An Roinn Comhshaoil,
Aeráide agus Cumarsáide
Department of the Environment,
Climate and Communications

Ms 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

24 August 2023

Re: Communication ACCC/C/2014/113

Dear Ms Marshall,

1. The purpose of this submission is to update the Committee on the costs protection regime in Ireland, following the decision of the Supreme Court of Ireland in *Heather Hill Management Company CLG & McGoldrick v An Bord Pleanála, Burkeway Homes Ltd and the Attorney General* [2022] IESC 43 ("**Heather Hill**").

2. In particular, this submission provides an update with respect to the following issues:

    i. The scope of application of the costs protection regime in Ireland;

    ii. The protection afforded by a costs protection order in Ireland; and

    iii. The costs of a costs protection application in Ireland (the 'Catch-22' issue).

3. The Response of Ireland dated 29 September 2015, and Ireland's Reply to the Committee's Questions dated 19 May 2016, should be read subject to this update.

4. Prior to addressing those issues, however, a preliminary point arises.

5. This Communication was received on 5 August 2014. Ireland's Response to the Communication was filed on 2 November 2014, a hearing was held at the Committee's 51st meeting in December 2015 and responses to further questions raised by the Committee following that hearing were

Bóthar an Bhaile Nua, Loch Garman, Y35 AP90
Newtown Road, Wexford, Y35 AP90
T +353 1 678 2000 | 1890 44 99 00
www.gov.ie/decc

filed in June 2016. It is therefore now in or about nine years since the Communication was made, and over seven years since the pleadings closed.

6. It is worth emphasising that the length of these proceedings, and the necessity for further submissions to address systemic changes in Ireland's costs protection regime since the pleadings closed, is the result of the Communication relating not to the application of Ireland's costs protection regime to any identified proceedings or set of facts, but instead to the costs protection regime in the abstract.

7. In that respect, and for the avoidance of doubt, Ireland emphasises that it maintains its objection to the admissibility of the Communication on the basis that it is both academic and speculative, as opposed to being based on a concrete set of facts or any alleged harm suffered by the Communicant. The length of these proceedings clearly demonstrates the force of Ireland's objection on admissibility.

8. The balance of this submission is without prejudice to that objection.

I. Scope of Application of the Costs Protection Regime in Ireland

9. In *Heather Hill,* the Supreme Court confirmed that there are three bases in Irish law on which a party to environmental proceedings can seek costs protection: [1]

   i. Section 50B of the Planning and Development Act 2000 ("**the PDA 2000**");

   ii. Sections 3, 4 and 7 of the Environmental (Miscellaneous Provisions) Act 2011 ("**E(MP)A 2011**"); and

[1] *Heather Hill, §10.*

iii. Order 99 of the Rules of the Superior Courts ("**RSC**") and/or the inherent jurisdiction of the Court, interpreted in accordance with Article 9(3) and 9(4) of the Aarhus Convention ("**the EU interpretative obligation**").

The Proper Approach to the Interpretation of the Legislative Provisions

10. Prior to considering in more detail the scope of those provisions, it is important to emphasise that the Supreme Court in *Heather Hill* clarified the interpretative approach that the Irish Courts must take to the relevant statutory provisions, where any issue as to the scope or effect of the costs protection regime arises for determination.

11. In particular, the Supreme Court confirmed that s.50B of the PDA 2000 and the relevant provisions of E(MP)A 2011 must be interpreted together, as the legislation by which it was intended that the State would implement *in full* the 'not prohibitively expensive' ("**NPE**") requirements of the Aarhus Convention. In that respect, it held that "*the clear intent was that between the two provisions, complete effect would be given to the NPE provisions of the Convention.*"[2]

12. The Supreme Court therefore confirmed that the Courts must approach the interpretation of s.50B of the PDA 2000 and the relevant provisions of EMPA 2011 "*so as to enable as complete an implementation of the NPE obligation in Article 9(4) as the language of those provisions will permit*".[3] This is the basis on which the Irish Courts will be required to determine any issue with respect to the interpretation of s.50B of the PDA 2000 or the relevant provisions of EMPA 2011 that might arise in the future.

