Submission to the ACCC on:

The progress report from Ireland as the Party Concerned on MoP decision VII/8i:

From:

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Context for submission

This submission has been prepared by the Environmental Law Officer, ELO of the Irish Environmental Network, IEN, the coalition of national eNGOs. Given the practical implications of the demands of this role, the timeframes pertaining and the technical complexity of the matters pertaining – the views expressed are mine, and do not necessarily represent the views of all our member groups. However they may of course rely on the content of this submission, as may any member of the public, given the arguments made are in the public domain. As IEN ELO I have engaged over many years as an observer on the communications at issue here.

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Introduction

The opportunity to comment on the progress reported by Ireland in respect of its Action Plan submitted to the Aarhus Convention Compliance Committee, ACCC, on Decision VII/8i is most welcome.

I am deeply conscious of the extent to which the resources of the secretariat and ACCC are over-stretched so it is my firm intention to limit the length of this response and not to overly duplicate matters I concur on, which have already well aired by communicants Right To Know on communication ACCC/C/2016/141 – relevant for paragraphs 4 (b) (i) and (ii) of Decision VII/8i

So I will try to confine myself to what I think is additionally necessary and might be of use to the Committee, and some comments in relation to progress on paragraphs Para. 4 (a) (i) and (ii) of decision VII/8i of Decision VII/8i, relevant for communication ACCC/C/2013/107.

I provide a copy of the submission made on the draft AIE regulations as an annex to this submission for more detailed comment on paragraph 4(b) of MoP Decision VII/8i.

General comments on the matter of the progress report.

1. **Earlier comments on the action plan to be taken as read – and need for focus on the core issue of the findings:**
   In the first instance I wish my comments on the actual action plan submitted by Ireland on June 30th 2022 to be taken as read here, as the actions proposed remain in my view inadequate to meaningfully and effectively address the non-compliances covered by decision VII/8i. It is my firm understanding that what is critically important in terms of the findings of the Committee and the MoP decision, is that it is the finding of non-compliance that must be the core focus. The recommendations are recommendations on actions which might be used to bring the Party into compliance.

2. **Late submission of progress by the Party Concerned.**
   I am conscious that Ireland despite having been alerted severally to the deadline for submission of the progress report by 1 October 2024, that it did not submit a progress report by the deadline.
   This included reminders by the Chair of the ACCC at the working group of the Parties in June 2024, at which two members of the Party Concerned's Aarhus unit were in attendance. Ireland was also reminded subsequently by the secretariat in its letter of September 1st 2023 to Ireland as the Party Concerned, and the significance of the deadline was highlighted by myself personally albeit informally earlier in August.

   It is however readily appreciated that:
   - Within the last year there has been significant turn over of staff in the Aarhus unit with the Department of Environment, Climate and Communications, DECC, and
   - The circumstances for handover have been less than ideal for the new incumbents.

   However, while one can of course, and does empathise with the practical difficulties for those persons now involved in the Department in the context, nonetheless, such practical difficulties do not ultimately operate to absolve or excuse Ireland for failure to

deliver on its legal obligations. The EU Court of Justice has made that abundantly clear.[1] **As a matter of law - practical issues within the Department do no exonerate Ireland's failure to deliver on its legal obligations.** Ireland is a party to the Convention and is bound accordingly and must address its compliance failures endorsed by the Meeting of the Parties with all the legal significance such endorsement has, which I do not need to rehearse here.

Were this late submission by a margin of some weeks an exceptional occurrence – I would also be less concerned and more sympathetic. But the failures to implement effective action have been the result of a concerted failure to advance resolution over a long period of time.

This is also not unique to the Committee's findings and the MoP decision. I regret to say that Ireland has a seriously bad habit of delaying and prevaricating when it comes to transposing and implementing its legal obligations and responding to issues. This has been evidenced extensively in terms of EU law environment law obligations and in its engagement on infringements and responses to judgements of the EU Court of Justice. (Should the ACCC wish to have more specific evidence to support my assertion here I would be happy to provide it).

