (1) of section 28 of the Planning and Development (Housing) and Residential Tenancies Act 2016 (No. 17 of 2016)) of the Planning and Development Act 2000 (No. 30 of 2000) is amended –
>
> (a) in subsection (1), by –
>
> (i) the substitution of "On application to it in that behalf, but subject to subsection (8)," for "On application to it in that behalf", and
>
> **(ii) the deletion of clause (II) of subparagraph (i) of paragraph (a),**

this in response to the public consultation on the draft Action Plan.

l) The Committee may wonder why the following point taking issue with a response in the decision table is highlighted below, but for me it sadly serves to reflect how either the effect of the changes are being misunderstood by the authorities, or even more concerningly how the rationale for the changes may be being misrepresented. Given we are 3 years on from the Committee's Findings published on 19/08/2019, and Ireland commendably undertook to agree with the Committee making recommendations in accordance with paragraph 36(b) of the annex to decision I/7, it is disappointing there is such confusion and issue, notwithstanding the October 2024 deadline following on from MoP VII.

m) I submit it is also incorrect to rationalize the deletion of the s,28(1) test for EIA and AA in s.42(1)(a)(i)(II) highlighted in ;i) above, as being associated with limiting the extensions to commenced and substantially completed projects – as was indicated in the decision table where it states: "Section 42(1)(a)(i)(II) has been deleted as it provided for an extension of duration for un-commenced development or development where substantial works have not been carried out."

n) As a matter of fact, s.42 as amended by s.28(1) already achieved that as is clear from the LRC's consolidated version of the PDHRTA here , as s.28(1) operated to entirely replace s.42(1)(a) and effectively eradicated the previous s.42(1)(a)(ii) which allowed for un-commenced and un-developed activities to be extended, the so-called NAMA provisions, introduced during the economic collapse in Ireland. As is clear from the following from s.28(1) of the consolidated PDHRTA: (emphasis added)

"28.F49[(1) Section 42 of the Act of 2000 is amended —

(a) in subsection (1) by substituting the following for paragraph (a):

'(a) (i) the authority is satisfied that—

(I) the development to which the permission relates was commenced before the expiration of the appropriate period sought to be extended,

(II) an environmental impact assessment or an appropriate assessment, or both of those assessments, was or were not required before the permission was granted,

(III) substantial works were carried out pursuant to the permission during that period, and

(IV) the development will be completed within a reasonable time,',

and

(b) by substituting the following for subsection (4): ……"

o) A core new concern now arising is of course the limited perspective on the activity which is considered when reconsidering or updating the permission, further to SI 456/2021. The following points are made:

i) It is clearly inconsistent with the focus of Article 6(10), which has the nature of the

original activity in focus when considering the public participation requirements triggered by paragraph 1 of Article 6.

ii) Notwithstanding any argument which might seek to leverage the reference to "as appropriate" – the Irish provisions as enacted are fixed – and do not allow for any consideration of what might be appropriate or not, nor can the reference to mutatis mutandis by manipulated to justify this.

iii) I note from the very helpful Implementation Guide a Slovak case of the Committee's is highlighted as follows on page 159:

> "In its findings on communication ACCC/C/2009/41 (Slovakia) the Compliance Committee stressed that "although each Party is given some discretion in these cases to determine where public participation is appropriate, the clause 'mutatis mutandis, and where appropriate' does not imply complete discretion for the Party concerned to determine whether or not it was appropriate to provide for public participation".[335] The Committee considered that "the clause 'where appropriate' introduces an objective criterion to be seen in the context of the goals of the Convention". It held that the clause did "not preclude a review by the Committee on whether the above objective criteria were met and whether the Party concerned should have therefore provided for public participation in the present case".[336]

iv) This brings into focus the further issue with the narrowness of Ireland's approach in limiting the trigger for consideration of public participation to just EIA and AA. But, EIA and AA are clearly insufficient to capture the full complement of activities encompassed by Aarhus Article 6(1) upon which public participation is required under Article 6(10) which is engaged clearly by the following: "*when a public authority reconsiders or updates the operating conditions for an activity referred to in paragraph 1",* in Article 6(10).