[2] *Heather Hill, §185.*

[3] *Heather Hill, §§196.*

13. The scope of each basis in Irish law on which a party to environmental proceedings can seek costs protection, in light of that interpretative obligation as clarified by the Supreme Court in *Heather Hill,* is summarised in this section.

The Scope of Section 50B of the PDA[4]

14. In *Heather Hill,* the Supreme Court clarified the categories of proceedings that benefit from the facility extended by s.50B, as well as the scope of the protection afforded to those proceedings.

15. First, the Supreme Court confirmed that s.50B applies to all proceedings by way of judicial review of *any* decision made pursuant to *any* statutory provision that gives effect to any one of the European Union ("**EU**") environmental law provisions specified in s.50B ("**the listed EU Provisions**").[5] In that respect, it is not necessary that the proceedings themselves engage the listed EU Provisions, or raise grounds under the listed Directives. Once the provision under which the decision challenged is made gives effect to any aspect of the listed EU Provisions, there will be an entitlement to costs protection.

16. Second, the Supreme Court confirmed that in the context of the planning regime, this means that costs protection under s.50B will apply to any challenge by way of judicial review to a

---

[4] *For completeness, the Committee might note that Ireland is in the process of conducting a comprehensive review and reform of its planning code. As part of that review, new provisions concerning protective costs in planning matters will be introduced by the Planning and Development Bill 2022, replacing and repealing the current section 50B of the 2000 Act. The relevant provisions, currently section 250 of the Planning and Development Bill 2022, remain at Heads of Bill stage, and will be subject to further development and amendment prior to the enactment of the Bill.*

[5] *Those EU law environmental provisions are as follows: a provision of Council Directive 85/337/EEC ("the EIA Directive") to which Article 10a of that Directive applies, any provision of Directive 2001/42/EC ("the SEA Directive"), a provision of Directive 2008/1/EC ("the IPPC Directive") to which Article 16 of that Directive applies, or (iv) paragraph 3 or 4 of Article 6 of the Habitats Directive. Reference to the Habitats Directive was inserted on 22 October 2018 by the Planning and Development (Amendment) Act 2018, s.29(1)(iv)(b).*

decision to grant development consent, whether under ss. 34 or 37 of the PDA, s. 9 of the Planning and Development (Housing) and Residential Tenancies Act 2016,[6] or otherwise. Again, this will be the case irrespective of the grounds on which the development consent is challenged.

17. Third, the Supreme Court confirmed that the application of s.50B is not restricted to proceedings taken under the PDA,[7] or to challenges to decisions to grant development consent. Rather, it will apply to any challenge to a decision made pursuant to any statutory provision that gives effect to any aspect of one of the listed EU Provisions. Other contexts in which the Supreme Court noted that s.50B of the PDA may have application include challenges to decisions made under the Environment Protection Agency Act 1992, the Waste Management Act 1996, the Foreshore Acts 1933 to 2014, the Gas Act 1976 and the Minerals and Petroleum Acts 1960.[8]

18. Fourth, the Supreme Court confirmed that where costs protection under s.50B applies to proceedings, it will apply to the entire proceedings. The protection afforded under s.50B is not restricted to those aspects of the claim that relate to environmental concerns; rather, *all* of the claims advanced in proceedings to which s.50B applies will be afforded protection. The protection offered by section 50B therefore goes further than what is required as a matter of European Law, which permits costs protection to be confined to the costs associated with individual grounds of challenge.[9] This aspect of the decision of the Supreme Court supersedes

---

[6] *Section 9 of the 2016 Act is the provision under which development consent for certain large-scale residence developments is granted.*

[7] *Heather Hill, §§35, 144. This finding by the Supreme Court overtakes the submission at §87 of Ireland's Reply to the Committee's Questions date 10 June 2016.*

[8] *Heather Hill, §144.*

[9] *Case C-470/16 North East Pylon Pressure Campaign Ltd v An Bord Pleanála, §44*

the decision of the High Court in *McCallig v An Bord Pleanála* [2014] IEHC 353 relied by the Communicant.