I highlight this pattern by way of encouraging the ACCC not to be overly indulgent of Ireland's delay here, as I have no doubt that:

a) Addressing an effective response to bring Ireland into compliance is not seen as priority by the Irish authorities including those within the Attorney General's Office, and

b) Maintaining the status quo is.

3. Issues with the Progress Report as provided.

I really do not wish to appear overly harsh as I am conscious of, and very sympathetic on a personal level to the newness of staff in the unit. But what has been presented in a number of separate emails is not really a progress report in respect of the action plan presented by Ireland, nor does it serve to address the issues raised in the Committee's comments on the issues with the action plan.

Even were the process deficiencies to be overlooked, and I do not intend to dwell on them here as they are self evident, I have no hesitation in saying the substance of what is being reported on also does not constitute "progress" – and that is a matter for which responsibility must be shared with the Department of Housing Local Government and Heritage.

Had there been any consistent and appropriate focus on delivery of the necessary actions – it would have been easier to have provided

- A timely report as an appropriate update on the actions detailed in the action plan,

[1] Judgment of the Court, 28 Sep. 2023. C-692/20 – Commission v UK, EU:C:2023:70, para 49-50 refers here

- Any further responses and information to address the concerns that the Committee had raised on the action plan as presented,
- Detail on any further proposals Ireland had to enhance its response, or to outline difficulties in delivering on its response, and to set out updates to the action plan accordingly, and to have provided
- All of this in an appropriate format easy for the Committee to consider against the submitted action plan.

However what has been submitted is clearly not that.

Specific comments on progress in respect of paragraphs 4(a) (i) and (ii) of MoP Decision VII/8i in respect of the findings in communication ACCC/C/2013/107.

There is no reported progress on actions detailed in the action plan to address the now long outstanding issues within s.42 of the Planning and Development Act, despite the concerns raised by the Committee about them. This means that despite numerous changes made to it even since the communication was submitted, Ireland has consistently failed to provide for compliance with Article 6.10 of the Convention, and to address the issues at the heart of the findings as expressed in their paragraph 94 which stated:

> "94. The Committee finds that, by failing to provide opportunities for the public to participate in the decision-making on the 2013 permits to extend the duration of Trammon quarry, the Party concerned has failed to comply with article 6 (10) of the Convention. Moreover, the Committee finds that, 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"

There is no report or response provided in respect of the concerns raised by the Committee in its letter of December 7th 2022 on the actions detailed in the action plan which had already been undertaken, or the concerns raised in the subsequent session on December 14th by Mr Peter Oliver as curator for the Committee on the changes made.

There also has been no effort to address the deficiencies in communicating and explaining what are now very complicated changes – with changes heaped on changes for the wider public.

Now "progress", such as it is, has been complicated further by yet another major change proposed to Planning Legislation in the Planning and Development Bill, 2023 published on December 7th 2023. It is important for the Committee to understand this bill is

intended to replace the current 2000 act entirely. It runs to over 712 pages and further changes and at least another 50 pages are to be added by Government amendment during the legislative process which is now underway.

In terms of timelines – I am conscious of the Committee's recommendations in Paragraph 4(a)(ii) of Decision VII/8i reflected a need for "prompt enactment of the measures to fulfil the recommendation in subparagraph (i)"

We are now in January 2024 without an adequate legislative response. This is despite the MoP decision of October 2021 – over 2 years ago, and Ireland's earlier explicit acceptance of the implications for action and engagement under Article 36(b) of the Annex to Decision 1/7 of the Meeting of the Parties in its letter of response to the draft findings on 14th August 2019 That commitment arose further to the relevant assumptions and requirements clearly set out in the ACCC Secretariat's letter of 3 July 2019, accompanying the circulation of the draft findings for comment.

The Government have indicated they intend to have this major new bill enacted as soon as possible and by the summer of last year. But they have missed every deadline they have indicated publicly for this bill, and by some margin. For example they originally intended to have it enacted by end of Q2 in 2023, but the bill was not even published until December 2023.

The Committee will also be painfully aware from earlier changes supposedly to address these self same findings – that changes even when enacted may lie un-commenced for years. I should flag in that regard there is currently no clarity on either transitionary arrangements for the legislation or on a commencement strategy.

