

Preliminary Observation Re: First progress review of the implementation of decision VII/8i on compliance by Ireland with its obligations under the Convention

From: Attracta Uí Bhroin, Law Officer, Environmental Law Ireland

I would like to express appreciation for the focus and efforts of the Committee and its secretariat in preparing the Committee's review of progress on Decisions VII/8i for Ireland. Ireland's progress updates were circulated late so the Committee's review was circulated and published on Monday of this week.

In the interests of providing a very quick update on the importance and most timely value of the Committee's report, I will just focus here on one aspect of the review, paragraph (a)(i) of the MoP decision concerning the Committee's findings in ACCC/C/2013/107, and comment briefly in respect of the implications for paragraph (a)(ii).

1. As it happened the delivery of the Committee's review was most timely. Because legislation in focus in that review, which Ireland had submitted would address the issues in the aforementioned Paragraph (a)(i) of the MoP decision was at a crucial stage in our Parliament.
2. I set out the following which will hopefully afford the Committee some insight into how valued its work and that of the secretariat, has been, what I endeavoured to do with it, and the impacts.
3. The legislation (the Planning and Development Bill, 2023), was concluding its passage in the Dáil in a guillotined debate on Tuesday afternoon and Wednesday night of this week. It was then due to be rushed through the Seanad stages for the bill, as Government had made clear then intended to have it enacted by the Oireachtas's Summer recess. In fact the Minister with overall responsibility for the bill had promised the audience at a property and construction conference in April that the bill would be enacted by the summer recess "come hell or high water" - see [here](#).
4. Ireland had put chapter 5, Part 4 of the bill, before the Committee in its progress report, asserting it would address the aforementioned non-compliance issue.
5. I flagged concerns on the approach in the chapter to the Committee, and that it would not address the non-compliance issue, and indeed would make it worse, in my submission in January on Ireland's progress report.
6. On Monday we got the [Committee's review of Ireland's progress](#), which made abundantly in its own analysis in paragraphs 28-50 that it did not agree with Ireland and that the non-compliance issue in paragraph (a)(i) of the [MoP Decision VII/8\(i\)](#) would still stand, para 47 of its review in particular refers.

"47. In the light of the above considerations, the Committee does not consider that, if enacted in their current form, proposed sections 133 and 135 (2) (b) and (d) of the Planning and Development Bill 2023 would fulfil the requirements of paragraph 4 (a) (i) of decision VII/8i."
7. The Committee also referenced extensively the significance of its advice to the Netherlands in responding to paragraph 3(a) of MoP decision VII/8m, where compliance with the public participation obligations when reconsidering or

updates a permission subject to Article 6 of the Convention, (effectively the Article 6(10) obligation, also arises).

8. I was therefore shocked to hear on Tuesday evening, over 24 hours after Ireland had received the Committee's report, Minister Darragh O'Brien, who has primary responsibility for the bill, assert in the Dáil chamber (full transcript [here](#)) in response to concerns on the Bill's compliance with the Aarhus Convention that

“As we said right the way through pre-legislative scrutiny, Second Stage and Committee Stage, every element of this Bill that we have worked through is Aarhus-compliant, unquestionably. We sought the advice of the highest law officer in the land and worked directly with him to ensure that is the case.”

