Environmental Pillar
An advocacy coalition of 28 ENGOs from Ireland

Re. ACCC/ C/2013/107

Observation on

The Committee's Questions of 28th October 2016,

&

The responses to them from the Party Concerned & the Communicant

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Information on this observation

This submission was prepared on behalf of the Environmental Pillar following a plenary mandate but does not necessarily reflect the policy position of each member group in the pillar.

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Introductory and prefacing remarks

Prior to making some observations to the responses' to the committee's questions of 28th October to the Party Concerned and the Communicant , at the outset we first wish to thank and acknowledge the Committee's evident detailed consideration of this most important matter.

Secondly, we wish to make it plain our concern and support for the issue which the Communicant has brought to the attention of the committee, namely the failure to provide for public participation on extensions of planning permissions, which fall within the scope of Article 6 or the convention.

Thirdly, wish to highlight that at this very moment, the Party Concerned is advancing new legislation through the Oireachtas (The Irish legislature) – which arguably further extends** the approach at issue here. This is being done in the context of the proposed Planning and Development (Housing) and Residential Tenancies Bill 2016 – see here. A copy of the relevant section 22 of this Bill is included in Annex I, and the provisions again arguable fail to provide clearly for Public Participation and certainty on the right to review falling with any Aarhus cost protection provisions implemented by Ireland, and the associated characteristics of the Art 9(4) of the Convention.

Fourthly, we note Ireland's reservations in respect of replying to the Committee's questions on domestic remedies and Ireland's cost regime – in para 10 of its response dated 18th November 2016. We find this quite ironic in the context of the Party Concerned having raised the issue of the communicant's failure to avail of domestic remedies, in its written submission of 27/11/2015 here following the pre-admissibility decision , paragraphs 2-4 refers[1], and also in its opening statement to the Hearing here, para 4[2] refers.

[1] https://www.unece.org/fileadmin/DAM/env/pp/compliance/C2013-107_Ireland/Party_s_response_to_communication/frPartyC107_response_to_communication_27.11.2015.pdf
"2. The Communicant has not attempted to avail of any domestic remedies. Paragraph 21 of the Annex to Decision I/7 imposes a requirement upon Communicants to exhaust domestic remedies unless the remedy is prolonged, ineffective or insufficient as a means of redress.
3. The Communicant has not availed of the domestic legal process to challenge any of the decisions made in respect of Trammon Quarry and has not shown that he was stopped from doing so.1
4. A Communicant cannot avoid the obligation to exhaust domestic remedies in circumstances where he has neither evidenced nor even claimed any cause of action which would entitle him to avail of domestic remedies.[2]

[2] See also Paragraph 6(b) of Decision V/9 on general issues of compliance: "the Committee should ensure that, where domestic remedies have not been utilized and exhausted, it takes account of such remedies". "

[2] https://www.unece.org/fileadmin/DAM/env/pp/compliance/C2013-107_Ireland/Communication_from_Party/frPartyC107_opening_statement_52_CC_meeting_09.03.2016.pdf
"4. In particular, we rely upon the points made in its written submissions in respect of the failure of the Applicant to exhaust domestic remedies. No challenge was taken in the domestic courts either to the original permissions or to the extensions."

In the context, and even regardless of the Party Concerned's efforts to unseat this communication as a valid non-compliance issue – we submit that it is entirely appropriate that the Committee consider such matters in the context of the issue being raised. We also note it is entirely within the scope and remit of the Secretariat of the Committee to raise its own inquiry on non-compliance.

We are concerned that the Party Concerned appears in para 40 of its response to have taken such issue with our observation of September 13th and characterises it as a collateral attack on Ireland's cost regime. As stated at the time its purpose was to endeavour to assist all in an appreciation of the practical difficulties now being encountered and evident in the extent of satellite litigation necessary to clarify the scope and application of the cost rules which were introduced with the best of intentions of complying with certain of the Convention's obligations, and in so doing provide some context for the consideration in particular of questions concerning domestic recourse on a number of communications, and which Ireland tabled in taking issue with the admissibility of this communication. We hope that our remarks below in response to the Committee's questions – will demonstrate how that background paper was to and did infact anticipate a number of the issues which now need to be aired again and which we simply refer back to – relying on the more detailed outline in that paper.

Fifth, we note the Party Concerned also indicates in para 13 of its response of 18th Nov 2016 to the Committee's questions, that another specified communication is the appropriate forum for consideration of Ireland's cost regime. It is arguable as to whether the scope of ACCC/C/2014/113 extends fully to encompass the issues which Mr Cummins, the communicant on this matter ACCC/C/2013/107 would have been exposed to had he endeavoured to pursue domestic remedies, such as they are.

In our observation below – we endeavour to provide some response to the Committee's question over and above that provided by the communicant, and additionally some comment on the responses provided by the Party Concerned.

Observations on the Committee's questions of 28th October 2016, and the initial responses to them from the Party Concerned and the Communicant.