There is no indication at all of any interim change being proposed to the Planning and Development Act 2000, to address the deficiencies originally identified by the ACCC and which have not been resolved within the current version of s.42 despite multiple changes to it. Where I mean interim changes, I mean pending the enactment of this major new Planning bill, and where commencement of the new provisions on various alterations to permissions in chapter 5 of Part 4 of the bill is also unclear. The changes to duration are now embedded with major changes on a whole range of possible changes and alterations to consents, and the relevant provisions now run to 23 pages and where the issue of compliance with Article 6.10 is relevant throughout. But the original issue of participation on extension of durations is now in much more complicated legislation – to add to the complexity of the layers of changes already made, some of which were left in limbo for ages and others changed before they were commenced, and which had made the status of the legislation very hard to follow.

I had intended to highlight the significant issues with the current new changes proposed in the bill in meeting the requirements of Article 6.10 of the Convention and in addressing the findings. But I noted in coming to provide this commentary, that the Focal Point – Ms Kennedy has indicated in her letter of December 11th 2023 that the Government intends to submit amendments to its own bill, published only days before on December 7th, including to the relevant part of the bill, chapter 5 of Part 4 of the Bill.

While I note the scope of the changes indicated in her letter – I am conscious they may be more extensive and that amendments on transitionary provisions are also proposed – so further complications may arise.

I am therefore hesitant to provide here an analysis of the 23 pages of changes proposed in the new bill as published in terms of the issues relevant for the Committee's findings of non-compliance ACCC/C/2013/107. The provisions in the bill may be substantially amended by the Government in the next couple of weeks and possibly again before the bill is enacted.

I will therefore indicate only here that I have the most serious concerns on what is proposed.

- The approach is much altered. Instead of prohibiting changes to the duration of the permission in very limited situations where Ireland considers public participation would be necessary – the approach is to allow for multiple different types of alterations and changes to the permission – but to require participation, rather than block the change if participation is required. That difference in principle in itself is of course not an issue.
- However, the test proposed and the limitations which trigger the public participation requirement are really problematic and deficient in my opinion, and the provisions are overly complex.
- The definition of what constitutes "a material alteration" in s 133(1) presents serious failures to appreciate the breath of the test required by the Convention.
- The approach to what doesn't constitute a material alteration in s. 133(2) also fails to reflect the very helpful guidance published by the Committee in response to the Netherland's request for advice on paragraph 3 (a) of decision VII/8m.
- The provisions are also particularly complicated combining a whole range of possible alterations of changes to the consent – not just the duration of the permission
- There also appear to be other serious issues within the provisions, relevant to the non-compliance findings.

Therefore given the scale of the changes and that further changes proposed imminently, I propose to reserve substantive comment. I think is reasonable in the context and I wish to reserve the right to comment further when the Government amendments to this section have been published. The Government has indicated that the deadline for amendments for Select Committee stage is January 24th.

So in summary. I am obliged to indicate to the Committee the latest set of changes proposed in the bill do not reflect:

- The core issues identified in the findings;
- The matters highlighted as a concern in the Committee's letter of December 7th 2022 before the Committee's public discussion on the action plan, on December 14th 2022;
- The concerns raised by Mr Peter Oliver during the discussion at the December 2022 session, and on the changes then made and detailed in the action plan;and

- The Committee's guidance provided to the Netherlands on a similar issue in respect of have not been reflected paragraph 3 (a) of decision VII/8m.

Specific comments on progress on Paragraph 4(b) (i) and (ii) of MoP Decision VII/8i for communication ACCC/C/2016/141

Highlevel comments:

In the interests of brevity I wish to adopt and rely on the observations submitted on the action plan by Right to Know in respect of paragraphs b(i) and (ii) of MoP Decision VII/8i, albeit I provide some specific nuances to my view on the progress achieved and what is required in what follows below. So by way of brief summary on progress:

- Ireland's action plan was defective and deficient in terms of proposed actions.
- It has not delivered the legislative changes it committed to within the indicated timeframes
- The changes proposed are not sufficient to address the findings and are not adequate for the purpose of the recommendations.
- There is no real clarity on when the legislative changes as proposed, or even if revised would be made and implemented.
- There are serious concerns on the use of regulations to provide for the legislative provisions on AIE, and to some extent this includes issues relevant to what the Minister may and may not be able to do to specify provisions capable of addressing the compliance issues here.
- There has been a complete failure to undertake the type of analysis necessary to specify what would be a timely decision for the OCEI appeal and Court decisions as required under paragraph 4 (b) (i) and to support its effective implementation.
- There has been a inadequate response to ensure Court orders are provided to ensure the Court provides for adequate and effective remedies as per paragraph 4 (b) (ii) and to support its effective implementation
- There are no measures proposed to ensure what is implemented is actually delivering on the requirements at the heart of these particular compliance issues.
- Ireland has not delivered an appropriate progress report on the action plan

These issues are set out in more detail below.

Ireland in the action plan proposed in respect of the paragraph b(i) relating to the OCEI to:

> "Revise the current existing European Communities (Access to Information on the Environment) Regulations 2007 – 2018 to include a specified deadline within which the Office of the Commissioner for Environmental Information must issue a decision. "

It also indicated that "It is anticipated that the revised Regulations will be finalised during Q3 2022." It has failed to deliver on this.

It indicated the following actions in respect of paragraph b(ii) of Decision VII/8i relating to the courts:

> "Revise the current existing European Communities (Access to Information on the Environment) Regulations 2007 – 2018 to include a requirement that pursuant to Article

> 13 of the AIE Regulations public authorities shall comply with any order of the court requiring the requested information to be issued to the person making the request."

This was quite inadequate in terms of addressing the requirements of the recommendations in paragraph 4b (i) and (ii). The requirement on timeliness in para 4 b(i) extended to both the Courts and the OCEI.

The requirement on adequacy and effectiveness of Court remedies in 4b(ii) and the deficiencies in the action plan was the subject of particular concerns from the Committee expressed it's letter of December 7th 2022 stating: (my emphasis)

> "With respect to paragraph 4 (b) of decision VII/8i, the Committee points out that this recommendation stems from the Committee's finding in paragraph 133 (b) of its findings on communication ACCC/C/2016/141 (Ireland) that, "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." **The issue to be addressed through paragraph 4 (b) of decision VII/8i is therefore that the courts, having determined that an information request falls within the scope of the AIE regulations, fail to make any orders for the adequate and effective resolution of the information request, and not that public authorities fail to comply with such court orders."**

In short the action plan entirely failed to appreciate the distinction and focus on the obligation which falls on Courts to make orders for adequate and effective resolution of the information request, rather than specifically on public authorities to comply with such court orders.

In response to the "Final date by when implementation of recommendation will be completed" Ireland indicated that "It is anticipated that the revised Regulations will be finalised during Q3 2022."

In summary in terms of progress – Ireland has entirely failed to deliver on the legislative changes including a failure to deliver within the indicated timeline.

What has happened and the possible need for an interim solution:

It has now produced draft regulations and there are serious issues with them not just in terms of the inadequacy of the response to the MoP decision – but also on wider issues. This means that the likelihood of them being finalised and signed, and implemented and the timeframe for this are very unclear in my opinion.

I have highlighted to the Department the possibility to engage with the OCEI's office in particular to address as an interim solution changes to its operating procedures to provide for more timely decisions. There is also the potential to engage with the Courts on Practice Directions which could serve to address the issue of timeliness of Court decisions and the provision of orders to ensure for adequate and effective remedies. I have highlighted an example of how receptive one of the new divisions of the High Court has been to submissions made on Practice Directions to include some progressive environmental considerations. So it is suggested here that Ireland be

encourage to address interim solutions pending a more robust legislative and all measures approach to addressing these non-compliances.

It is important to consider as the Committee will be acutely aware that the communication came forward after years of frustration about delays in reviews, and the inadequacies of Court remedies – in circumstances where access to environmental information is the foundational pillar on which participatory and access to justice rights depend. These delays are happening at a time when the IPCC has described as having interdependent climate and biodiversity crises. These are existential challenges for our time and are central to the focus of the Article 1 objective of the Convention. In short the delays and inadequacy of remedies being experienced are serious issues going to the heart of what the Convention is about – and are not mere technical niceties.

