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28th November 2017

Attn. Aarhus Convention's Compliance Committee [ACCC]
FOA: Ms. Fiona Marshall, Secretariat

Re: - ACCC/C/2013/107
Public Participation
Extension of Duration without Assessment

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Dear Ms Marshall

The compliance committee may consider that it has enough information before it to make a determination in regard to case ACCC/C/2013/107.

Notwithstanding, there have been recent developments in Ireland (last week), which further substantiate non-compliance by Ireland with the Aarhus Convention. On reflection I felt obliged to bring these to the attention of the committee. In particular, there have been a number of important legislative and judicial developments since the Committee last considered this communication. If there is any doubt regarding Ireland's non-compliance with the convention here, I would urge you to consider the following points which I hope and believe will assist the Committee in making both its findings and recommendations in light of the most up to date interpretation of the law in Ireland.

Recap

1. The core issue before the committee is whether section 42 of the Planning and Development Acts 2000 to 2016 which provides for extensions of periods of planning permission in certain circumstances is in compliance with the Convention. In particular this Communication alleges non-compliance with articles 6(1) and/or article 6(10) because section 42 excludes public participation and screening of significant effects on the environment irrespective of the nature of the project for which an extension of

duration is requested.

2. The issue of exhaustion of domestic remedies has arisen in Ireland's response to the Communication. While the focus up until now has been primarily on the prohibitive costs of litigation in Ireland, a recent High Court decision of the 21st November 2017[1] also illustrates that standing and scope of review are also problematic for section 42 decisions to the extent that there is no realistic remedy available to challenge the substantive decision under section 42 on environmental grounds or any grounds. This further issue of *locus standi* or standing was also flagged in the submission from the Irish Environmental Pillar setting out the context for issues with domestic recourse in Ireland given issues with inter alia costs and standing and the overall lack of clarity on the scope, timing and application of the cost rules introduced to address certain Aarhus Convention obligations on Access to Justice.

Why section 42 does not comply with the Convention

3. Section 42
    a. Does not allow a public authority to screen an extension application for possible significant effects on the environment in light of the most up-to-date environmental information even in the case where the original permission required environmental impact assessment (**EIA**) or appropriate assessment (**AA**) under the Habitats Directive (or both) or where the environmental context has chenged.
    b. Additionally, there is no opportunity whatsoever for public participation in any such decision.
    c. Furthermore, there is no administrative remedy and the judicial remedy is extremly limited to a residual judicial review of the procedural legality of the decision in a legislative context where the public authority's obligation to grant an extension is expressed by the legislation as being mandatory with limited discretion.

Recent judicial consideration of section 42 and its forerunners

4. A decision of the High Court[2], on 21 November 2017 which concerned an application under section 42 for an extension of the planning permission period for the construction of a new runway at Dublin Airport – re-affirmed several decades of case law on this point. **Crucially this case illustrates that the ratification of the Convention in 2012 by Ireland has failed to influence how extension decisions are made in Ireland**. In summary, the court found that irrespective of the nature of the original planning permission or any changes to the receiving environment[3] that: -
    a. Section 42 is a measure that is solely administrative and mandatory in nature reflecting the fact that permission has already been granted;
    b. The conditions of permission cannot be varied (other than conditions requiring financial contributions);
    c. Once it has established that development has commenced a planning authority cannot take into account provisions of the EIA Directive or Habitats Directive;
    d. A planning authority has limited prescribed discretion when making its decision which primarily concerns factual matters;
    e. The streamlined nature of the procedure and the fact that permission has already been granted means that the legislature explicitly excluded public participation in such decisions;
    f. Compliance with the grant of permission is not a relevant factor in extension decisions;
    g. The EIA and Habitats Directives have not been transposed by Ireland in a manner which permits their application to section 42 decisions and these directives are not directly effective;
    h. Friends of the Irish Environment, an Irish eNGO, did not have standing to bring judicial review proceedings on the basis of Article 11 of the EIA Directive; and

[1] Friends of the Irish Environment CLG v. Fingal Co Co and ors (Barrett J, High Court, 21 November 2017, 201-JR)
[2] Friends of the Irish Environment CLG v. Fingal Co Co and ors (Barrett J, High Court, 21 November 2017, 201-JR)
[3] *Ibid* at paragraph 50

i. Because of this, section 42 decisions do not come within the scope of article 6 of the Convention at all.

5. From the above it is also implicit that there is no administrative review. For ordinary planning permission, a review is possible with by An Bord Pleanála. The scope of judicial review is severely constrained by standing issues and by an extremely narrow residual judicial review of the "limited prescribed discretion" of the public authority decision maker. These are clearly relevant to this Communication.

Legislative history of section 42

6. The Irish planning code has for many decades included a provision which provides for extensions of the period of planning permission. As originally conceived the purpose of an extension was to permit a development where substantial works were carried out to be completed within a reasonable time. To date the maximum extension permissible is 5 years and may be availed of once only (however see below for a proposed amendment permitting a temporary measure allowing a second extension for large housing developments).