v) In particular, subparagraph (b) of paragraph 1, of Article 6, is intended to capture activities "*may have a significant effect on the environment*" and this is undoubtedly wider than the classes of projects listed in Annex I and II of the EU's EIA Directive, or where there is a screening determination of likely significant effects on Natura 2000 sites classified under the EU Birds and Habitats Directives. For example an activity may be well outside the confines of Natura 2000 sites, and not be of a class to trigger EIA directly or indirectly as listed in Schedule 5 of the Planning and Development Regulations, but could for example

a. Impact upon species such as otters or cetaceans which are considered so important each individual together with its breeding and resting places, are in Ireland subject to the strictest level of protection afforded under the EU Habitats Directive, through it's second pillar on the strict protection of species, Articles 12-16 refers.

b. Significantly impact upon water quality.

vi) Turning once again to the new focus on just the outstanding works, it is appreciated that a development may for good reason not have completed within the original timeframe of the permission. However, the outstanding portion can then not be split off as it were a separate project, assessed for its impact, and then the original permission extended to accommodate it without participation, in circumstances where

the outstanding element is not considered to require EIA or AA, regardless of the scale and impact and nature of the original development. Consider for example the possibility of enabling infrastructure, in a different time construct the effect of this in respect of the overall project could be materially different.

vii) Also in discussing this matter with practitioners it appears that extension of durations are being sought for windfarm developments which failed to include the grid connection in the original application and which then was not subject to a combined holistic EIA and AA in respect of the total impacts of the development in line with a decision of the Irish Courts in a case called *O' Grianna & ors v An Bord Pleanala & ors*.* What is happening is that extension of durations are being sought for the windfarm and contrary to O'Grianna, the Grid connection is being applied for as a separate project.

viii) I do not wish to overly extend this submission with considering relevant judgments of the CJEU such as C-570/13 Gruber[5], Case C-416/10 Križan[6] and in particular C-254/19 - Friends of the Irish Environment[7]

ix) The CJEU in case c-254/19[8] found that i.a.

> "It is for the competent authority to assess whether a decision extending the period originally set for carrying out a project for the construction of a liquefied natural gas regasification terminal, the original consent for which has lapsed, must be preceded by the appropriate assessment of its implications under the first sentence of Article 6(3) of Directive 92/43 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 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."

x) However, there is no such flexibility provided in the new Irish provisions for s.42, it is a one size fits all approach – and only the outstanding portion is considered. I note the above judgment, without prejudice to any view of its consistency with the actual requirement of Article 6(10) of the Aarhus Convention – which of course is concerned with a particular matter – the public participatory requirements under the Convention.

xi) The approach Ireland has taken has consistently beein to try to make an extension of duration of permissions an administrative exercise, and therefore moved to prohibit extensions where participation is required. However this has necessarily driven it to extremis in and difficulty in taking a narrow view on the environmental significance and to limit that to EIA and AA, and it has wholly failed to provide for a robust approach to the screening requirements of Article 6(1)(b) in particular in such contexts. It has then been further drive to employ that and to in all instances to consider only the outstanding portion of the project. To compound this the lawfulness of some of the changes effected via SI 456/2021 to primary legislation are arguably unlawful as highlighted earlier as they go beyond changes necessary to comply with EU law, which is the limitation of what can be done by a Minister using regulation, statutory

[5] Judgment of the Court (Fifth Chamber) of 16 April 2015, C-570/13 – Gruber, EU:C:2015:231

[6] Judgment of the Court (Grand Chamber), 15 January 2013, C-416/10 - Križan and Others, EU:C:2013:8

[7] Judgment of the Court (First Chamber) of 9 September 2020, case c-254/19, Friends of the Irish Environment, EU:C:2020:680

[8] Ibid

instruments to change primary legislation, pursuant to the European Communities Act, 1972.