Domestic Remedies

For both parties

2. Please provide evidence (e.g. examples of the costs in other similar cases) of how much it would have cost for the communicant or another member of the public to challenge the planning permissions dated 24 July and 5 November 2013 (planning reference numbers: ta/130399, ta/130400 and ta/130581) before the Planning Board, the High Court and any other appropriate mechanism.

1. We note neither the Communicant nor the party concerned appear to have fully addressed this question in order to afford the Committee some context for costs for appeals in front of An Bord Pleanála / the Board– as they both focus on the fact that no appeal to the Board was available on the matter in question. But in case the Committee wishes to have that overall context of the Irish review structures regardless, we hope the following will assist.

An Bord Pleanála Costs – Administrative review

2. To be clear - it appears to be common ground between the Communicant and the party concerned and ourselves that :

> a) Initial applications for planning permissions granted by a Local Authority can be appealed to An Bord Pleanala.
>
> b) **However**, **a subsequent application for an extension to the period for which that permission has effect granted under s.42 of the Planning and Development Act 2000, as amended, "the PDA 2000", is** NOT **open to such an appeal**

Ireland highlights in paragraph 17 of its response to the question here:

> *"A member of the public cannot challenge a decision under s.42 before the Planning Board."*

3. The Party Concerned consistently remarks bizarrely on the fact the communicant did not challenge other related decisions, whereas a core issue for the communicant as we understand it - is now clearly clarified as being concerned with the failure to provide for public participation on one type of decision – the extension to duration of a previously granted planning permission.

4. Given the dates of the decisions referenced in the Committee's question – the Committee's question appears to refer to the latter type of decisionin b) above – namely decisions to extend the duration of an original permission. Therefore no appeal could be entertained by the An Bord Pleanala/ the Board on them, and therefore strictly speaking the costs of an appeal to the Board are somewhat academic, but the Committee may wish to understand these for overall context.

5. So to assist the Committee with the overall context, we wish to clarify that:

- Ordinarily the fee to lodge an appeal to An Bord Pleanala is €220 Euros[3], in circumstances where an appeal is allowable. This in itself is not an inconsiderable amount and is more than sufficient to discourage many from pursuing appeals / reviews of local authority decisions.
- That fee of course does not cover the costs of any expert statements or studies which an appellant would need to submit in order to support an effective appeal, not to mention expert assistance in dealing with complex arguments or analysing technical documents.
- The Board has absolute discretion in how it awards costs when it makes a decision on review. Typically no or only a small proportion of recompense is ever awarded to a successful appellant – which is often not collectable. We can provide further detail on this as required – but do not wish to overburden this response with detail which the Committee may not require.
- Anyone wishing to make an observation on that appeal is required to pay a fee of €50.
- These fees to An Bord Pleanála are substantially more that the fee which is required normally to make an observation to an application at Local Authority level which is €20, albeit no such observation is allowable either under Irish law on applications for extension of the duration of an existing permission under s.42 of the Planning and Development Act.

6. As has been acknowledged by Ireland, The Planning and Development Act makes no provision for an appeal to An Bord Pleanála, of an extension of duration of a permission already granted which is applied of under s.42 of the Planning and Development Act 2000, as amended, "the PDA" or "the PDA 2000".

[3] See Category (a) (vi) for appeal fee of €220 and b(e) for observation fee of €50 to An Bord Pleanala : www.pleanala.ie/news/newfees.doc

High Court Costs- Judicial Review

7. We note the Communicant has provided detail on costs of a notice party in a JR proceeding. Should the committee require further evidence on costs – please do not hesitate to contact us, and we will endeavour to assist. To give some context to the impact of such costs - we with to add that the Central Statistics Office reports average annual earnings in Ireland to be €36,090[4]. It is in that context the prohibitive nature of the costs for having to deal with an award to a Notice Party, not to mention the costs associated with meeting the costs of the respondents being the Local Authority and potentially also a State Respondent should be viewed.

8. In commenting on the committee's query on the costs of JR we have drawn on a number of points made by the Party Concerned from across their submission.

9 We note the Party Concerned's comments to the Committee on the difficulty of speculating on the likely costs of JR in general terms and the variables at issue, for example what cost rules would be invoked/apply, and the nature and size and calibre of the legal teams involved by the various parties to the proceedings, para 35 of their answer refers.

10. We submit other variables would also include the duration of the proceedings. We note this could be influenced substantially by the extent and complexity of any satellite litigation necessary to determine issues of locus standi and what cost rules apply or protection etc.

11. We submit the very difficulty any applicant would face in contemplating pursuing Judicial review and what cost exposure they might have is more than adequately demonstrated by:

a) The very difficulty the Party Concerned has in commenting on and speculating on potential costs in response to the Committee's questions, given the number of variables at issue which it refers to in paragraph 35 of its response; and

b) How even in the context of this scrutiny from the Compliance Committee that the Party Concerned also refuses to clarify what cost regime it considers would apply to a s.42 decision were it to be challenged. We note in this regard it states in paragraph 39 that:

> *" ..at this juncture Ireland strongly emphasises that it does not wish to speculate on which cost rules would apply"*

We submit this lack of certainty must surely add considerable weight to the argument about how chilling and frightening it is for a potential applicant to the courts to entertain pursuing Judicial review, given the uncertainty on the extent of cost exposure they might be subject to, and at what personal cost. That is a prospect which only the very rich or those without assets, dependents or commitments - 'the man of straw' - could entertain.