A more detailed consideration of progress or lack thereof:

In the action plan – Ireland outlined a number of actions some of which had been done - ie the consultation on the current regs, and indicated it was reviewing the submissions made, and would then move to prepare the new regulations, which as noted above were anticipated to be made in Q3 2022.

However in Q4 2023 – over a year later

- A consultation was commenced on November 14th on draft regulations.
- No assessment or response was provided in terms of the issues raised by the in the submissions on the earlier consultation on the current regulations where the consultation was not limited to the issues required to comply with the Committee's findings, and it was immediately clear the changes in the new draft regs are not limited to the Committee's findings.
- No detailed rationale is provided for any the changes proposed, or indeed no rationale is provide for the changes made supposedly to comply with the Committee's findings.
- No data or analysis was provided to provide any insight on what could be considered "timely" which is the requirement specified in Draft Regulation 10(8) or to justify the upper-limit of a timeline of 4 months proposed in Draft Regulation for the OCEI to make decisions on appeals.
- No consideration has been set out on why the various considerations which allow for the suspension of the counting of time on appeals in the Draft regs– are consistent with the requirement for a timely decision.
- No timeline was indicated for Court decisions in the Draft Regulations, remembering the findings were concerned with the timeliness of the OCEI appeals and Court decisions as were the recommendations in para 4(b)(i) of the MoP decision
- No adequate provisions were made to ensure adequate and effective remedies from Court decisions as per the findings and the associated recommendations in paragraph 4 (b) (ii) of the MoP decision

Of more general consideration on the difficulty of engaging on this consultation on the new draft regulations:

- No link was provided to the current regulations which are comprised of a number of statutory instruments, or to the consolidated version of the regulations recently provided by the Law Reform Commission, so you could compare the current provisions vs the new draft provisions and comment accordingly.

- Reference was made on the consultation page to the fact there had been findings of non-compliance by the ACCC as being a background and reason to update the regulations – but no details on the issues were described, no communication number was indicated. The only link provided was to the ACCC's page with the overall list of communications. So the public would have to know the communication number in order to find it or have to trawl through all the communications on Ireland.
- Only a copy of the new draft regulations was provided, and a document which purported to provide a summary list highlighting the changes. Not only did this not provide a reflection of the current text vs the new text – it was also not accurate even in how it highlighted changes – so it could not be relied upon.
- The website page was also updated some weeks after the consultation was launched without any indication of what had been changed on the consultation. So if you had downloaded the draft regulations and worked through them – you could not know if they had been changed further or not.

I therefore emailed DECC on December 7th, and in a very rushed and hurried email (full of typos I fear) outlined concerns on the consultation page, and highlighted the multiple difficulties for the public in engaging on this consultation. I called for these issues to be addressed, and reluctantly proposed that the consultation be extended in order to facilitate meaningful engagement. I say 'reluctantly', as I was conscious of Ireland already running late on its response to this compliance matter.

I was also very conscious on a deeper level and concerned that Ireland was bringing forth regulations where primary legislation arguably is ultimately needed, to address a multiplicity of issues in the current provisions, some of which extend beyond the Committee's current scope.

But these had to be of concern in the recent consultation, given the potential legal issues for significant elements of the provisions and their legality if made only via regulation. This is given the restriction to Ministerial powers under s.3 of the European Communities Act 1972, which the Minister was relying on to make the regulations, and limitations under Article 15 of the Constitution to what the Minister could do. (This is a complex matter which I set out in detail in the section 5 of the submission I made on the substantive issues with the regulations and which I attach as an appendix to this submission and I raised this with the Department when I engaged with them in December.) By way of brief overview - the draft regulations cite and rely on the powers under s.3 of the European Communities Act 1972, (the 1972 Act) to give effect to the AIE Directive. No mention is even made to giving effect to the Aarhus Convention which is very alarming! However, given the express limitations to the use of regulatory powers under the 1972 Act, the Minister may be acting *ultra vires* his powers under the 1972 Act, and given Article 15 of the Constition on the making of legislation. So certain of the provisions in the proposed regulations which arise consequent on discretionary choices being made, may not be legally robust.