12. It is also noted that the Circular Letter: EUIPR 01/2021 provided by the Department of Housing Local Government and Heritage to Public Authorities on these changes is very carefully caveated stating:

> "Please be advised that the above synopsis of the new legislative provisions has been prepared by the Department for ease of reference only and does not purport to be a legal interpretation of the legislation, which is a matter for planning authorities, in the first instance, and ultimately a matter for the Courts."

I note this circular was provided to the ACCC in October 2021. Nothing equivalent has been put out to assist the public in this consultation or indeed to assist them in coming to grips with the new legislation and changes, and the multiple elements of them.

Given the complexity in following the legislation – sentences such as the following in the circular serve to further entrench the potential for confusion and issue that it is the effect of extension which is being considered alone eg

> "In particular, AA screening and EIA screening (for extension applications that do not equal/exceed the EIA thresholds) shall now be required for all applications for extension of duration, including applications for further extensions under section 42(1B) as referenced above."

This seems to reflect some internal confusion.

13. Clearly a project may or not require EIA or AA originally, but overtime environmental circumstances and other factors may change and when revisited it may require either or both. The original and evolved context need to be considered, and it is not merely consideration of the impact of the extension, but the historic and current context and impact of the project and indeed cumulative impacts which needs to be considered when determining public participatory requirements. So the whole needs to be considered together with the wider context. But notwithstanding the circular letter – this is clearly not what the provisions enacted now provide for – the consideration is limited to the portion of the project which is outstanding and which needs the **extension of duration of the original permission**, in order to complete.

14. The following statement from the decision table reflects a core underlying issue with the perspective of the Irish authorities on the matter of the environmental significance of extending the duration of a project

> "The principle behind an application for Extension of Duration is to allow for the completion of projects (which are approved development and have valid consent) and where the project is substantially completed. The development/project is not being extended, rather the time taken to complete it is"

This clearly fails to recognize that even if there are no changes to the physical specification of a project, when it occurs in a different time period – it may have dramatically different environmental effects, particularly in respect of the status of the receiving environment which may have changed, or indeed the information and technologies which assist us in understanding effects and status etc. The temporal change – is a material factor in triggering different environmental impacts potentially,

and the public's participation rights must be assured in respect of the consideration of the original activity appropriately, and a robust consideration of the Article 6(1) requirements thereon, and not this one-size fits all approach.

15. The changes made through SI 456/2021 to s.42 of the Planning and Development Act, PDA and the further requirements in the Planning and Development Regulations through SI 457/2021 and elsewhere – fail significantly to address compliance with the public participatory obligation under Article 6.10 of the convention which is the core issue in the findings as set out below – and it is that context the recommendations need to be read.

16. Therefore in conclusion, on this point it is submitted that Ireland's proposed action plan in terms of its reliance on legislation enacted and set out here is inadequate and must be revisited.

17. I would respectfully urge the Committee to recommend Ireland actively engage to in advance discussions on further changes, as it is notable that without exception – all of these changes to s.42 have been done without consultation. It is even clear from the Decision table that the Department of the Environment, Climate and Communications which has responsibility for the Aarhus Convention, may not have been fully involved, and it appears clear the changes are being driven by a development agenda in the Department of Housing, Local Government and Heritage which has responsibility for Planning.

18. Additionally, I wish to highlight that the focus of the action plan is very limited in scope and suggestions for enhancing the engagement with the public in bringing them up to speed with the changes directly relevant for them as rights holders were seriously inadequate. The focus is directed toward the authorities only.

19. In fact it was notable that no consolidations of the changes or even links to the explanatory circulars provided to public authorities was provided as part of the consultation to assist the public get to grips with what has been a very complex and confusing set of changes. The decision table response was merely to provide the links – but to do nothing to remediate the issues within the consultation or to commit to awareness and training for the public as part of an implementation strategy.