[4] http://www.cso.ie/en/releasesandpublications/er/elca/earningsandlabourcostsannualdata2015/

12. The uncertainty of the Irish Cost regime – even following the introduction of what were clearly well intended Aarhus related provisions – was what motivated us to provide the Committee with a background paper which we submitted on the 13th of September 2016. That paper sought to highlight the extent of satellite litigation which has spawned simply to clarify the scope of the new cost rules and when they do or do not bite on a particular set of decisions or "kick-in" as it were.

(This issue of when the rules "kick-in" in relation to a particular decision or development is quite separate and over and above when the provisions have legal effect following on their enactment, and relates to what point in the process of decision making the rules come into effect or cease to have effect.)

13. Any party considering JR – would have been faced with the prospect of most likely having to argue –

i. That they had sufficient *locus standi* . They would have had to do so without being able to demonstrate they had made a prior submission on the matter. This requirement while a contentions requirement has been a focus in the Irish courts as evidence of "interest" – a point recently at issue in Grace & Sweetman v An Bord Pleanala & Ors, neutral citation [2015] IEHC 593, which is now before the Supreme Court. This would be a particularly problematic requirement for any applicant given they were not entitled to make any such a prior submission on a s.42 application, and new arrivals in the area could not for a moment be expected to have made submissions on the original applications. However could be reasonable be expected to be amongst *the public concerned* in respect of any extension of duration – from an Aarhus perspective.
ii. They would also most likely have been outside the 8 week period for seeking leave to judicially review – as they would like the communicant here most likely find out by accident about the extension, as planning registers are not bed time reading for most of the normal public. So they would have had to argue for an extension to the leave period – ironically !
iii. They would have had to argue entitlement to cost protection unless their circumstances were such that an award of costs against them was not an issue. It is clear here – Ireland is reserving its position on whether the special Aarhus cost rules apply or not to any such challenges. In fact it is surely telling, that even in the context of arguing the communicant should have availed of domestic recourse, and that JR was open to them, – that the State will not clarify their position on whether they new Aarhus Cost protection rules apply or not, paragraph 39 of their response refers.

14. The Party Concerned in paragraph 47 and also in 58 of their response also indicates an applicant can engage a legal team on a conditional fee arrangement, a "no foal - no fee" basis, and that the remuneration of the legal team can be addressed through an award of

costs which the court "may" award if they are successful. As highlighted in our background paper – that arrangement is contingent in the first instance on the team being reasonably convinced that the Irish Courts will find in favour of the applicant – which is of course I say respectfully separate to whether the applicant is right in their arguments. While our Judiciary is rightly cherished – there have been a number of cases pursued by the EU Commission which have evidenced the error of a number of Irish court decisions. That is little solace to those applicants who remain faced with the pursuit of costs under those self-same Irish Court decisions – a situation which pertains today. Additionally we highlighted in our background submission – the Court enjoys discretion on the extent of award and the prospect of payment may fall far short of the effort expended. Also as we highlighted in our background submission - Conditional Fee Arrangements are more feasible for eNGOs who litigate regularly and who develop relationships with legal teams, rather than a one –time litigant where there is no incentive for the legal team to nurture a long term relationship. Legal professionals need to eat and pay mortgages too – so pursuing cases with small or uncertain prospects or with high effort and relatively small return is a concern, and not sustainable, making it hard therefore to secure representation on a conditional fee basis. Arguably also conditional fee arrangements does not facilitate equality of arms where the other side is being remunerated differently, and equity in the review is a required characteristic under Article 9(4) of the convention.

15. The Party Concerned also indicates in paragraph 52 that:

> *"…the Irish Courts permit individuals to represent themselves, thus eliminating own costs altogether."*

This appears to entirely miss that Article 9(4) of the Convention in setting out the characteristics for review in the Access to Justice Provisions of the Convention –requires also the con-committant characteristics of "fairness" and "equity" for the review. In other words – the quality of review is not supposed to be a choice between– 'cheap and unfair' or 'expensive and equitable' , as one might consider the prospect of someone trotting into court as a first time litigant, never involved in legal proceedings previously to face the ranks of eminent Senior and Junior Counsel representing separately the Local Authority and the State both who would most likely be named as two respondents on the case, not to mention those additionally for the Notice parties involved in such matters – which might extend beyond the developer, to other national federations interested in protecting the legislative provisions under challenge.

16. Nor has Ireland adequately implemented a response to Art 9(5) of the Convention or Art 11(5) of the codified Directive in order to "remove", "reduce financial and other barriers to access to justice" – lest the Party Concerned endeavour to rely on that in the future. We do not for a moment wish to detract from the own cost rules principle – the issue is the lack of clarity in the provisions specifying it and the ongoing failure of the State to bring forward the long-since proposed Aarhus Bill envisaged to rectify matters – which we referred to in our

background submission. It is no longer visible on the legislative agenda or the programme for Government nor is there any reasonable horizon for its publication of implementation in sight some 4 years after ratification of the convention – all as highlighted in our earlier submission.