In fairness the Department responded quickly to the concerns raised in my email. In the next days it extended the window for the consultation. Following a call later then to discuss the concerns they moved later that same day on the 22nd of December to:

- provide link to the communication, ACCC/C/2016/141 and to the LRC's consolidated version of the regulations;
- made some textual updates and a clarification of the updates made on the 22nd December to the consultation page.

But it is important for the Committee to understand that the consultation was far from ideal and appeared to be a somewhat pressurised response to provide evidence of progress.

My focus then turned to the substantive issues with the Draft regulations. As has been well highlighted in R2K's submission – the fundamental issues are that the changes proposed are not sufficient.

I would add that the concept of timeliness connotes or implies relevance of the timeframes to the issue at hand. But there is nothing specified in the draft regs on what needs to be considered in respect of being timely where it is specified in draft regulation 10(8) (a) which merely states:

> "(8) (a) A decision by the Commissioner under paragraph (5) shall be made in a timely manner and, insofar as practicable, not later than four months after the date of receipt by the Commissioner of the application for the review concerned."

Also a blanket upper 4 month deadline is likely to become the target – and is unlikely to suffice for the purposes of timeliness.

But there has not even been an attempt to analyse what needs to be considered in order for something to be timely, and also nothing indicated to reflect how this upper limit timeline of 4 months could be considered timely. Quite apart from the fact that the appeal only can commences after the initial decision has been made and an internal review conducted - it clearly can't be timely – particularly in the context of the timeframes for public participation which are in the order typically of 4,5,6 and 8 weeks depending on the decisions involved. In the absence of any consideration of the need underlying the request and timeframes indicated by the requestor of the information it has hard to see how something can be considered timely. (I am of course aware that a requestor does not need to explain the rationale or interest for the request - Article 4(1)(a) of the Convention refers, – but can indicate the timeframe desired pursuant to the AIE Directive where Ireland is of course a member of the EU and bound by the Directive – as part of its national law.)

But as also pointed out in my detailed submission on the draft regs - there is no analysis of why the OCEI decisions are taking so long and indeed why the timeframes for decisions have increased beyond the worst timeframes highlighted in the communication according to Right to Know, R2K. I am taking R2Ks analysis at face value here given how extensively it has analysed this area. They indicate in their submission on this progress update that in 2023 – the average time taken to make a decision on an appeal is 444 days – that is 40% longer than the 316 days in the worst year referred to by the Committee in its analysis of the communication.

Of course some appeals will have taken longer, and no mention is made here of the further issues when decisions are simply remitted – and no adequate remedy can be considered to have been provided. (There is little point in complying with one of the characteristics of the Article 9(4) of the Convention on timeliness if the implication is that other characteristics required for review are blown out of the water as a consequence.)

In my submission to the recent consultation, I highlighted the view that key to coming up with a workable solution to the issue of timely appeals and Court decisions, was the need to improve proactive dissemination of information. This is so that appeals and Court proceedings are more exceptional and more importantly that problems with delayed access are avoided in the first instance.

There is also a real need to address repeat offenders who appear to play the system over and over with a view to avoiding or delaying the release of information and to avoid precedentory decisions by releasing information at the last minute. The Committee may push back on such comments and argue on the need to support them – which is understandable. But I would argue the onus of proof also lies with the Party Concerned here as there is also an obligation on the State Parties to demonstrate they have implemented Article 3(1) – in order to be able to argue they have taken all "necessary legislative

regulatory and other measures" – they need to be able to demonstrate they have evaluated the efficacy of the system – and clearly Ireland has not undertaken any such evaluation. It does not have a relevant set of metrics and methods for capturing them and for assessing them and to determine what is working and not working.