20. Further, recommendations made in my submission in respect of monitoring and evaluation of the efficacy of measures and changes and the need for these to be explicitly detailed in the Action Plan were rejected out of hand on page 4 of the decision table with the response:

"The Action Plan does not require this."

I submit this is not consistent with the spirit of compliance, and the General Provisions of Article 3, and paragraph (2) in particular:

> "2. Each Party shall endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters."

and indeed the guarantee required of Parties under Article 1 of the Convention:

"In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to

justice in environmental matters in accordance with the provisions of this Convention."

Rights cannot be guaranteed where the Party Concerned is not actively monitoring how it is delivering on them, this is clearly all the more important following on a non-compliance.

21. The Actors involved needs also to include the Department of Environment, Climate and Communications, DECC, given it's overarching responsibility for the Aarhus Convention. It cannot leave this matter to the discretion of Dept of Housing Local Government and Heritage, HLGH, as that would be to abrogate DECC's responsibility, and be a failing in supporting HLGH in ensuring Ireland finally moves towards compliance on this matter, in circumstances where HLGH has wholly failed to respond in appropriate timescales.

22. I would also urge the ACCC to prompt for a a much more proactive response – for example as highlighted in observations made on on ACCC/C/2013/107 – there are multiple other sections in the PDA which have the same and similar issue as s42 and these also need to be addressed in the sprit of a Party who has fully ratified the Convention, and where participation rights are compromised when revisting permissions, and the focus should not just be limited to Planning. I appreciate fully the focus of the Committee's findings in respect of a specific section – but given the workload for all involved, I have to say most respectfully that it is an absolute nonsense that when finding a flaw which occurs elsewhere – that it is not par for the course to require that the flaw which lead to a non-compliance finding be corrected and eliminated wherever it occurs in the national system. I make that criticism constructively in the spirit of not overburdening the compliance mechanism and the effective and efficient use of resources for all concerned, and the sprit of the Convention and the need to move towards compliance on a Convention which is so important at a time when we have interdependent climate and biodiversity crises, as highlighted so clearly in the recent IPCC report.

Re Recommendation Para 4(2) (ii) of decisions VII/8i

Recommendation: Para. 4 (a) (ii) of decision VII/8i	In paragraph 4 (a) (ii) of decision VII/8i, the Meeting of the Parties recommends that the Party concerned take: (a) With regard to section 42 (1) (a) (i) and (ii) of the Planning and Development Act 2000: (ii) The necessary steps to ensure the prompt enactment of the measures to fulfil the recommendation in subparagraph (i) above;

In response to the action plan on this further element – please see above.

RE: Recommendation 4(b)(i) of Decisions VII/8i

Recommendation: Para. 4 (b) (i) of decision VII/8i	In paragraph 4 (b) (i) of decision VII/8i, the Meeting of the Parties recommends that the Party concerned take: (b) The necessary legislative or regulatory measures to ensure that: (i) Appeals under the Access to Information on the Environment Regulations to the Office of the Commissioner for Environmental Information or the courts, whether commenced by the applicant or any other person, are required to be decided in a timely manner, for instance by setting a specified deadline;

Comments on action plan for 4(b) and 4(c) of Decision VII/8i (ACCC/C/2016/141 and ACCC/C/2014/112)

Given limitations of time – some brief remarks are made here in the hope that the ACCC will encourage the Department to pursue the recommendation for constructive dialog to advance the details and specification of the action plan which remains serious deficient on specifics on the nature of the changes to be made.

In respect of both paragraphs 4(b) and 4(c) of Decision VII/8i pertaining to these two communications in decision VII/8 - the same sort of comments in respect of the need to stipulated further actions and actors in respect of monitoring, evaluation, reporting on the efficacy of the changes and measures made in respect of the other communications stand here also.

Also in respect of the actions indicated for both of these paragraphs, there is no indication of any complementary implementation measures to communicate to the wider public the proposed changes once made to the AIE regulations in respect of new deadlines, and clarifications on rights to cost benefit analysis and obligations on the Courts. The public and other key stakeholders need to be appraised so they are in a position to be able to leverage their rights.

