Update on developments relevant to ACCC/C/2023/198 and partial response to the Party Concerned's response of 17 Oct 2023.

From: Attracta Uí Bhroin, Manager and Law Officer of Environmental Law Ireland

1. Introduction.

The update is in relation to

1. Specific developments pertaining to the impugned legislation and also the approach in new legislation intended to replace it. This is given the categorical rejection on April 18th by the relevant Minister of two separate amendments tabled by members of the opposition. These amendments in my view could have operated to correct one of the alleged breaches in the above communication in relevant Irish Planning legislation.
2. More generally I regret to say, I believe this update also provides important context against which the Party Concerned's grievance in its response to the communication of 17 October 2023 regarding lack of engagement with it may be viewed.

    a. Firstly it highlights serious concerns on the quality of engagement by the Irish authorities even in the context of the most efforts made on these matters by members of our legislature, who have listened to concerns on these issues and sought to engage to address them. They infact:

        i. Highlighted their concerns on the Oireachtas record that new legislative proposals clearly did not comply with a specific finding of the Committee in ACCC/C/2015/131 upon which one of the compliance issue alleged in this communication is based, and also
        ii. Sought to correct the current legislation at issue in this communication with reference to those Committee's findings.

    Both efforts were rejected.

    b. Secondly it highlights extensive engagement with the Department of Environment, Communications and Climate Changes with responsibility for the Aarhus Convention on the specific compliance issue highlighted here, not just by myself and colleagues, but also the lawyer acting for the Communicant. This engagement also included engagement within days of its submission.

3. Finally, while the main thrust of this update pertains to one aspect of the Communication, I wish to also highlight that in the context of the legislative process underway for the Planning and Development Bill, 2023 which is an intended 700+ page replacement of the current Planning and Development Act, that the burden of demonstrating ongoing compliance and that the changes proposed do not impinge on the rights envisaged under the Convention should rest with the Party Concerned, including in respect of the matters raised within this communication.

    While I appreciate the differences pertaining, I still wish to draw and argue by analogy on the same principles and logic which guided the Committee in determining in para 101 of case ACCC/C/2016/137 **that the burden of proof rests with the Party**

Concerned to demonstrate the criteria imposed do not present a barrier to eNGOs incompatible with the objectives of the Convention stating:

> "101. The burden of proof falls on the Party concerned to demonstrate that any requirements in national law are consistent with the above criteria."

In short, Ireland has heretofore relied on its existing legislation to argue for its implementation of the Convention in its National Implementation Report. Now also the Communicant has to grapple not only with a response in respect of existing legislation, but also an effectively entirely opaque rationale for the extensive changes proposed in this new replacement bill which are relevant for the communication. Given it is the Government's clear intention to replace the existing planning legislation at some undisclosed point – it is incumbent on it to demonstrate how it believes it will be compliant and not be subject to the same or worse issues raised in the communication. To do otherwise is to leave the public in the unacceptable position of chasing a moving target, which can be engineered expressly with the intention of creating an overwhelming burden in defending rights and a dynamic and unclear situation in respect of intended outcomes, and timed perfectly to coincide with the Committee's findings, and thus evade effective intervention via the Communications Compliance Mechanism.

2. The specific issue of compliance in focus in this update

There are a number of breaches alleged in the communication, but the one in focus in this particular update is that: currently in Irish planning legislation the time for the window to apply for Judicial Review runs from the date of the decision, rather than from the date on which the decision became known to the public. The non-compliance issue alleged in Irish legislation follows on from one aspect of the Committee's findings in ACCC/C/2015/131.

The specific provisions in focus here in this update pertain to the current and proposed planning legislation underway before the Oireachtas (the Irish Parliament), specifically:

a) In the current Irish legislation, specifically s.50(6) of the Planning and Development Act 2000[1] which was raised in the Communication, but it also highlights
b) Provisions in the proposed new bill to replace that current Act, namely in s.253(1)(a) of the Planning and Development Bill, 2023[2]

In highlighting the new provisions, it is not my intention to extend the communication, but to highlight the discrepancy there is in the view of what is required by the Convention, and to also highlight material and relevant events for this communication associated with this new bill.

I would be happy to provide you with further information on this as appropriate, and don't want to overburden the secretariat or the Committee at this point, and simply summarise the relevant particulars below.