17. Additionally Ireland points out in paragraph 45 - than an applicant can seek a declaration from the court on the application of the cost rules provided in Environment and Miscellaneous Provisions Act 2011, EMPA 2011. This is why yet again in anticipation of exactly such arguments, we highlighted in our background paper the practical difficulties and onerous process associated with the pursuit of this s.7 declaration to which Ireland refers in paragraph 45. It is also noteworthy that there is no such declaratory provision in the s.50B rules which cover EIA development – and which an optimistic applicant might reasonably hope would cover a s.42 extension of duration decision of an EIA project such as the instant case. However Ireland has dispatched unequivocally any such vain hope as it states in paragraph 45 of its response : (emphasis added _

"As no EIA is required for a s.42 decision, the S50B cost rules will **not** *apply"*

17. Therefore in conclusion – we submit we roundly disagree with the conclusion that an applicant would not dissuaded from pursuing domestic recourse consequent on the risk of exposure to prohibitive costs. The Communicant as an applicant would have been faced with the prospect of having to make and win several arguments even in order to finally get to their substantive argument, each one carrying cost exposure. We also submit that the background paper serves not as a collateral attack as Ireland alleges but a more detailed outline of the context for the above issues – all in response to matters raised by Ireland in its response to the Committee.

18. As highlighted above – even in the context of this scrutiny by the Compliance Committee – Ireland is unprepared to clarify what cost rules apply or not in its view – and only states clearly and rather shockingly on 18th November that s.50B does not apply to the extension decisions at issue, and this is even after the Court of Justice's recent ruling and clarification in c-243/15, dated 8th November 2016, here – the implications of which hardly need expansion here.

3. What procedures existed to challenge the 2013 decisions to extend the operating time of the quarry and what was the time-limit to exercise them?

19. Judicial Review is the only mechanism which would appear to be available, as there is no recourse to an appeal to An Bord Pleanala for a s.42 decision. Therefore the generic provision of s.50(2) of the Planning and Development Act 2000 would seem to apply which provides:

"(2) A person shall not question the validity of any decision made or other act done by—
(*a*) a planning authority, a local authority or the Board in the performance or purported performance of a function under this Act,
(*b*) the Board in the performance or purported performance of a function transferred under Part XIV, or
(*c*) a local authority in the performance or purported performance of a function conferred by an enactment specified in section 214 relating to the compulsory acquisition of land,
otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986) (the 'Order')."

20. We concur with the Party Concerned's assessment that the relevant period for challenging the validity of a decision is 8 weeks, as governed by s.50 of the Planning and Development Act as amended.

"(6) 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.
(7) 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)(*b*) or (*c*) applies shall be made within the period of 8 weeks beginning on the date on which notice of the decision or act was first sent (or as may be the requirement under the relevant enactment, functions under which are transferred under Part XIV or which is specified in section 214, was first published)."

21. We also concur that it is possible to seek an extension of that pursuant to s.50(8) as below. However the practicalities of that are very limited and even the pursuit of that presents additional cost burden.

"(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."

22. The High Court has viewed the strict time limit in the Act as being a clear statement of intent from the legislature that facilitating review is not to be lightly entertained, and it was accompanied by a high bar in terms of standing for ordinary members of the public who had to prove a substantial interest. While these provisions have been amended – with the interest test of substantial in s.50A(3)b being amended to "sufficient" . The importance of the

concept of legal certainty is highlighted by Ireland in its response. We submit this serves only to illustrate further the difficulty there would be in getting any court to consider an extension to the period for challenge of a particular decision, particularly where the legislation governing the decision in the first instance doesn't even provide for the public to be consulted. Without engaging in the substantive argument around the requirement for public participation and incurring significant cost exposure in so doing – the prospect of success in securing an extension on the leave period to JR the decisions would be arguably low. So the burden and exposure falls squarely on people like the communicant – who are not placed to be so exposed.

23. Interestingly, we also note that the notification of the decision to extend the duration of the permission issued by the Council under s.42 even on the most recent decision – **entirely failed to provide any notice on how the decision could be reviewed in its notification** to the quarry owner who had sought the extension or to the Department of Arts Heritage & the Gaeltacht whom it notified of the decision. Nor did the Manager's Orders indicate how the decision could be reviewed. In short no practical information was made available at the time of the decision to facilitate it being reviewed. A copy of the notifications to the quarry owner on the most recent extension decision is attached. So even had the quarry owner wished to challenge a condition on the extended duration permission – they were not facilitated with practical information.

24. It is hard to know how a member of the public who didn't know of the decision and isn't informed of how to challenge it – is expected to proceed or even to be aware of their rights or the possibilities, when they haven't been informed at the time of the decision being made. However of course even the awareness that an application and subsequent decision had been made is a vexed matter here.