7. In the context of the financial crisis, section 42 was significantly amended in 2010[4] so that extensions could be granted additionally for developments where considerations of a commercial, technical or economic nature beyond the control of the applicant substantially militated against the commencement of development or the carrying out of works pursuant to the planning permission. In the case of developments which originally required environmental impact assessment or appropriate assessment or both an extension could only be granted where the development had commenced. In 2012 Ireland ratified the Aarhus Convention. No associated changes were made to section 42 of the Planning Act.

8. In December 2016 the Planning Act was opened to address a number of changes. eNGO's (Environmental Non Governmental Organisations) engaged to try and make s.42 more Aarhus compliant, seeking inter alia public participation, screening and Acccess to Justice provisions. These were rejected. As a partial compromise an amendment to section 42 was enacted[5] but has yet to come into force. This amendment, if commenced, will (a) permanently remove all decisions which originally required an EIA or AA or both from the scope of section 42 and (b) allow for a limited time a second extension of the planning permission period for housing developments with 20 or more houses provided the original permission did not require EIA or AA or both[6]. Clearly this does not go far enough.

9. There was further legislative activity in 2017 where an amendment to the amendment was enacted to allow separate commencements of the permanent removal of all EIA and AA projects from section 42 and the temporary change permitted second extensions for large housing extensions. The Minister stated that the intention was to commence the latter as soon as possible while waiting until developers had an opportunity to adjust before commencing the former.

10. During the passage of this legislation opposition members of parliament were again pressed by Irish eNGOs to move amendments requiring screening for significant effects on the environment and for public participation in section 42 applications. Unfortunately these proposed amendments were again flatly rejected by the Minister. As of today's date the amendment of section 42 has yet to come into force (see the next section for relevant parliamentary interchanges in this respect.)

[4] Section 28 of the Planning and Development (Amendment) Act 2010
[5] Section 28 of the Planning and Development (Housing) and Residential Tenancies Act 2016
[6] We have attached a consolidated version of section 42 produced by the Irish Law Reform Commission showing section 42 and the legislative history including the proposed amendments.

11. Note that these amendments to section 42 are primearily concerend abiout housing and not quarries.

Statements in the Irish Parliament

12. In the debate[7] on the 2017 Act the Minister stated that the reason for further amending the amendment to section 42 was to allow for immediate commencement of the second leg applicable to large housing developments and to postpone the commencement of the first leg which is a permanent exclusion of EIA/AA projects from the scope of the power to extend the period of planning permission. This was, according to the Minister, to give developers time to adjust to the new regime.

13. The Minister also stated that the reason for the amendment to exclude EIA/AA projects from the scope of section 42 whether or not they had commenced was to bring the planning code into line with EU law, stating the following: -

"Specifically, section 28 of the 2016 Act provides: under section 28(1), a permanent change to section 42 of the 2000 Act, providing that extensions of duration would no longer apply where environmental impact assessment, EIA, or appropriate assessment, AA, was required in respect of the original planning permission. That is to bring the planning code fully into line with EU law requirements. Under section 28(2), a temporary change is being made to section 42 of the 2000 Act, providing that a second extension of duration of planning permission could be approved for a development of 20 or more homes in certain circumstances and where development had substantially commenced within the original permission period. It was always intended to commence these provisions separately, as the first was drafted in response to EU requirements, and as is the norm with such new legislative them. Developers need time to consider and comply with the new EU law requirements, and, as the case may be, apply for an extension of duration or a new planning permission. That is the reason I am not commencing this provision immediately but expect to do so by the end of this year. The second provision is more urgent. If a second extension of duration is required to deliver housing that is in short supply, I am anxious that this be acted upon as soon as possible. However, due to the legal construction of section 28 with these two separate provisions, as I have outlined, legal advice received indicates that it is not possible to specifically commence the second provision without also commencing the first. Accordingly, this Bill seeks to allow us to commence this second provision separately, and without delay."

14. During the legislative procedure the proposed amendments to section 42 were scrutinised by Irish eNGOs, who raised issue with the compatibility of the amendments with EU law and the Convention. Concerns were unsuccessfully raised in the parliament around public participation and the need to screen for significant effects on the environment in any application for extension under 42. Deputy Eamon Ryan of the Green party pressed the Minister on this point during the debate leading the Minister to state as follows (emphasis added): *"Deputy Eamon Ryan asked about the relationship between the two provisions in section 28(1) and 28(2). They were always meant to be treated differently. They are two separate things and there was always meant to be a staggered commencement. Section 28(2) was always meant to be commenced almost immediately and section 28(1) was meant to follow at a later date. Section 28(1) has very wide-ranging implications and time is needed for all the stakeholders with regard to infrastructural development to adapt to that, whereas section 28(2) is a simple technical extension to meet an original intention of another Bill that already made its way through the House. I will commence section 28(1) at the end of this year because it is a good section and it is necessary. <u>We recognise that but it is a permanent change for those who required an EIA at the time to the effect that they would require another EIA when they sought a first</u>*