[1] Link provided to the Law Reform Commission's annotated consolidated version of the Planning and Development Act 2000.
[2] Link provided is to the Planning and Development Bill, 2023 as initiated.

3. The requirement as clarified by the Committee:

Given the volume of matters in focus for the Committee, and indeed in the instant communication, for convenience the essential issue of non-compliance which I wish to focus on in this update is recapped here.

The Committee previously held the UK to be in breach of the Convention nearly 3 years ago in a number of matters in ACCC/C/2015/131

> "174. The Committee finds that:
>
> ....
>
> (d) By maintaining a legal framework in which the time limit to bring judicial review is calculated from the date when the contested decision was taken, rather than from when the decision became known to the public, the Party concerned fails to comply with the requirement that review procedures in article 9 (2) be fair in accordance with article 9 (4) of the Convention;
>
> ..."

The Committee then clarified in its Recommendations that the clock should only start to run when the information is known to the public, indicating in para 175(a)[3]:

> "The time frame for bringing an application for judicial review of any planning related decision within the scope of article 9 of the Convention is calculated from the date the decision became known to the public and not from the date that the contested decision was taken;"

The Communicant has alleged that the same flaw arises in Irish legislation with the clock running to pursue Judicial Review from the date of the decision, rather than from when it the decision became known.

4. Recap on existing legislative issue and brief on current situation:

Despite this requirement being so clear for nearly 3 years since the Findings in October 2021, and the instant communication having been lodged by Right to Know in February 2023, the Irish Government have not only failed to correct this in the current Irish planning code, but have brought forward new legislation published in December 2023, which repeats the error, and indeed compounds it.

Specifically in terms of the current legislation s.50(6) of the PDA 2000 provides:

> "Subject to subsection (8), an application for leave to apply for judicial review under the Order in respect of a decision or other act to which subsection (2)(a) applies shall be made within the period of 8 weeks beginning on the date of the decision or, as the case may be, the date of the doing of the act by the planning authority, the local authority or the Board, as appropriate."

For ease of reference – the referred to subsection (8) is concerned with extensions of time., which to put in context as a lay person are 'as rare as hens teeth'.

[3] Link is to the English version of the findings in ACCC/C/2015/131

(8) The High Court may extend the period provided for in subsection (6) or (7) within which an application for leave referred to in that subsection may be made but shall only do so if it is satisfied that— (a) there is good and sufficient reason for doing so, and (b) the circumstances that resulted in the failure to make the application for leave within the period so provided were outside the control of the applicant for the extension.

Should it be necessary and useful – I can provide details of the relevant case law. But should Ireland seek to rely on this, I would submit that the idea that each and every decision should have to be subject to an argument that time needs to be extended beyond the date of the decision, presents an unreasonable burden on the public in exercising their rights, and is not a reasonable or credibly effective implementation of the rights and obligations under the Convention.

5. Update on relevant recent developments

5.1 New legislation:

The new Planning and Development bill 2023 is intended to replace the current Planning and Development Act. It is currently going through the legislative process in the Oireachtas, and has just completed Dáil Select Committee Stage. It needs to complete Report and Final Stages before moving to the Seanad for all stages there, before it reverts to the Dáil.

It is unclear when it will be enacted, and when elements of it will be commenced to replace the current Act. But the relevant Minister indicated his intention to enact it "come hell or high water" by the summer recess - which is July 11th 2024.[4]

Specifically: s.253(1)(a) provides for the same error on the counting of time for JR, and indeed compounds it in respect of omissions and failures, providing for an impossible window in respect of ongoing functions, bearing in mind these provisions now apply to a whole range of "relevant bodies" as a function of s.251 read in conjunction with s.250.

