

Additional Submission in connection with PRE/ACCC/C/2019/165

In her communication to the Committee of 11-3-19, Ms Joyce, National Focal Point Ireland-Aarhus has argued that the Aarhus Convention is only engaged once the EIA screening decision is made. She has argued that public participation is not required for the screening process. *'While contracting parties may voluntarily provide for public participation in the screening process, they are free not to provide for it'*. (Point 10)

I dispute this point.

The Aarhus Implementation Guide states;

Article 6 and EIA

At first glance, it may appear that article 6 refers simply to public participation in EIA procedures. However, EIA is not in itself a permitting or authorization process. It is a tool for decision-making. The term EIA has become associated with a standard form of procedure for the assessment of potential environmental impacts as part of the decision-making process relating to a proposed activity.

While the term EIA is used in the Convention, the test as to whether the Convention applies to a particular decision-making procedure is not whether that procedure is required to include EIA, or is considered as "environmental decision-making" under national law, but whether the decision-making itself may have a potentially significant impact on the environment.

Public consultation for the screening process for the listed forestry activities is not voluntary, it is required. Under the Forestry Regulations (2017) before the Minister can grant approval for a screened project (Afforestation, Forest Road, Aerial Fertilisation or Tree Felling Licence), he must first determine if the project is likely to have a significant environmental effect.

The Forestry Regulations (2017) state;

Public consultation

10. (1) Where the Minister receives an application under Regulations 3, 5, 6 or 7, he or she shall, before making a decision on the matter, publish a notice of the application in a manner determined by the Minister.

Regulation 3 – Application for a Tree Felling Licence
Regulation 5 – Application for an afforestation licence
Regulation 6 – Application for forest road licence
Regulation 7 – Application for aerial fertilisation licence

(2) A notice under paragraph (1) shall state—

(e) that any person may make a submission or observation to the Minister within 30 days from the date of the notice or whatever longer timeframe appears on the notice,

Where there is likely to be a significant adverse impact on the environment the Minister should refuse an application.

(3) The Minister shall refuse an application if, in his or her opinion, the proposed development—

(b) is likely to have significant adverse impact on—

- (i) animal or plant health,*
- (ii) water quality,*
- (iii) an archaeological, historical or cultural site or feature,*
- (iv) an area of special amenity,*
- (v) a European site, or*
- (vi) nature conservation.*

Public consultation is required for the screening of the listed activities under national legislation. The requirement for it to be included in national legislation may or may not be required under European or International legislation but once there is a legal commitment to engage the public as part of an environmental decision making process on activities that may have a potentially significant impact on the environment then the Convention applies and I believe that my communication should be treated as admissible.

My communication concerns the manner in which the notice of the applications, as determined by the Minister, is published and whether that is compliant with the requirement of Article 6 (2) to be adequate, timely and effective.

Ms Joyce refers to case Spain, ACCC/C/2008/24 to argue the inadmissibility of my communication (Points 11 & 12). It would be my view that the findings in that case support the admissibility of my communication.

The Committee notes that it cannot address the adequacy or result of an EIA screening procedure, because the Convention does not make the EIA a mandatory part of public participation; it only requires that when public participation is provided for under an EIA procedure in accordance with national legislation (paragraph 20 of annex I to the Convention), such public participation must apply the provisions of its article 6.

In the case of the forestry activities listed, public participation is provided for under an EIA procedure in accordance with national legislation (Forestry Regulations (2017)) and the provisions of Article 6 should apply. The '*factual accuracy, impartiality and legality of screening decisions are not subject to the provisions of the Convention*' but the public consultation process is.

Ms Joyce also refers to case ACCC/C/2008/27 (points 11 & 13). My reading of that case is that it relates to an activity not covered under national legislation. Since public participation in this case is covered under national legislation the two cases are not comparable.

Relevant recent development

The recent Opinion of Advocate General Kokott delivered on 23 May 2019 in Case C-280/18 is relevant to this communication. The Opinion states *inter alia*;

53 *It cannot therefore be sufficient to employ any means of information if it is not ensured that the public concerned is actually reached. Rather, the information must give the public concerned a reasonable chance to learn about decision-making on proposed activities and how they can participate. Only in this way is it possible to achieve the objective of Article 6(4) of the EIA Directive of giving the public concerned effective opportunities to participate in the decision-making procedure. (My emphasis)*

I am arguing that the public and the public concerned are not given a reasonable chance to learn of proposed activities / decisions under the current system of notification.

54 *Where there are established information channels whose effectiveness is known from past experience, these should be used. If there are not, it must be examined by which information channels those persons can be reached. Possibilities include not only local, but also national newspapers, radio and television, the internet, notices and even notifications to individuals.*

The Department has provided no evidence to substantiate the effectiveness of established information channels. In my communication I have sought, with my limited resources, to show how the established channels are not effective by providing statistics on low levels of website access and patterns of internet usage that show a significant proportion of the public are effectively

excluded from notification. The Department has dismissed the possibility of publishing notifications in local newspapers but has not provided any evidence that it has examined this or other options in terms of their efficacy. If the effectiveness of current procedures cannot be substantiated then there is an onus on the Department to examine other reasonable options which may achieve better coverage. Publication in newspapers (local and national) is an accepted and common form of public notification.

Recently (May 2019) a local community in North Leitrim has, in protest, blocked off access to an area where a licence has been awarded for the clear felling of approximately 16 Ha of plantation forest. One of their grounds for the protest was that there was no public consultation. The application and decision were published on the Department's website but the community concerned was not aware of the activity until the machines were about to roll in. Although the Department may claim that there was a public consultation process clearly the method of notification in this case was not effective. Had there been notification in the local newspaper or through other local channels (e.g. local radio) this community would, most probably, have become aware of the development at a much earlier stage and would have had an opportunity to input constructively in to the process. This is not an isolated case. My argument is that there are potentially more effective means of notification open to the Department that have not been tried and it appears the Department is not willing to examine as options. Other options for notification could lead to a more aware and informed public which should lead to a better decision making process.