9. So on Wednesday, I wrote to Minister Ryan who has responsibility for the Aarhus Convention in Ireland, and the Aarhus Unit and Aarhus Convention Focal Point sits in his Department.
10. I drew his attention to the report and its significance for the Planning and Development Bill, and the implications he had for assertions which he had also repeated, including to me, that the bill was Aarhus Compliant and the Attorney General had reviewed it for compliance.
11. I wish to be clear, I appreciate the Committee has not reviewed the entire bill, which is now well over 700 pages and is to replace our entire planning code. But the implications are clear to me, the assessment on the compliance of the whole, has been cast into question by virtue of the fact the same actors were so incorrect on chapter 5 Part 4. At the very least a review is needed.
12. I expressed concern also that it would appear that Minister O'Brien had misdirected the House on the bills Compliance, or that Minister Ryan and his Department had left Minister O'Brien in an invidious positions by not alerting him to the Committee's report and it's significance.
13. In summary, I therefore called on him to engage immediately with his Government colleagues to alert them to the significance of the Committee's report, and to make clear that the advance of the bill should be paused, pending a full review of its compliance, and indicated it would be entirely inappropriate to seek to put in front of the President of Ireland to sign in the context.
14. I had also alerted Deputy O'Callaghan to the significance of the Committee's report and asked him to raise it during Wednesday's debate. Time was very tight in the debate, but he did so as best he could in the context, in fact waving a copy of the Committee's report in the air in desperation: (full transcript [here](#))

“I have raised repeatedly on Committee Stage and on Report Stage the issue of Aarhus compliance, and every time I have raised it, the response has been a general one that we have checked and we have been told it is Aarhus compliant. I keep on raising specific instances and specific details and I do not get replies on the specific details I have raised. We have a report this week published by the Aarhus compliance committee on compliance by Ireland with its obligations under the convention. I certainly would not have the time to read significant sections of the report into the record here or anything like that. However, there are 105 conclusions and recommendations in the report and one after another highlights serious concerns with regard to this Bill, how it is and its failure to meet compliance. It particularly references Chapter 5 in Part 4 of the Bill as not being Aarhus compliant. Every time I raise that as an issue, I get a general response but I do not get a detailed response or defence. Maybe the Minister of State will do that.

Maybe he will explain why, in the context of the different concerns I raised regarding the Bill and Aarhus compliance, we had a report this week from the Aarhus compliance committee stating that sections of the Bill are not Aarhus compliant. I ask the Minister of State to please not brush that off again with, “We have checked. It is all Aarhus compliant.” The Aarhus compliance committee is clearly saying it is not. I ask him to please address that.”

15. Regrettably, Deputy O’Callaghan received no response during the debate.

16. I had also been at pains earlier in the legislative process, to highlight the Committee’s advice to the Netherlands on paragraph 3(a) of MoP Decision VII/8m. In fact on 11 April, further to my request, Deputy Cian O’Callaghan had specifically asked Minister O’Brien during the Select Committee debate about whether that advice from the Committee was reflected in Chapter 5 Part 4 of the bill. Regrettably, the relevance of the Committee’s advice was dismissed summarily out of hand. Link to the relevant part within the full transcript of the debate is [here](#). The following quote is the relevant part: (emphasis added)

“Deputy Cian O’Callaghan: I thank the Minister. On amendment No. 735, does the Minister have a view on the way non-material alterations are treated and defined in the section? How does it reflect the advice that the Aarhus Convention compliance committee provided to the Netherlands when seeking to correct its approach to public participation obligations when revisiting permissions and the response to Decision VII/8m of the Meeting of the Parties? Has the Minister any comment on the threshold for triggering public participation obligations?”

Deputy Darragh O’Brien: If they are not material, they will not have an environmental effect. **The Dutch system is very different from ours.** Section 137(5) states that a deciding authority shall give notice of a decision under subsection (1) in such form and manner, and to such persons, as may be prescribed, and section 137(6) lists what a notice under subsection (5) shall state. They relate to the material alteration of permission, but non-material alterations will not have an environmental impact. If they are material, they are covered.”

17. I had also highlighted my concerns on the chapter again back in January in a submission to the Committee on Ireland’s late progress report, and expressed concern it did not reflect the Committee’s advice further to the request of the Netherlands’ request for advice on paragraph 3 (a) of decision VII/8m.

18. The bill completed in the Dáil on Wednesday at midnight, without these matters being satisfactorily addressed.

19. When the guillotine falls, all the hundreds of Government amendments to its own bill automatically get added to the bill – without any debate or scrutiny on them. Included within these, are two further changes which have similar errors in respect of Article 6(10). So while I appreciate these are not part of this MoP decision, nor the original communication, you may no doubt appreciate my intense frustration at what is being done here, despite all the constructive efforts by many actors, including the Committee and its secretariat, to assist Ireland.