The Scope of E(MP)A 2011

19. The scope of application of the relevant sections of E(MP)A 2011 has been addressed in previous submissions and will not be repeated here.

20. By way of summary, the relevant provisions of E(MP)A 2011 complement the protections provided by s.50B of the PDA 2000. While s.50B of the PDA 2000 applies to challenges to decisions, acts or omissions under the listed EU Provisions, the relevant provisions of E(MP)A 2011 apply to proceedings relating to compliance with statutory requirements, or conditions or requirements specified in or attached to a licence, registration, permit, permission, lease, notice or specified consent, where the failure to ensure compliance has caused, is causing, or is likely to cause, damage to the environment.

21. The decision of the Supreme Court in *Heather Hill* provided further clarity with respect to the proper interpretation of those provisions.

22. First, a key aspect of the decision in *Heather Hill,* with respect to the scope of application of the relevant provisions of E(MP)A 2011, is the confirmation by the Supreme Court that those provisions are, in conjunction with s.50B of the PDA 2000, intended to give full effect to the NPE requirements of the Aarhus Convention, and must be interpreted so as to enable as complete an implementation of the NPE obligation in Article 9(4) as the language of those provisions will permit. Section 3, 4 and 7 of E(MP)A 2011 will require to be interpreted on that basis, in any future case addressing the scope or effect of those provisions.

23. Second, the Supreme Court confirmed that, as with s.50B of the PDA 2000, where costs protection under E(MP)A 2011 applies to proceedings, it will apply to *all* parts of such proceedings.[10]

The Interpretative Obligation

24. Finally, in addition to the requirement that, as a matter of domestic law, the Courts should "*strive to ensure that legislation purporting to give effect to the [Aarhus] Convention has done so",* the Supreme Court has confirmed previous Irish jurisprudence to the effect that an interpretative obligation also arises as a matter of EU law.[11]

25. In particular, insofar as any proceedings relating to national environmental law in the field of EU law do not already attract costs protection under section 50B of the PDA 2000 or section 3 of the E(MP)A 2011 – and it is emphasised that the Communicant has not identified, or even sought to identify, any such lacuna in the statutory provisions – the Irish Courts are obliged to interpret and apply Order 99 RSC so as to ensure that those proceedings are NPE within the meaning of the Aarhus Convention.[12]

---

[10] *Heather Hill, §196(i)*

[11] *Heather Hill, §164. Case C-470/16 North East Pylon Pressure Campaign Ltd v An Bord Pleanála ("**Case C-470/16 NEPPC**"), §§57, 58 and 66(3).*

[12] *Heather Hill, §§46, 60(iv) 164; C-470/16 NEPPC, §§57, 58, and 66(3). By way of example, where proceedings relating to national environmental law in the field of EU law would, but for the environmental damage requirement, fall within the scope of s.4 of E(MP)A, the Irish Courts are required to exercise their discretion under Order 99 to ensure that such proceedings are NPE.*

26. In that respect, the Supreme Court has confirmed that "*national law relating to the environment*" must be given a broad interpretation, consistent with decisions of the Aarhus Convention Compliance Committee. [13]

Conclusion with respect to the scope of application of the costs protection regime

27. The decision of the Supreme Court in *Heather Hill* has significantly clarified the scope of application of the costs protection regime in Ireland. In particular, the broad interpretation by the Supreme Court of the relevant statutory provisions reaffirms that the costs protection regime in Ireland complies with the requirements of Article 9 of the Aarhus Convention and, in a number of respects, is broader in scope than what required by the Aarhus Convention or EU law.

II. Protection afforded by a costs protection order in Ireland

28. The Supreme Court in *Heather Hill* further confirmed that, where proceedings attract costs protection under s.50B of the PDA 2000 or the relevant provisions of E(MP)A 2011, the protection afforded is also greater than that required by either the Aarhus Convention or EU law.

29. For completeness, this section summarises the protection provided by a costs protection order in Ireland, and updates the Committee on recent developments in the jurisprudence in that respect.

