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Re. Public Consultation on the Implementation of the UNECE Aarhus Convention and PRTR Protocol in Ireland

An Taisce welcomes the opportunity to comment on the implementation of the Aarhus Convention in Ireland. We wish to make the following observations on the Draft National Implementation Report (NIR).

1. Concerns Regarding Recent Legislation

The Aarhus convention sets out rights for the public to a process which is fair, equitable, and timely, and Article 9(3) in particular, which requires States to "*ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.*"

Article 9(4) then specifies that this shall include: '*adequate and effective remedies, including injunctive relief as appropriate, and be fair.*' The Aarhus Convention delineates the right to public participation and access to justice in the planning process and stipulates that such participation should not be "*prohibitively expensive.*"

An Taisce would like to raise serious concerns regarding two recent legislative attempts to restrict public participation and access to justice in the planning and forestry consent processes. We consider these to be in breach of Article 9 of Aarhus and that they should therefore be addressed in the National Implementation Report.

1.1 Housing and Planning and Development Bill 2019

The Housing and Planning and Development Bill 2019, the Heads of which were released in late 2019, attempted to restrict the ability of ordinary citizens and environmental NGOs to take a judicial review (JR) on planning decisions which they view to have potentially

[redacted]

negative environmental consequences. Through several amendments, the Bill aimed to significantly curtail which members of the public may take a legal challenge, place arbitrary and restrictive thresholds on which organisations qualify as environmental NGOs, and significantly increase the financial exposure for qualifying members of the public and environmental NGOs who wish to take a legal challenge. An Taisce considered this to be a significant erosion of the public's right to access justice and participate in the Irish planning process and a significant Aarhus breach.

Though these amendments have not yet progressed due to the dissolution of the last Dail, we are given to understand it will be brought before the Oireachtas again in the near future. The amendments also appear to have influenced the framework of the forestry legislation discussed in the next section.

The proposed Planning Bill would introduce a requirement for NGOs to have existed with a "distinct legal personality" (having articles of association, etc.) and have worked towards stated environmental objectives for a minimum for three years before being eligible for standing to take JR proceedings. As such, it would prevent recently established NGOs concerned with local environmental issues from bringing legal challenges. This is particularly problematic for local, citizen-led groups who may have only recently formed due to perceived controversial developments going through or about to go through the planning process.

The Heads of Bill also proposed that an NGO must have at least 100 members in order to take a JR, a provision which appeared to be completely arbitrary and lacking in justification. Such a restriction would exploit a capacity issue at most Irish NGOs and would rule out the vast majority of Irish environmental groups from bringing challenges, even when considering national environmental NGOs and foundations. It would also exclude many local, citizen-led environmental organisations from being able to act.

As the law currently stands, a potential litigant must prove that they have a "sufficient" interest in the case in order to be granted leave to take a JR. The proposed Bill would have amended this to "substantial" interest, a much stricter requirement, and a roll back on amendments to the Planning and Development Act, which were recently implemented to bring Irish legislation in line with European Directives and Aarhus. As such, the would-be challenger would have to prove that the development impacts them directly, and in a personal and peculiar way.

The proposed new cost rules would expose individuals and groups to significantly higher legal costs if they lose in court, and create uncertainty on costs from the start. As such, it would become much harder for people and groups to hire a legal team without having to

significantly finance it themselves. The new system outlined in the Heads of Bill would impose a cap on costs for adverse rulings of €5,000 for individuals and €10,000 for groups. We consider this to be prohibitively expensive, particularly for organisations that may need to take several cases in order to fulfil their objectives of protecting the environment from problematic planning decisions.

To date, the Government has not provided any substantive justification of these proposals or an analysis of the amendments' Aarhus compliance.

1.2 Forestry (Miscellaneous Provisions) Act 2020

This Act is similarly problematic in regard to compliance with Aarhus, but even more crucial given it has been enacted and is live legislation.

1.2.1 Introduction of fees

The Forestry (Miscellaneous Provisions) Act 2020 very much undermines the provisions of Aarhus Article 9 discussed above, restricting the ability of the public and environmental NGOs to appeal the granting of forestry licences.