Specifically then in respect of Par 4(b) (ii) of decision VII/8 – ***(ACCC/C/2016/141)***

- It is very disappointing that the measures indicated again are so limited in scope being a legislative change only.
- Additionally they are entirely vague and only indicate a specific deadline will be included in the updated AIE regulations – there is no indication at all what that timeframe/deadline would be
- There is no discussion or indication of what considerations will informing the specification of that deadline.
- Very particularly there is no indication of or what other changes or wording would be used to ensure that the public's rights to participation or access to justice are not impacted

through a delay in accessing information. This was a core point made in the observations including the lead up to the ACCC's draft report on progress to the MoP. AIE is often not an end in itself and the timeframes for them to support the interplay within the pillars of the convention need to be compatible with other environmental decision-making processes as they are implemented in Ireland, and how ultimately compliance with Article 3(1) of the Convention will be assured and supported through this deadline.

- There is no discussion on the outcome of the consultation on the AIE Regulations or any wider context for the changes proposed within those regulations following on the consultation.
- There is no indication of what the legislation will provide for if the deadline is not met.
- There is no indication any complementary measures or changes to ensure that this deadline will be adhered to – for example

    There could be greater requirements on proactive dissemination so less AIE requests are necessitated, refused and appealed in the first instance, thus reducing the burden on the OCEI.

    There is no indication on additional resourcing to ensure the deadline will be met, particularly if faith in the process improves and the volume of appeals goes up.

- While it is admitted that some of the concerns raised in my submission and in an individual submission denoted as submission "1" are "noted" in the decision table responding to the public consultation – there is no clarity on what the consequences of that noting will be.

- I note that certain matters are indicated as matters which will be dealt with in Guidance – and I urge the Committee to recommend very active engagement in the development of that Guidance particularly with the expert communicants in ACCC/C/2016/141 who I know are willing to engage very constructively to assist Ireland in moving towards greater compliance.

- Finally, while the plan and decision table refer to a public consultation on the AIE regulations, I believe it is important for the Committee to fully understand how unsatisfactory that consultation was. Quite apart from the absence of essential links and information which admittedly were largely addressed once I highlighted these to the Department by email – see Annex I. However, this was then already the 25th of March 2021 so it was well into the consultation window which concluded on 16 of April 2021, but there was an entire absence of consultation matter to be considered as part of the consultation. In short there was no issues paper, no change proposals, no considerations to be commented upon. There was simply the existing regulations, and further to my email eventually some relevant links. I regret to say I have to be deeply critical of this consultation, and note that over a year later – there is no decision-table reflecting any due consideration of the comments made in submissions, nor has there been any engagement that I am aware of to discuss the way forward with public and eNGO stakeholders.

- I do note that some of the comments made in the submissions on the draft action plan are being discussed with the Office of the Commissioner for Environmental Information, OCEI but this while welcome is not sufficient.

Specifically then in respect of Par 4(b) (ii) of decision VII/8 -

The action plan fails to respond to the issue in the findings around the Court's failure to provide direction. Ireland needs to go beyond any perceived limitation in the Recommendation to address

the failure identified in para 133 (b) of the findings which stated

> "133…
>
> (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."

So the non-compliance issue lay in the failure to provide direction – rather than in complying with the Court's direction. The recommendation is non-binding – but the compliance failure is absolute and is what must be addressed. The actions proposed in the draft action plan has focused on compliance with the Court's direction or order – which in the context is both missing the core point of the finding highlighted above. There may be some further benefit to making clear and express obligations in respect of complying with a court order – however it would be important not to trammel the discretion of the Court where it might wish to really provide for express responses from public authorities. The issue which needs to be addressed in the action plan would seem to be to appropriately impress upon the Courts the duty to ensure they provide for "adequate and effective" remedies in line with the Convention in the context of their review.

Re Section A. Description of the process by which the plan of action has been prepared

A number of issues arise in respect of the consultation conducted:

1. The consultation page is extremely misleading for those who have not been intimately involved with the process of the Committee on the action plan development.