General Rule: No Order as to Costs

[13] *Heather Hill, §175-178*

30. As detailed in Ireland's Response to the Communication, in general, where an applicant is entitled to costs protection under s.50B of the PDA 2000 and/or s.3 of the E(MP)A 2011:

    i. There shall be no order as to costs against the applicant;

    ii. The costs of the proceedings, or a portion of such costs as are appropriate, may be awarded to the applicant to the extent that the applicant succeeds in obtaining relief; and

    iii. Even where the applicant does not succeed in obtaining relief, costs may be awarded to the applicant in a matter of exceptional public importance and where in the special circumstances of the case it is in the interests of justice to do so.

31. As noted by the Supreme Court in *Heather Hill,* this goes beyond Ireland's obligations under EU law, or the Aarhus Convention.[14]

Not Prohibitively Expensive Costs

32. As previously confirmed to the Committee, there are two circumstances in which, although proceedings fall within the scope of the protective costs regime, an applicant will not be entitled to the default no order as to costs. However, in both of those scenarios, any costs ordered as against the applicant will be *NPE costs only*.

33. First, costs may be awarded against an applicant in proceedings that fall within the scope of s.50B of the PDA 2000 or s.4 of E(MP)A 2011, where the Court considers it appropriate to award costs:

[14] *Heather Hill, §36.*

i. Because the Court considers that a claim or counterclaim by the party is frivolous or vexatious,[15]

ii. Because of the manner in which the party has conducted the proceedings, or

iii. Where the party is in contempt of the Court.[16]

34. Since Ireland's previous submissions to the Committee, the compliance of that provision with EU law has been confirmed by the Court of Justice of the European Union ("**CJEU**"), in Case C-470/16 *North East Pylon Pressure Campaign* ("**NEPPC**"). The CJEU confirmed that a Member State cannot derogate from the NPE requirement, where a challenge is deemed frivolous or vexatious.[17] However, it further confirmed that it is nevertheless open to the national court, when determining whether to award costs against an applicant, to take account of factors such as whether the challenge has a reasonable chance of success, or whether it is frivolous or vexatious, "*provided that the amount of the costs imposed on the applicant is not unreasonably high*".[18]

[15] *Insofar as is relevant, the Irish Courts have recently confirmed that "frivolous or vexatious" in this context is a very high bar for Respondents to meet. See, e.g., Concerned Residents of Trescon and Clondoolusk v ABP & Ors [2023] IEHC 112 where the High Court (Humphreys J) held: "33. Sub-section (3) is not relevant. While I didn't accept that the applicant was entitled to relief, and while some of the more claims advanced in the present application might strike one as having been on the melodramatic end of the spectrum, I would not propose to characterise these as frivolous. Frivolous in this context is not a synonym for the merely meritless, but connotes a point that is so wildly meritless, or so lacking in even the possibility of ever succeeding, for example by lack of compliance with basic procedural requirements, or motivated by improper purposes, such that it would be inappropriate even to seek to argue it."*

[16] *s.50B(3) PDA, s.3(2) E(MP)A.*

[17] *Case C-470/16 NEPPC, §§62-63.*

[18] *Case C-470/16 NEPPC, §§65.*

35. Therefore, and as already identified in §92 of Ireland's Response to the Committee dated 29 September 2015, when awarding costs under section 50B(2) PDA 2000 or Section 3(3) E(MP)A 2011 the Courts must ensure that the awarded costs are NPE. It is therefore only the *additional* protection conferred on applicants by the Irish legislation that will be lost where costs are awarded under section 50B(2) PDA or section 3(3) E(MP)A. An applicant will still be entitled to NPE costs, even in those circumstances.

36. The second scenario in which costs may be awarded against an applicant in proceedings within the scope of protective costs regime in Ireland is where a protective costs order is made under Order 99 and/or the inherent jurisdiction of the Court, on foot of the EU interpretative obligation, rather than under section 50B PDA 2000 or section 3(3) E(MP)A 2011. In those circumstances, the applicant will be entitled to NPE costs, rather than no order as to costs.