[7] Planning and Development (Amendment) (No 2) Bill 2017: Second Stage 13 July 2017

extension. As it does not apply to second extensions, it does not apply to what we are trying to do here. While section 28(1) and 28(2) are warehoused in the same section, they do not impact upon each other in that regard. If one did not require an EIA at the point of the original permission, one will not require one now when one seeks the second extension. That is all we are doing with this. It applies to developments with a minimum of 20 units or houses requiring a second extension which did not require an EIA at the original point of permission. It will not cover the new fast-track planning scheme. People who get permissions under that new scheme, which only came into effect very recently, will be allowed to get a first extension but by the time they need to go for a second extension, this will have fallen out of law. The second extension will not apply to them. We became aware of the need to be in compliance or more in synch with EU law at the end of 2014 and the beginning of 2015. It is no big concern on the EU side; the concern is more on our side that we would be in synch with EU laws. The normal period for implementation would be one year and that is why we are commencing it at the end of this year. I thank Deputies O'Dowd and Mattie McGrath for their support of the Bill.

15. Clearly this indicates that the Ireland is aware that section 42 is not in compliance with the EIA Directive and therefore also not in compliance with the Convention. Notwithstanding the Minister's statement, **the relevant amendment of section 42 has still not been commenced**. There is no indication that the Minister intends to do so before the end of the year as originally indicated nor does the justification for non-commencement make sense.

16. The second issue is that the Minister flatly rejected a proposed amendment that would have obliged screening for significant effects on the environment to be conducted as part of any extension application so that changes in the receiving environment could be taken into account in the new decision. Amendments requiring public participation and access to justice measures were also rejected.

17. All of this, it is submitted, shows that Ireland is well aware that section 42 does not comply with the Convention (at the very least through the implementation of EU law) and that although it has taken some steps to partially address this non-compliance, Ireland remains non-compliant.

18. That said, I understand tht the proposed amendment to section 42 also failed to provide for consideration of compliance issues having regard to an existing development and to proscribe extension of duration in circumstances where there had been previous non-compliance (one of the issues in ACCC/C/2013/107 whey the local community needed to have their say to bring such issues to the attention of the authorities, but were excluded from doing so).

19. It should also be noted that in the recent *Friends of the Irish Environment* case, the Court found that domestic rules precluded the admissibility of parliamentary statements in Court proceedings and so the Court did not consider the statements quoted above or their implications.

Exhaustion of domestic remedies

20. I would refer to the extensive information already provided to the Committee in relation to the costs of environmental litigation in Ireland and whether or not evidence of the costs of a particular litigation is confidential. Without prejudice to my right to introduce other evidence of the costs of proceedings I believe it will be helpful and wise to refer the Committee to the recent opinion of Advocate General Bobek in *North East Pylon Pressure Campaign and anor v. An Bord Pleanála and ors*[8] and the observation that the costs in that Irish case were **€513,000** for four days of hearings solely on the issue of whether the applicant would be permitted to bring judicial review proceedings. The hearing on the issue of who should pay the costs took up a further two days of court time involving four separate legal teams[9].

[8] Case C-470/16 Opinion of AG Bobek 19 October 2017 paragraph 24
[9] *Ibid* paragraph 24

21. There is no need to rehearse the extensive points already made although my desire is that this Communication should not be about prohibitive costs since this matter is before the CJEU and the Committee in another communication. I would simply point out that it has already been well acknowledged that the common law rule that costs follow the event means that Irish environmental litigation is *prima facie* prohibitive[10].

22. In response to this Ireland introduced special costs rules for litigation concerning EIA and for litigation pertaining to compliance where lack of compliance has caused, is causing or is likely to cause damage to the environment[11]. By definition, therefore any litigation falling outside the scope of these special costs rules is prohibitively expensive. On the basis of the findings in the recent *Friends of the Irish Environment* case cited above, challenges to decisions under section 42 do not fall within the scope of the special costs rules and is therefore by definition prohibitively expenses.

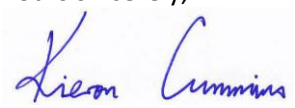
23. To this I would add that the decision in the recent *Friends of the Irish Environment*, "FIE" case indicates that a domestic remedy simply does not exist in respect of the substantive section 42 decision due to the lack of public participation generally.

Conclusion

In conclusion it is submitted that by not providing for screening and if necessary for the application of the measures in articles 6(2) to 6(9) (whether via article 6(1) or 6(10)) in decisions on applications for the extension of the duration of planning permission under section 42 of the Planning and Development Act 2000 to 2016, Ireland is not in compliance with the Convention and in particular articles 6 and 9 of the Convention.

I trust the above update will be useful and helpful to the committee. It remains only for me to thank the Committee for its effort and commitment on this and other compliance matters, and to assure you that I am happy to clarify any of the above if necessary.

Yours sincerely,



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[10] See for example *Commission v. Ireland* Case C-427/07 and *Edwards and Pallikaropoulos* Case C-260/11

[11] Section 4 of the Environment (Miscellaneous Provisions) Act 2011