25. Ireland's expectations seem entirely unreasonable in this regard. It is only through belated greater awareness of the Convention that people such as this Communicant are understanding the extent of injury to their rights.

26 However, in that respect it is only fair to acknowledge that the Party Concerned has made efforts to promote awareness of the Convention. However, there has been no meaningful baseline evaluation of the understanding of the convention or progress in relation to increased understanding amongst the wider public, and it is surely fair and correct to say you can't manage what you don't measure. In this regard, we will refrain from passing further comment on the adequacy or inadequacy of the Party Concerned's implementation of the General Provisions of Article 3 of the Conventions, paragraphs 1-3 in particular for the present.

27. A further important consideration in respect of costs of any JR of a decision for an extension of duration of an existing permission would be likely to heard "on notice" to the

other parties – who would be most likely to participate. This thus immediately increases the prospect of further cost exposure if that initial application is unsuccessful.

28. We note the Party Concerned is unprepared to speculate on whether the Communicant would be able to reach the bar of "good and sufficient reason" for delay . More importantly they also fail to offer the Communicant, or any future potential applicants any comfort on how it would respond to such an application, if joined to the proceedings as a respondent.

29. Finally, it would seem to us that the Communicant has more than ably highlighted the difficulties encountered and the accidental discovery of the decisions. Quarries are not somewhere one casually goes into and inspects and measures or quantifies its scope, nor are planning files. That is the purpose and rationale behind notification to facilitate "effective" public participation as required under Article 6.

4. Are any domestic procedures to challenge the 2013 extension decisions still available today?

30. The 8 week period for challenge to the 2013 decision has clearly expired. As discussed above in respect of question 3, it is in theory possible to make an application for JR outside the 8 weeks – but it would seem unrealistic in the context of this now being 2016.

31. No further provision or change has been introduced into the Planning Acts since which would make any new s.42 decision to extend an existing permissions easier to challenge. In fact as highlighted in our Introductory and Prefacing remarks a new bill is progressing through our legislature which extends the application of s.42 type extensions to certain housing developments – again all without Public Participation and without reference to whether the development in question has likely significant effects on the environment, or whether it is an EIA development, and fails to improve the existing s.42(1) at issue here.

5. If any such domestic procedures still exist, what would be the typical cost of making such a challenge? Please provide an estimate of all costs through to the issuance of the judgment at first instance as well as a brief reference to the legal basis for your estimates. (You may refer to the excerpts of legislation submitted by the observer on 13 September 2016, if appropriate.)

32. We note the Party Concerned is not prepared to indicate if a JR challenge to a s.42 would be covered by the special cost rules which we highlighted in our observation of 13 Sep 2016, para 39 of their response refers. We do note in paragraph 46 – they are explicit that s.50B of the PDA 2000 as amended – would not apply in their view, and it would seem would clearly take such a position in court were an applicant to seek cover under those rules.

33. As set out in our observation of 13 September – the effect of the cost rules in either s.50 B or Part 2 of the EMPA 2011 are the same in terms of providing for "an own cost approach", with certain conditions or circumstances allowing the Court discretion to

compromising the application of that protection under those same rules. The difference between s.50B and the EMPA 2011 provisions is the set or type of decisions which they cover. A very real concern any applicant would have would be the prospect of in the first instance having to argue that the cost rules applied, and then even if they were successful – that they would not be deemed to have pursued a claim so far out of time – that it would be deemed to have no prospect of success, or which might otherwise fall foul of the frivolous and vexatious clause which punches a hole in the cost protection.

34. In respect of disbursements and outlay costs - it is noted that Ireland had introduced a zero cost for the stamp duty for Aarhus cases – which can save an applicant in the order of €500+ at High Court level, depending on the number of papers to be filed and number of motions, affidavits etc. However there is very low awareness even amongst expert practitioners of this, and in the context of a case where there is argument on whether one falls within the Aarhus rules – one might be apprehensive of availing of this lest it compromise you later on. However, we were also unable to find details of this on the Courts service website to provide details on it and to confirm it this still has effect in time to submit this observation.

35. Some **simplified** possible cost scenarios are set out below, which hopefully might assist the committee:

A) If you were successful in arguing you were within the Aarhus rules of either s.50B or the EMPA 2011 :

i) Ultimately lost your case – you would have to bear your own costs; or if

ii) Ultimately won your case – you might have some of your costs awarded – the extent would be unclear until the Judge made the award, or

iii) You might be deemed to have pursued a case so far out of time or otherwise fell to be considered to fall within the the scope of being "frivolous and vexatious" – then you could be exposed to cost awards against you.

B) If you were **un-successful** in arguing you were within the Aarhus rules of either s.50B or the EMPA 2011– and :

iv) Ultimately lost your case – you would have to bear your own costs, and most likely would be exposed to the costs of the respondents, the Local Authority and most likely also the State and any Notice Parties involved given the normal "costs follow the event rule"; or

v) Ultimately won your case – you might have some of your costs awarded – the extent would be unclear until the Judge made the award; or

vi) You might be deemed to have pursued a case so far out of time or otherwise fell to be considered to fall within the the scope of being "frivolous and vexatious" – then you could be exposed to cost awards against you.

vii) You could try to reach the very high bar in respect of public interest – which as set out previously is not easy one to reach.