I do not wish to appear to be moving beyond the scope of the response to the decision VII/8i 4(b). My point however is that I am fundamentally of the view that in order to be able to meaningfully deliver on a review which meets the requirement of being "timely" – Ireland cannot simply hope to pull a figure out of the air and plug that into a piece of legislation and regulation – absent wider considerations on how the system works, doesn't work and its vulnerabilities. I refer to my more detailed submission on the regulations in this regard, including in the section 4 and the incorrectly numbered sub-headings of 3-1 to 3-5.

I of course also take serious issue with the fact that under regulation 10(8) – the timeline for appeals can be entirely punctured and rendered useless as it can be suspended for a variety of reasons. 10(8)(b) provides for the puncturing of the timeline for the review as follows:

- Sub paragraph (i) allows it be suspended to allow a public authority up to 3 weeks to provide new reasons for its refusal where the OCEI is not satisfied with the original reasons given. There is no clarity on what the OCEI can will or should do, if the Public Authority does not comply with an order under 10(3) – at all or provides another set of unsatisfactory reasons.
- Sub paragraph (ii) allows for it be suspended during settlement talks – taking the pressure off the OCEI and any possible pressure on the Public Authority in achieving a resolution.
- Sub-paragraph (iii) allows for it be suspended where further information is requested by the OCEI of the requestor or some third party to the appeal – where the latter could hold the whole appeal in an indefinite limbo, until all the information requested has been provided.

The ACCC's findings in ACCC/C/2016/141 indicated clearly that the fact the OCEI conducts a review of both fact and law does not excuse it from delivering on a review which must be timely[2]. To allow for the counting of the time of the review to be suspended, and to given the OCEI discretion on the various mechanisms for doing this, as is proposed in the draft regulations is to render any requirement to be timely null and void.

It is worth nothing that there is no specific legislative barrier to the OCEI making the decisions it is currently entitled to make in a timely way – but in fact its procedures appear to be such that it simply does not do so, nor does it feel obligated to do so.

It is however notable that mandatory timelimits are to be proposed now for certain planning decisions in the Planning and Development Bill, 2023. So it would seem only appropriate that

- The environmental information system be configured to engage accordingly with the timelines proposed for participation and mandatory decisions, if Article 3(1) of the Convention is not to be blatantly flouted.

[2] Paragraph 106 of the findings in ACCC/C/2016/141

But more generally I would submit that the approach to responding to the concept of timely decisions requires additionally a much wider and comprehensive response including to address the following:

- Much greater focus in the regulations and in the wider set of implementation measures is needed to drive much greater progress in proactive dissemination of information requirements, and in making every effort to minimise the necessity for having to request environmental information, and by making it generally available.
- The absolute discretion of the OCEI on the procedures for conducting an appeal under the regulations does not appear entirely appropriate or satisfactory. While of course the independence of the appeal function must be protected – it would be important to circumscribe that discretion with requirements reflecting the core characteristics for review which are required under Article 9(4) of the Convention.
- The OCEI needs to be empowered to work through obstacles and to be motivated to do so, including under the legislation. This means provisions giving the OCEI Powers in respect of: taking evidence under oath; powers to require the production of information; powers to be able to issue relevant directions and to be able to undertake the necessary investigations and hearing at the requisite level to determine disputed facts – are all essential.
- Additionally, the OCEI needs to be freed up from the burden of dealing with persistent repeat offenders in the community of public authorities who are soaking up resource, and it needs to be able to implement dissuasive penalties on such bodies and to have powers to be able to work around the obstacles thrown up.
- Specific consideration is needed on the matter of litigation costs – including for applicants who are notice parties to proceedings where the OCEI is acting effectively on their behalf. Some provision on this appears to be provided under regulation 10(13)(a) but there is a lack of clarity on the extent to which this has been or would be used in earnest, and there is a lack of specification in the regulations of potential reasons to prompt the Court to make any such order. A non-closed list should be included – allowing for further discretion by the Courts including in the interests of justice, and fairness and equity. This may well be necessary in order to ensure that decisions are made in a timely way.
- The potential limitation on the engagement of the OCEI given concern over its litigation costs is another issue which may well be distorting the approach to the resolution of requests, and further consideration is needed to establishing the extent to which that may be an issue and addressing it accordingly.
- Draft Regulation 10(10) provides for discretionary powers of the OCEI to compel certain things of the public authority. But the extent to which these powers are or are not effectively deployed is not well documented or evidenced. The utilisation of the powers of entry and to secure and take copies of information "found" may be very powerful if used in a way which triggers wider expectations that such powers will be used in earnest. There is a seeming lack of clarity on what powers of search and seizure pertain here and what additional powers might be advantageous and appropriate, in order to ensure its ability to deliver timely decisions.
- Very, very limited powers of enforcement are provided in respect of the powers of the OCEI. For example under Draft regulation 10(12) in respect of decisions of the Commissioner under Draft Regulation 10(5). So further consideration is needed to enhance the regulations in respect of enforcement powers which are dissuasive and