   The Committee in addition to the sessions it conducted to assist Parties, produced an information note and a blank template action plan.

   However, on the Irish Government's consultation page here[9], the version of draft plan developed by Ireland is preceded by the following text: *"In light of the questions received at the open session, the ACCC prepared a sample template to assist each Party concerned in preparing its plan of action, including a template for Ireland."* So the implication is that the document which follows which includes the term "template" on the webpage is one prepared by the ACCC not the proposed draft actions from the Irish authorities. The impression that the draft is one prepared by the ACCC itself, is further compounded by the text which follows the document which is "*Through this consultation, we are seeking your views on the draft ACCC plan of action*." The following images are from the webpage to illustrate this point – with highlighting added for emphasis

[9] https://www.irishstatutebook.ie/eli/2021/si/456/made/en/print

Plan of Action

In paragraph 5 (a) of decision VII/8i concerning Ireland's compliance, the Meeting of the Parties to the Aarhus Convention has requested that Ireland submits to the Committee by 1 July 2022 a plan of action, including a time schedule, addressing the recommendations contained in that decision.

To assist Parties in the preparation of their plan of action, the ACCC held an open session at its seventy-third meeting (13-16 December 2021) to provide guidance and to answer any questions Parties had regarding the form and content of their plan of action.

In light of the questions received at the open session, the ACCC prepared a sample template to assist each Party concerned in preparing its plan of action, including a template for Ireland.

Decision VII.8i Ireland Plan of Action Template

Download

Through this consultation, we are seeking your views on the draft ACCC plan of action.

The closing date for submissions is **5.30pm Tuesday 10 May 2022**

Submissions should be sent by email to environmentpolicy@decc.gov.ie or by post to:

ACCC plan of action

Department of the Environment, Climate and Communications

Government Buildings

2. At the outset it must be said it is very regrettable that the draft action plan was developed in isolation and absent engagement with the communicants, and observers to the process and other stakeholders who could have provided insight on suggestions on the preparation of this draft. Instead it has it seems been solely developed with and by the establishment. This has not been mitigated against by the consultation on the draft plan. Clearly in respect of the legislative changes for communication ACCC/C/2013/107 – these were developed and enacted without any public consultation, or indeed any Pre-Legislative scrutiny within the Oireachtas, and were by in large enacted at pace and under extreme time pressure just as the Oireachtas was rising for either Christmas or Summer recess.

   While the public consultation in Ireland on the draft action plan might have served to mitigate against this to some extent – the opportunity for a robust collaborative response and constructive engagement and active dialog and consideration has been lost, or at least has been

severely compromised, and it is imperative that this is the approach for the corrections needed and the further outstanding elements. The deadline for submissions was May 10th – with the action plan then needing to be submitted by I July 2022. This management of the timeline by the Department on the Consultation and its deferral of any engagement until that point – really operated to limit the opportunity for meaningful changes to be effected following on the consultation.

3. It is important to note that while Ireland will undoubtedly highlight it's busy legislative schedule in arguing against further legislative changes needed – it can move at pace when it so chooses, and I am happy to highlight examples of this. Moreover in the last Oireachtas term it took steps to modify the scope of at least 3 pieces of legislation to allow entirely different changes including changes to different Acts be introduced, often major changes, and late in the legislative process. Again I am happy to provide specifics to the Committee on this if useful. So while I absolutely do not condone such an approach to legislation, except where it is absolutely necessary and urgent – it is well within the capacity of the Irish Government to deliver changes necessary to comply with the Aarhus Convention, in this way if it so chooses.