36. The orders for costs against you could well be in the order of a multiple of those indicated by the Communicant in his response showing costs for a notice party of €64,000. The costs for the respondents in general could be considered to be higher and conservatively the notice party cost indicated would most likely be multiplied by three for two respondents and a notice party and potentially some element of own costs, so in the order of €200,000+ - with the caveat that we cannot speculate on the likely duration of the proceedings.

37. Any judgement of the court then subjected to a subsequent appeal, could then introduce a further iteration with an increased level of costs as the case moved to the Court of Appeal and/or Supreme Court.

38. It is noteworthy that c-427/07 an original judgement of the court of justice against Ireland back in 2009 in respect of implementation of Art 10A of the EIA Directive, took issue with the lack of certainty for JR applicants and the extent of discretion of the courts. It seems we have not moved further along despite the new cost rules given the interpretation and scope issues pertaining.

6. At the time the original planning permission was granted in 1997, was the public provided with the opportunity to submit its views on the possible impact on the environment in the event of an automatic extension of the planning permission? If so, please provide documentary evidence to substantiate that the public were given this opportunity.

39. We do not dispute that Ireland provides for public participation in respect of the initial application for an EIA development. We do wish to highlight the contentious provision of s.42 of the PDA 2000 do not provide for an automatic extension of planning permission – as seems to be indicated in the Committee's question above. In s. 42 as it currently exists in the PDA 2000, certain circumstances need to occur and an applicant needs to apply for the extension. Otherwise a planning permission expires after the period specified on the original grant of permission. However once these circumstances are met and an application meeting the specified requirements is made – the Planning Authority has to grant the extension under s.42. Ireland seems to view this makes it purely administrative and fails to appreciate that in itself is an issue, but also fails to appreciate the authority has discretion under s.42(2) to specify the period for completion and conditions pertaining – matters on which public participation would be clearly relevant to inform them.

40 While it is correct to say that s.42 only provides for the possibility of addressing conditions in respect of security for the satisfactory completion of the proposed development (through s.42(2) and also its reference to 34(4) (g) – in developments like quarries where rehabilitation and remediation should be fundamental parts of the permissioned project – the effective use of securities could be very important in relation to environmental impacts. It is of course however a further issue with s. 42 that it is limited in this way – as it clearly inhibits due account being taken of public participation.

40. We submit it is not clear to use why it is relevant whether Public Participation was facilitated on the underlying original decision. The concern here is on the failure to provide Public Participation on the subsequent decision to extend the duration of the permission.

41. They are in effect two entirely and distinct decisions, requiring assessment, participation and consideration. For example the environmental context has changed since the original decision was made, the cumulative impacts will be different in the new timeframe envisaged for the project, and a new community of public concerned may now be in the area which were not "concerned" before; issues may have arisen with the development which set a context in which any extension needs to be considered. This we submit is what we understand the purpose of Article 6.10 of the convention to be purposed to address.

42. We find it strange that Ireland chooses to focus on the fact that there have been multiple statutory requirements which allowed for extension of duration. For example it highlights that prior to the enactment of s.42 of the PDA 2000, s. 4 of the The Local Government (Planning and Development) Act 1982 allowed for the extension of the duration of an original permission, and notes these provisions would have been in effect at the time of the original 1998 decision granting permission and when it was being consulted upon. In paragraph 91 of its response Ireland states rather bizarely:

> " It was therefore entirely within the discretion of an interested person to make a submission to the planning authority or the Board at the time the original planning application or appeal was being considered, raising concerns about the possibility of an extension of permission"

However there would have been no point in any member of the public concerned taking issue at that point in time about the possibility of an application for an extension in the future as :

> a) It could not be foreseen then at that earlier point in time that the circumstances in which such an extension would be required in the future would arise, or the circumstances which would make it possible to consider it as required under s. 4 of the 1982 act would ever arise, and even the Party concerned points this out in paragraph 85 of their response when arguing that it would not be possible to make a notification at that time of the original application about a possible extension at

some point in the future. However it then appears in para 91 to then expect the public to be able to comment about these unforeseeable circumstances.

b) The context for the environmental concerns in the future would be unknown and the cumulative considerations – so the nature of meaningful comment would be constrained;

c) The nature of any concerns which might arise consequent on the conduct of the original permission could not be known at the point of the original permission;

d) Even if the Local Authority was minded to stipulate in conditions on the permission that no extension to the quarry permission could be granted – such a condition would be likely to be considered to be *ultra vires* – as Irish legislation clearly provided for the right in certain circumstances to make an application for an extension of duration, and the requirement for the Local Authority to grant the extension if the specified conditions were met. S(4)(1) refers of the Act of 1982, and then subsequently s.42 of the PDA 2000 for extensions which fell to be considered until the later enactment.