20. The Bill was then expected to go to the Seanad, and complete before the summer recess. The bills office require at least 2 weeks to prepare for this given the volume and complexity surrounding this bill. So the actual window for the Seanad to consider this immense and profoundly important piece of legislation, was going to be extremely tight. This is also because if the bill was changed in

the Seanad, it would need to revert to the Dáil, for what is typically a perfunctory debate. But the Dáil rises on 11th July.

21. Therefore it was with immense relief that [the Government announced on Thursday](#), that the bill will not now complete before the summer recess. This was entirely unexpected not having given any such indication during the debate concluding hours before at midnight on Wednesday.
22. I had also included the Aarhus Unit and senior officials in Minister Ryan's Department of Environment, Climate Action and Communications, DECC in my email of Wednesday to Minister Ryan. Early on Thursday, I also further briefed them on the fact that:
 - a. other changes to the bill had gone through in unscrutinised Government amendments to the bill, with similar issues to those arising in Chapter 5 Pt 4, and
 - b. that the Committee's advice to the Netherlands, had been highlighted and dismissed during the Select Committee stages of the Bill.
23. I have received no acknowledgement of response to my correspondence at time of writing.
24. I earnestly hope that the surprising announcement that the bill will not complete, will facilitate a full review of its compliance, in addition to addressing the issues in chapter 5 part 4. However I am not confident in this regard, and understand the Government plan to advance the important Committee stage before the recess which will mean the value of the Seanad's scrutiny of changes needed to the bill will be very compromised, and not following the thorough review and reworking needed of the bill in my view.
25. But at least there is a chance for a better window of opportunity to correct matters. I believe the Committee's report is fundamental to triggering a recognition that all is not well, albeit I know its scope is specific. But in my view any reasonable person can appreciate the implications for the assessment and assurances made on the wider bill.
26. In the interim of course s.42 of the Planning and Development Act remains unchanged. Even if the Planning and Development Bill, 2023 is corrected, it also remains to be seen when that chapter would be commenced. So it is important the Committee realise the lack of progress made.
27. However having worked on this matter for so many years, as has the secretariat and the Committee, I wished to afford you the courtesy of this update and to let you know how pivotally important your efforts have been and our efforts here to leverage them.
28. My own involvement has spanned years on these matters. Having seen the communication in ACCC/C/2013/107, and identifying then back in 2013 that it in my view highlighted an issue in Irish legislation which was not compliant with Article 6(10) of the Convention, I engaged positively with the Communicant. I have been responsible for a number of observations on that matter, over a number of years, leading up to the Committee's findings that Ireland was in fact not compliant with the Convention's Article 6(10) in respect of s.42 of the Planning and Development Act.
29. I have stayed involved in the subsequent all important MoP follow-up processes, which are as the Committee will appreciate are where "the rubber hits the road", in terms of the corrections and changes which then need to be effected in the Irish legislation.

30. I also contributed to the Committee's consultations when it was preparing guidance for the Netherlands in respect of the highly important advice on para 3(a) MoP Decisions VII/8m, where is also highly relevant to the Irish issue referred to here.
31. I also had made observations to the Committee on issues with multiple flawed corrections Ireland has made to s.42 and issues around their implementation, and endeavoured to engage in the legislative process.
32. In response to Ireland's progress report, I had also flagged concerns to the Committee that provisions in the Planning and Development Bill, 2023, which Ireland was relying on to correct the issue in Irish law going forward, would not in fact correct the issue, and would in my view make matters worse.
33. I feel all those hours have been worthwhile, not to mention the hours of the Committee and secretariat, notwithstanding we are not yet in compliance on this matter. All I can say is "Thank-you" for your diligence and focus and efforts.

Attracta Uí Bhroin