37. Therefore, in all circumstance in which the Courts are permitted to award costs against an applicant in proceedings that fall within the scope of the protective costs regime, the Courts are required to ensure that those costs are NPE.

Measuring NPE Costs

38. The manner in which NPE costs are to be measured has, since Ireland's previous submissions to the Committee, been further clarified by the Supreme Court, in *Klohn v An Bord Pleanála* [2021] IESC 51.

39. In that case, the Supreme Court, following a preliminary reference to the CJEU, confirmed that when measuring costs both the Taxing Master (now replaced by the Legal Costs Adjudicators)

and the Courts are required to ensure that any costs awarded against an applicant in environmental proceedings entitled to costs protection are subject to the NPE principle.[19]

40. In doing so, both the Taxing Master and the Courts are required to have regard to any costs actually paid by an applicant to his or her own lawyers (if any), in determining the quantum of any adverse costs order, so as to ensure that the costs of the proceedings as a whole are NPE. The Supreme Court further accepted that it may be appropriate for NPE costs to be assessed at zero, in certain circumstances, having regard to the costs already incurred by the party concerned in paying for their own reasonable representation.

41. It has therefore been confirmed by the Supreme Court in *Klohn* that any authority engaged in the measurement of costs is required, where the proceedings are entitled to costs protection, to do so in a manner compliant with the NPE principle.

Conclusion

42. In light of the foregoing, it is clear that where proceedings fall within the scope of the protective costs regime in Ireland, parties to those proceedings are afforded protections that meet – and in the majority of cases significantly exceed – what is required by Article 9 of the Aarhus Convention.

III. The Costs of the Costs Protection Application

43. Finally, and for completeness, the Committee should be aware of recent jurisprudence clarifying that an applicant seeking a costs protection determination in environmental

[19] *Klohn, §3.8.*

proceedings is *not* at risk of an adverse costs order with respect to that costs protection determination.

44. In that respect, the Communicant expresses a concern that, in any (hypothetical) environmental law challenge that he might take in the future, it may not be possible for him to determine, prior to his embarking on environmental proceedings, whether he is entitled to costs protection. He has further expressed a concern that, if he sought a costs-protection determination in advance of issuing those (hypothetical) proceedings, or at the commencement of proceedings, he would be exposed to the risk an adverse costs order, should he be unsuccessful in that application (the so-called 'Catch-22').

45. Ireland has already, in its Response to the Communication, confirmed to the Committee that there is no basis for that concern. Where a party to environmental proceedings in Ireland seeks to establish an entitlement to costs protection, that issue can in all cases be determined at the commencement of proceedings,[20] and without that party being exposed to the risk of an adverse costs order (excepting rare circumstances arising due to that party's own conduct).

46. This was recently re-confirmed in *An Taisce v Minister for Agriculture Food and the Marine & Ors* [2022] IEHC 96 (**"***An Taisce")*. In that case, the applicant was of the view that proceedings it intended to bring were entitled to costs protection under s.4 of E(MP)A 2011. However, it expressed the same concern raised by the complainant here: "*that if it is unsuccessful in an application for a costs-protection determination, then it might be liable to pay the costs incurred*

[20] *In that respect, see, e.g., Practice Direction HC119 Commercial Planning and Environmental List, Rules 3(7)(b), 16(1)(k), and 19(9)(1). This reflects also the practice outside that list.*

by the other parties in respect of the application".[21] That High Court was therefore required to determine "*who should pay the costs of the costs application*".[22]

47. In those proceedings, the Minister and the Attorney General confirmed that the State's position was that, on a proper interpretation of s.7 of E(MP)A 2011, that section did not envisage the making of a costs order against an unsuccessful applicant for a costs protection determination.[23] The High Court (Simons J) confirmed that was the correct interpretation of the section, and that an applicant for costs protection under s.7 of E(MP)A was not at risk of an adverse costs order:

> *"31. I am satisfied, therefore, that on its correct interpretation section 7 of the Environment (Miscellaneous Provisions) Act 2011 does not envisage that a costs order would be made against an unsuccessful applicant under that section. The ordinary rule will be that each party bears its own costs of the application. In an exceptional case, where an applicant has demonstrated bad faith or has otherwise engaged in litigation misconduct, then it might be open to the court to mark its disapproval by the making of a costs order. This would, however, be very much the exception."*[24]

48. Simons J further confirmed, for the avoidance of doubt, that his decision was equally applicable to applications for costs protection under section 50B of the 2000 Act and/or under Order 99

[21] *An Taisce, §11.*

[22] *An Taisce, §3.*

[23] *An Taisce, §§16-17.*

[24] *An Taisce, §31. See also Enniskerry Alliance v An Bord Pleanála [2022] IEHC 6, §76.*

RSC.[25] The conclusion reached by the High Court (Simons J) in *An Taisce* was reiterated by the High Court (Humphreys J) in *Clancy v An Bord Pleanála* [2023] IEHC 233.

49. The High Court has therefore confirmed, in two recent decisions, that the 'Catch-22' feared by the Applicant does not in fact arise.[26] A person seeking to establish an entitlement to costs protection in environmental proceedings can do so at the commencement of proceedings, without exposing themselves to any risk of NPE costs.

IV. Conclusion

50. Recent developments in the jurisprudence of the Irish Courts, and in particular the decision of the Supreme Court in *Heather Hill,* have re-confirmed that the costs protection regime in Ireland implements in full the requirements of Article 9 of the Aarhus Convention.

51. Complaints 1(a), 1(b) and 1(c) in the Communication are, in the circumstances, clearly unsustainable:

    i. Complaint 1(a) is unsustainable where the High Court has confirmed that an applicant for a costs protection determination under s.7 of E(MP)A 2011 will not be at risk of an adverse costs order.[27]

[25] *An Taisce, §38.*

[26] *For completeness, the Committee might note that there is an outstanding judgment of the Court of Appeal with respect to the costs of proceedings seeking to establish that a body corporate was entitled to apply for legal aid under the relevant statutory provisions in Ireland that may engage with issues relevant to the 'Catch-22 issue'. As of the date this further submission was filed, the Court of Appeal had not delivered judgment on the costs in that matter. The substantive proceedings in that matter are Friends of the Irish Environment CLG v Legal Aid Board [2023] IECA 19 and [2023] IECA 63.*

[27] *See An Taisce v Minister for Agriculture Food and the Marine & Ors* [2022] IEHC 96 and *Clancy v An Bord Pleanála* [2023] IEHC 233.

ii. Complaint 1(b) is unsustainable where the CJEU has confirmed that s.50B(3) of the PDA 2000 and s.3(3) of E(MP)A 2011 are compliant with EU law, and where a costs order under those sections will be subject to the NPE principle.[28]

iii. Complaint 1(c) falls away in light of the decision of the Supreme Court in *Heather Hill,* which has overtaken the decision in *McCallig* relied on by the Communicant.

52. Complaints 2 and 3, with respect to the alleged inadequacies of mechanisms for regulating own costs, and the alleged lack of transparency in respect of those mechanisms, have been addressed comprehensively in Ireland's previous submissions. For the avoidance of doubt, it remains Ireland's position that those mechanisms have no relevance to the substance of the complaint made in these proceedings, and that in any event the Communicant's criticisms of those mechanisms are unfounded.

53. Finally, insofar as the Communicant has sought to expand the scope of the Communication to allege that there are lacuna in the protective costs regime in Ireland, the decision of the Supreme Court in *Heather Hill* has re-confirmed that there can be no basis for any such allegation. For the avoidance of doubt, Ireland maintains its position that, in any event, any such allegation falls outside the scope of the Communication.

54. Ireland would be pleased to respond to any further questions the Committee might have, arising from the decision in *Heather Hill* or these further submissions.

Kind Regards,

[28] Case C-470/16 *North East Pylon Pressure Campaign, §§62-63.*

Elaine Kennedy
National Focal Point - Aarhus Convention