e) Furthermore the matters on which conditions could be specified by an Authority provided for under s.26(2) of the then operative Local Government (Planning and Development) Act 1963 do not appear as far as we can ascertain any scope for a Local Authority to specify a condition which would prohibit an extension of the duration of the permission in the future, or an application seeking same.

f) Therefore any submission by the public could be to no avail as any attempt to curtail extension would have been ultra vires and contrary to rights provided initially under s4 of the Local Government Act 1982 and then after its repeal with the enactment of the Planning and Development Act 2000, under its s.42 .

f) Finally, having any such comment on file would be to no avail – as the section does not provide the Local Authority with discretion – as if the specified conditions are met – then it "shall" provide the extension. This does appear to be a fatal flaw in the Irish code – particularly in respect of a change to an EIA project as we set out earlier above – where a further EIA screening at the very least should be triggered. However the potential for the extent of extension and the conditions imposed – are within the discretion of the authority and this is in particular where public participation element may have served well.

7. It appears from the facts before the Committee that in 2004 the operator received retention permission to continue quarrying a bigger area then originally licensed in the 1997 permit and submitted an Environmental Impact Statement in that regard. In your submission of 27 March 2015 you state that full public participation was exercised at this point in time. Please provide details of the public participation procedure carried out. Was it apparent to the public who participated in the 2004 procedure that the operating time of the quarry might be automatically extended beyond 2013? If so, please provide relevant documentary evidence of this.

8. It further appears from the facts before the Committee that in 2010 a further extension of the quarry was permitted. In your submission of 27 March 2015 you state that full public participation was exercised at this point in time. Please provide details of the public participation procedure carried out. Was it apparent to the public who participated in the 2010 procedure that the operating time of the quarry might be automatically extended beyond 2013? If so, please provide relevant documentary evidence of this

We re-iterate our commentary in respect of question 6 above. The same principles apply. The Planning and Development Act 2000, repealed *inter alia* the previous Local Government Planning and Development Acts of 1963,1976 and 1982 (Schedule 6 of the Planning and Development Act refers). S 42 to all intents and purposes did the same as the previous s.4 of the 1982 Act – and failed to provide for public participation even for duration extensions for EIA projects either prior to or following Ireland's ratification of the convention.

Similar to the issues we set out above in respect of the regime under the Local Government Act – it would have arguably been ultra vires the Planning Authority to have indicated in the consent that no application could be made in the future for an extension of duration – even if submissions had been made to it in that regard at the time of the original application. Equally the matters on which conditions can be specified are set out in s.34(4) of the PDA 2000 as we understand it – and there is nothing here which would allow a Planning Authority specify a condition which would preclude the granting of an extension in the future. Therefore any advance or pre-emptive submissions in this regard would be in vain.

Ireland appears to be contending on the one hand for some extraordinary far-sighted requirement on behalf of the public concerned, and an equally far-sighted judgement call on behalf of the local authority which both act together to code for an original permission which precludes an extension. However the Authority has no discretion to refuse that extension permission – if the conditions specified in s.42 are met. It only has discretion to limit the extension it deems necessary to complete the works and to impose conditions pursuant to s. 42(2). The issue at stake here is that not only does s.42 fail to provide for public participation in accordance with Art 6 – but it also fails to provide for the ability of the Planning Authority to truly take "due account" of the outcome of the public participation process in accordance with Art 6(8) of the convention and to provide for the public participation procedures for changes to EIA projects as set out earlier above.

Finally, we assume it is not necessary to rehearse the significance of the recent ruling of the court of justice in c-243/15 here in respect of participatory rights,

Observations on Ireland opening and concluding remarks "Whether Ireland considers that change of time constitutes a change of operating activity and a "change or extension" within the meaning of paragraph 22 of Annex 1?" para 109 – 117

We are unclear for the basis for Ireland's further remarks – particularly in this penultimate section which appear to be reverting to address the admissibility argument, and whether the decisions at issue fall within the scope of Article 6 of the convention and despite the Committee's earlier findings to proceed with the communication.

We submit the Party concerned's legislation is fundamentally flawed in providing for the decision to extend the duration of a previous planning permission as purely an administrative decision, and has failed in adhering to its legal obligations arising from the EU's Environmental Impact Assessment Directive, in respect of changes to projects requiring EIA, which are of course thus requirements of its national law relating to the environment.

We submit it clearly falls within the ambit of both Art 6(1)a and 6(1) b, and make these arguments without prejudice to each other.

We dispute Irelands argument in paragraphs 109- 117 with the following.

Ireland in addition to having ratified the Aarhus Convention is of course a Member State of the European Union, and is bound by the obligations arising from its Directives, including Directive 85/337/EC as amended, the EIA Directive, now codified as 2011/14/92[5] . The EIA Directive, was of course amended to reflect and implement the Public Participation obligations and Access to Justice requirements of the Aarhus Convention.