Additionally, as the Committee will see, there is also a compound requirement and threshold to be met in seeking extensions of time, requiring the delay was outside the control of both the applicant **and** the applicants lawyer, with s.253 providing as follows: (emphasis added)

> "Time limits applicable to Part 9 judicial review
> 253. (1) Subject to subsections (2) and (4), Part 9 judicial review shall not be commenced after the expiry of the period of **8 weeks beginning on the date of—**
> **(a) the decision to which the proceedings relate,**
> **(b) the doing of the act to which the proceedings relate, or**
> **(c) the failure to perform the function to which the proceedings relate,**
> **as the case may be.**

[4] Quote from secure transcript of the Minister's speech to the Irish Homebuilders Association in April 2024 : "So we're well advanced a committee stage on the Planning Bill and I will say to you here now that come hell or high water the Planning and Development Bill will pass the Oireachtas by the summer recess. "
As reported also in the Irish Time here

(2) A party may, by motion on notice (grounded in the manner specified in the applicable
Rules of the Superior Courts) apply to the High Court for an order granting the party an extension of time to commence Part 9 judicial review proceedings outside the period referred to in subsection (1).

(3) The High Court may grant an order under subsection (2), and make such consequential orders as it considers appropriate in the circumstances, if it is satisfied
that—
(a) there is good and sufficient reason for doing so, **and**
(b) **the circumstances that resulted in—**

(i) the proceedings being brought outside the period referred to in subsection
(1), and
(ii) **the delay, if any, between the expiry of the period referred to in subsection (1) and the proceedings being brought, were outside the control of the party applying for the extension and the legal practitioners advising that party in relation to the application.**

(4) Without prejudice to applicable Rules of the Superior Courts, where the period within
which Part 9 judicial review proceedings must be taken expires on a day that is a Saturday, a Sunday or a public holiday, the period shall be deemed to expire on the next day, following that day, that is not a Saturday, a Sunday or a public holiday."

5.2 Experience with corrective amendments & associated debate on Aarhus Compliance

Opposition amendments were tabled on Jan 22nd 2024 which would have operated to address and correct the timing issue in both the bill and in the current Act. Given it remains to be seen when the bill will be enacted, and indeed when the relevant new provisions will be commenced. So out of an abundance of caution opposition amendment #979[5] sought to correct the existing legislation and also provided that it be commenced on enactment, removing any discretion to delay its effect by the Minister. (The Committee is of course well aware from the experience in ACCC/C/2013/107 of how changes purportedly made to address compliance issues have been left languishing in limbo on the Irish statute books without being commenced.)

The amendments were tabled on January 24th 2024 and were available to the Government on the evening of Friday 26th January.

Some 12 weeks later during the debate on April 18th 2024 – the amendments were categorically rejected by the relevant Minister in their prepared statements of response, relying on the assertions that the Attorney General is satisfied Part 9 of the Bill is consistent with our Aarhus obligations, and extensive work by the Departments. Additionally in respect of the correction to the existing Act the Minister's rejection was explained on the basis that

[5] Link is to the amendment in the official Oireachtas list of numbered amendments.

the amendment "attempts to retrofit some provisions regarding costs and timeframes without the necessary legal framework or consideration that underpins the Government's own position, as reflected in Part 9, as initiated"

To be clear amendment #979 on timeframes simply sought to amend the counting of the 8 week timelimit from the date of the decision to being "within the period of 8 weeks beginning on the date of the notification or publication of the decision, whichever is the later, or"

It is acknowledged here that the amendments to the bill sought to replace the bill's new rules on JR with the current rules so as to maintain the status quo, which while not perfect, is a lot better than what is proposed, and it also sought to make 3 long-outstanding and seemingly non-controversial corrections to the text drawn from the current provisions. Separate to that a further amendment sought to correct the current act and to commence those provisions on enactment as explained above.

Had there been a difficulty in respect of specific formulation of the amendments as proposed, but not on the principle of the correction for example on the counting of time, the Minister could have simply, as is sometime the case, indicated that while they could not accept the amendment, they saw merit in the amendment, and proposed to review the matter and come forward with their own version in report stage. But not so here. The opening position after 12 weeks of reflection following on from over 2 years of looking at the legislation was to reject any change which ran the clock to apply for JR from the date the decision became known.

Admittedly when pushed vigorously in the debate by Deputies Cian O'Callaghan and O'Broin, the Minister of State standing in for the Minister gave some vague undertaking to look further into the matter.

In the interests of transparency a link to the official Oireachtas video and transcript of the debate is provided here[6].