The timeframes available to rectify what are in fact very serious failings in the action plan, before it needs to be submitted by 1 July 2022, are now challenging. This is particularly given the need to implement that response by Oct 2022 – and all the timeframes helpfully indicated in the document prepared by the ACCC: *"Preparing the plan of action Information note by the Aarhus Convention Compliance Committee, February 2022".*

Therefore following on from the constructive engagement I have endeavoured to provide on these matters throughout - a core recommendation in this submission is to:

- Provide for opportunities for constructive dialog and discussion with key stakeholders and communicants to resolve serious issues with the proposals in the draft action plan, in order to build a participative approach to robustly resolving the issue of non-compliance prior to it's submission.

This is particularly necessary given that the detail of some of the legislative changes have only come to light and detailed scrutiny during this consultation. Therefore it is not possible in this consultation response to specify in detail alternatives, or to explore fully the rationale for such a limited and problematic changes, or to understand the rationale behind the vagueness of other legislative proposals. These concerns are set out further below in a very brief highlevel commentary on the actions proposed in respect of each of the three communications in turn, and I would very much welcome an opportunity to engage further to assist any clarification necessary on these concerns and to explore changes needed

Each of the sections in the document is commented on below with a view to constructively assisting Ireland develop not just a robust action plan but in becoming compliant, in the spirit of it's full ratification of the entire Aarhus Convention. *

Re B. General character of the measures that will be needed to implement the recommendations in the MoP decision"

The only measures detailed are "Legislative measures" and "Training to public Authority Officials"

It is **very disappointing** and indeed not appropriate that the implementation measures in no way reflect any outreach or measures touching on the wider public and the public concerned, communicants and eNGOs, and other stakeholders such as developers and the Courts. The non-compliance issues have served to impact and compromise on rights under the Convention and it is important that if and when rectified the "rights holders" are appraised properly and encouraged to take up their rights.

It is therefore recommended that:

- This section is updated to reflect further measures in respect of communication and outreach to the public and other stakeholders so they are aware of the changes and the implications for their rights and a comprehensive communication, awareness, guidance materials, website updates and appropriate training materials prepared etc
- To support the specification of these further outreach and education measures – it will be important to consult further as proposed in the overarching recommendation above.
- The detailed measures specified for each of the communications will also need to be updated accordingly. It is not intended in this submission to reflect this recommendation in respect of each of the communications and it should be taken as read.

This recommendation is entirely consistent with the expectation outlined in the ACCC's information note in respect of point 2 of its section C – Detailed plan of action where it prompts consideration of practical measures taken to implement the recommendation.

It is also very disappointing that there is no proposals in respect **of monitoring and evaluation of the changes proposed, or on the efficacy of the measures proposed**.

It is therefore recommended that:

- This section is updated to reflect further measures in respect monitoring and evaluation of the changes proposed, or on the efficacy of the measures proposed.
- The detailed measures specified for each of the communications will also need to be updated accordingly. It is not intended in this submission to reflect this recommendation in respect of each of the communications and it should be taken as read.

It is also very disappointing that there is **no consideration at all of remedies required for the serious breaches of rights and environmental impacts associated with that**. I fully appreciate this is complex, and that in general terms the compliance mechanism's focus is forward looking. But I recommend

- In the proposed dialogs - further detailed consideration should be given to the issue of remedies required as a consequence of the failures occasioned through the non-compliances.

In this regard I would highlight that Ireland's obligations to remedy failures in respect of non-compliance with obligations in respect of EIA and Appropriate Assessment and the remedies required – arise as an EU law duty irrespective of the Aarhus Convention and therefore for completeness this should be considered or at least cannot be disregarded in the overall context of Ireland finally moving to solve these issue.

I also recommend more explicit focus be put on efforts to make changes clearer and make the legislation clearer and to also provide additional supports on the effect of changes so they can be implemented and leveraged appropriately.

Conclusion:

I thank the Committee for its consideration of these remarks, made somewhat under pressure.

It is unfortunate that lack of supporting discourse has impacted the action plan before the Committee at this juncture in my respectful opinion. However I am very hopeful that the Department might consider this further commentary in the constructive spirit it is offered and seek to engage further so we can clarify the issues and work together to support the development of a robust and appropriate revised action plan to assist Ireland move into compliance on these matters swiftly.