Annex II of that Directive, lists projects which are required to be screened to determine whether they must be subject to Environmental Impact Assessment – given the consideration for likely significant effects on the environment, with respect to obligations arising from Art 2(1) and Article 4 of that Directive. Annex II includes the following class: (emphasis added)

> *"13. (a)* ***Any change*** *or extension of projects listed in Annex I or this Annex, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment (change or extension not included in Annex I);"*

While we would disagree, it might be argued by the Party Concerned that "extension" in the above relates only to an increase in the scope or range of the project – as opposed to an

[5] DIRECTIVE 2011/92/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment

extension in its temporal limits. However, we submit there is clearly no basis to limit the ambit of the phrase "***Any change***" as highlighted in the above class definition. Therefore a change even if just to the duration of the project period is thus captured. So the permissions to extend duration here are captured, and Ireland is failing in respect of screening such decisions and providing for the public participation obligations associated with same.

The underlying developments at issue are one which is subject to the EIA Directive, and required the submission of Environmental Impact Statements from the Developers under national law, and as such is a project indisputably "likely to have significant effects on the environment". Therefore the project falls directly under Art 6(1)b.

Additionally we submit it is captured under Article 6(1)a – by virtue of class 20, as the project characteristics are constant. It is in effect the same nature of project which required EIA in accordance with national legislation when getting its original development consent. Therefore when re-presented for an extension of the duration of that permission – it still is compromised of the same characteristics and would still fall to be determined to be a project requiring environmental impact assessment. Therefore it remains captured under class 20 and is thus a project under Article 6(1) (a).

Finally, and without prejudice to the earlier argumentations, the decision to extend the duration of permission of the developments at issue here, fall within the scope of Article 6(1) b by virtue of class 22 in conjunction with class 20 in Annex I of the Convention – where class 22 provides: (emphasis added)

> "**Any change** to or extension of activities, **where such a change or extension in itself meets the criteria**/thresholds **set out in this annex**, shall be subject to article 6, paragraph 1 (a) of this Convention. **Any other change** or extension of activities shall be subject to article 6, paragraph 1 (b) of this Convention."

The project characteristics are constant regardless of whether it is a first time consent or extension of permission – so the quarry projects at issue here, being a project which in the first instance (at Development Consent stage) required public participation under an Environmental Impact Assessment procedure under national law – it is being a change – it is captured by "Any change" project meeting "the criteria" "set out in this annex" in this case specifically class 20 of Annex 1 of the Convention which includes:

> "20. Any activity not covered by paragraphs 1-19 above where public participation is provided for under an environmental impact assessment procedure in accordance with national legislation."

It is undisputed the core underlying project is one which requires EIA, and the submission of an EIS was necessary for the original underlying consents. So while Ireland may choose to

argue in paragraph 109 that "extension" in class 22 pertains only to the physical /spatial extent of the development, as distinct from an extension of time – we submit that a) we dispute there is any legitimate basis for that interpretation given a purposive approach to an interpretation of the Convention and its objectives; and more irrespective of that – the convention could not be more expansive than when it says "Any other change" in the latter part of class 22. Therefore we submit the extension of duration project falls clearly within the scope of Art 6(1) (a) and (b).

Conclusion

We thank the Committee for its consideration of our remarks and its efforts to assist the Party Concerned toward greater compliance, and to assist our greater understanding of the convention, and we would be happy to clarify anything on request.

Annex I

The New Bill currently being processed by the legislature which provides for at best ambiguity on its provision of PP and screening etc and at worst – none and does nothing in respect of the existing issues with S42(1):

The Planning and Development (Housing) and Residential Tenancies Bill 2016

S. 22. Temporary construction of section 42 (power to extend appropriate period) of Act of 2000

Temporary construction of section 42 (power to extend appropriate period) of Act of 2000

22. During the period from the passing of this Act until 31 December 2021, section 42 of the Act of 2000 has effect—

(a) as if the following subsection were inserted after subsection (1):

"(1A) (a) Notwithstanding anything to the contrary in subsection (1), a planning authority shall—

(i) as regards a particular permission in respect of a development of the type referred to in subsection (1)(a)(i) that relates to 20 or more houses, and

(ii) upon application being duly made to the authority,

further extend the appropriate period by such additional period not exceeding 5 years, or until 31 December 2021, whichever first occurs, but the authority shall only so extend that period where the authority—

(I) considers it requisite to enable the development to which the permission relates to be completed,

(II) is satisfied that the application is in accordance with such regulations under the Planning and Development Acts 2000 to 2016 as apply to the application,

(III) is satisfied that any requirements of, or made under those regulations are complied with as regards the application, and

(IV) is satisfied that in the case of a permission—

(A) where the expiry of the appropriate period as extended occurred or occurs during the period from 19 July 2016 to the date of the commencement of this section, the application is duly made within 6 months of the said commencement date, and

(B) where the appropriate period as extended has not expired on the date of commencement of this section, the application is duly made prior to the end of the expiration of the period by which the appropriate period was extended.",

(b) as if in subsection (2) there were substituted "subsection (1) or (1A)" for "subsection (1)", and

(c) as if in subsection (4) there were substituted "Except where subsection (1A) applies, a decision" for "A decision".