effective for the OCEI in assisting the Commissioner in realising meaningful and effective remedies to the reviews requested in appeals.

- It would seem necessary also to provide some legislative provisions around the need for the Court to order its business and act in way which provides for a timely decision in order to meet a legislative change to support the requirements of timely decisions for Court reviews.
- Further consideration is then needed to assess what is needed to ensure the Court is able to deliver on that, and to support that, and similarly for the OCEI.

In respect of paragraph 4(b)(ii) of decision VII/8i on the adequacy and effectiveness of court decisions the Committee was at pains to highlight its concerns on the action plan Committee in it's letter of December 7th 2022, outlining certain concerns on the action plan submitted – it was at pains to highlight the following concerns on the actions proposed in respect of the issues with the adequacy of remedies provided by the Courts stating (my emphasis)

> "With respect to paragraph 4 (b) of decision VII/8i, the Committee points out that this recommendation stems from the Committee's finding in paragraph 133 (b) of its findings on communication ACCC/C/2016/141 (Ireland) that, "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." **The issue to be addressed through paragraph 4 (b) of decision VII/8i is therefore that the courts, having determined that an information request falls within the scope of the AIE regulations, fail to make any orders for the adequate and effective resolution of the information request, and not that public authorities fail to comply with such court orders."**

I am conscious of the provisions in draft regulation 11(4) which provides (emphasis added), go some way to addressing this.

> "(4) In an appeal under this Regulation to the High Court or, on appeal from that Court, the Court of Appeal or the Supreme Court, the court shall, where appropriate, specify the period within which effect shall be given to its order and **may** include such other matters as the court thinks appropriate to ensure the provision of an adequate and effective remedy."

I am conscious this in fairness goes further on the matter of an order in respect of adequate remedies than the current version of the regulations which provides only the following:

> "(4) In an appeal under this article to the High Court or, on appeal from that Court, the Supreme Court, the Court shall, where appropriate, specify the period within which effect shall be given to its order"

However while certain discretion needs to be allowed to the Court:

- There should be a clearer obligation on the court to specify the period in which its order needs to be given effect - in order for its decision to be adequate and effective, and

- It should be a mandatory obligation on the court which “shall” include such other matters as considered necessary by the Court to ensure the provision of adequate and effective remedy.
- I would recommend including “timely” here - as adequacy and effectiveness typically also require timeliness.

Specific comments on progress on paragraph 4(c) of MoP Decision VII/8i

I would simply highlight that the action plan indicated that production revised AIE Ministerial Guidelines, which will include information on this issues specified was to have been finalised during Q4 2022 – in the commitments made. This was to follow the production of updated AIE regulations the the action plan indicated were to be finalized in Q3 2022. But as highlighted above in respect of paragraph 4(b) of decision VII/8i – the regulations are far from being ready to be finalized.

It would seem that there should and could be the implementation of some interim measures to provide for example a circular update with guidance for public authorities on the matters of concern here including in respect of cost-benefit analysis. This might serve to provide some level of progress in respect of paragraph 4(c)(i) and the need for greater clarity and observance of cost benefit analysis falling within the definition of environmental information. But this is but an interim solution and robust legal provisions, useful guidance and appropriate and effective training are needed.

Conclusion:

In conclusion – there are serious issues with the progress Ireland has failed to make in respect of these compliance matters in Decision VII/8i.