However, it may immediately interest the Committee to consider the extract below as but one of the instances where the Committee's findings were expressly highlighted, and to note this discussion on confidence in the assertions being made arose in the context of major changes in Part 9 of the Bill. This changes alter radically the entire system of access to justice previously implemented to meet our Aarhus Convention and indeed multiple EU law access to justice requirements, including but not limited to the Public Participation Directive, and the EU Charter of Fundamental Rights. Therefore the concerns expressed by Deputy O'Callaghan went to the credibility of such assurances not just during this debate but on multiple other occasions and in other fora by Departmental officials and members of the Government.

> "**Deputy Cian O'Callaghan:** The Minister of State said he is satisfied that this proposal is Aarhus compliant and that the Attorney General has told the Department it is compliant, which is the standard response when I raise anything to do with Aarhus. We are told that the Attorney General has looked at this and that it is Aarhus compliant. Has the Attorney General specifically looked at the Aarhus Convention

[6]https://www.oireachtas.ie/en/debates/debate/select_committee_on_housing_local_government_and_heritage/2024-04-18/

compliance committee communication, ACC/C/2015/131, issued on 26 July 2021? This communication states:

> The time frame for bringing an application for judicial review of any planning-related decision within the scope of article 9 of the Convention is calculated from the date the decision became known to the public and not from the date that the contested decision was taken …

If the Attorney General's office looked at that communication, how could it possibly think this proposal is Aarhus compliant? Will the Minister of State explain that? If the Attorney General's office has looked at this communication specifically and concluded the proposal is Aarhus compliant, it rubbishes anything the Minister of State said regarding what that office stated is Aarhus compliant. Clearly, this is not Aarhus compliant. We need to adhere to that instruction from the Aarhus compliance committee and it should be in the legislation. It is deeply worrying. If the Attorney General's office has looked at that communication and stated that we are Aarhus compliant, it is deeply troubling. Will the Minister of State confirm that it has looked at that specifically? If it has, how can it possibly conclude the proposal is Aarhus compliant?"

If the advice is so clearly wrong on one obvious thing – how can one have confidence in any of it and in engaging on such a basis.

6. Reflection on engagement.

Despite 12 weeks of preparation to respond to amendments, and the earlier 2 years where the AG was leading a review of the current planning legislation, after the extensive prompting of Deputies O'Callaghan and O'Broin during the debate on the 18th of April, – the Minister of State admittedly made a vague and non-specific commitment to look into the matter of the timing of the window to pursue Judicial Review.

But given the opening position and extensive resources and focus which the Attorney General and the Departments are described over and over again throughout the debate as having expended on these provisions – it raises the most serious concerns on the intentions and focus here, on matters central to this communication, and there is little basis for confidence that this specific issue will be resolved during the legislative process. It must also be highlighted here to the Departments involved – that such treatment is warranted for the entirety of Part 9 of the Bill, albeit that is clearly a separate matter to the specific scope of this communication.

Furthermore, and very importantly this is critical context in which I must ask the Committee to view Ireland's view as expressed in its response of 17 October 2023 to the Communication about lack of engagement.

In terms of lack of engagement – I would highlight that the amendments were tabled by 11am Wed 24th January 2024 by the Opposition, and were available to the Government that Friday evening, Friday 26th. 12 weeks later, on April 18th it is I submit clear from the transcript there had been no meaningful engagement by the Government on the substance of the concerns raised in respect of compliance with ACCC/C/2015/131, even in the context of the Irish Communication ACCC/C/2023/198.

7. Further engagement undertaken on these matters

I would also highlight that in March 2023, a major and extensive submission on concerns on the compliance of an earlier Draft version of the bill was made to the Department of Environment, Communications and Climate Change. It raised this issue of the running of the clock for the 8 week JR timeframes specifically, and its compliance with the fairness requirement of Article 9(4) and indeed the informational requirements of 9(5).

It also specifically referenced the arguments and detail of this communication albeit a pre-admissibility stage then.

It also referenced a meeting which I attended with colleagues and lawyer Dr Fred Logue, representing the communicants on February 10th in which the matter of this timing issue was discussed, and earlier discussions.

I do not wish to over-burden the Committee, but I can provide this as necessary, but these matters are well known to the Department.

8. Conclusion:

I wish to thank the Committee and its secretariat for its consideration of this update, and I am of course available to clarity any matter as necessary.

Attracta Uí Bhroin

Manager and Law Officer, Environmental Law Ireland