The Act introduced fees for making submissions and taking appeals. We would highlight that, in the case of forestry, multiple licences and licence decisions could occur within a short time frame in the same area, unlike the situation in urban planning, where applications are more infrequent. This could render the submission and appeal process prohibitively expensive and would in effect deprive many of their right of public participation and their right to an administrative review, in light of Article 9 of the Aarhus Convention and Article 47 of the Charter on Fundamental Rights of the European Union. This Act rebalanced the favour away from the public, by limiting who is entitled to challenge the decisions.

This cannot be considered to be 'fair', given that the aim is to restrict who of the public is entitled to access justice. The new fees provide anything but equity for individuals and resource-limited eNGOs, when faced with dozens, if not hundreds of problematic forestry decisions per year. It would be all but financially impossible for many stakeholders to fully engage with the decision making process. As such, An Taisce submits that this new legislation is clearly contrary to the requirements of the Aarhus Convention.

1.2.2 Publicly accessible information on license decisions

In addition to charging for submissions and appeals, the Forest Service is also charging members of the public to have access to decision files. An Taisce recently requested the decision files on a felling decision from the Forest Service and were told:

> *"There is a fee of €20 per submission for each file listed below. I have included an extract from the Regulations for your information. See text in italics below.*
>
> *Forestry Regulation 417/2020 introduced with effect from the 7th of October 2020, introduced a charge for submissions and appeals. Section 2 of the regulation defines submission as any communication received in accordance with Section 10(4) of the Forestry Regulations.*
>
> *Section 10(4) of Forestry Regulation 191/2017 states:*
>
> *The public may make submissions or observations in writing concerning the application to the Minister within 30 days from the date of publication of the notice or whatever longer timeframe is set out in the notice, and where additional information is published, at least 30 days from the date of the publication of that information."*

The department is clearly classifying access to decision files as 'submissions', running counter to the requirement of the Aarhus Convention which requires access to justice and public participation. The legal obligation for this has been established in the obligations in respect of the decision clarified by the CJEU in C-75/08, *Mellor* and C-280/18, *Flausch*

Article 7 of Directive 2003/4 on access to information on the environment requires that the information relating to the application and determination should be available for inspection online. These provisions inform the proper interpretation of the Habitats Directive (1992/43), EIA Directive (2011/92), and Birds Directive (2009/147) and the legislation implementing them which includes the Forestry Act and regulations made under it. This is not currently the case in respect of felling licences, and to date the same information on afforestation decisions has only been available on request, but not freely publicly available.

A meaningful review of Ireland's Aarhus compliance should include evaluations of these two pieces of legislation. This is particularly important in cases such as these where it is a matter of public record that their compliance with Aarhus was questioned in the public consultation and pre-legislative scrutiny phases.

2. Implementation Gaps

2.1 The Planning Process

The Draft NIR rightly details the multiple provisions in the Planning and Development Act 2000 (as amended), the Planning and Development Regulations 2001 (as amended), etc. that uphold and operationalise the right to public participation and access to justice in the planning system. However, based on our experience as a prescribed body, An Taisce would highlight that a gap exists between the legal requirements and their implementation on the ground.

For instance, per Article 29 of the Planning and Development Act and as noted in Section XV of the Draft NIR, public submissions can be made on planning applications for a period of five weeks from the date the application is received by the Local Authority. While the documentation for any given application should be publicly available for the duration of that period, An Taisce has found that this is frequently not the case. Documents are often not uploaded to the Local Authority planning websites in a timely manner, labelled vaguely or mislabelled, uploaded in an unsearchable single document, scanned at low resolutions making them illegible, or scanned as images and therefore unable to be read by text readers for those with visual impairments or other accessibility needs. Some Local Authority online planning viewers are also not cross-browser compatible, making documents inaccessible to people whose computers do meet the required specifications. The need for documentation to be easily accessible online has been highlighted by the Covid-19 crisis where it is even less possible or practical for members of the public to visit Council offices to view hard copies.

Statutory Instrument 180 of 2020 was introduced in May 2020 requiring Local Authorities to publish all documents associated with a planning application on their planning websites within five days of the application being lodged. While this has improved the turnaround time for many Local Authorities, we would note that some are still not sufficiently resourced to be able to upload documentation in a timely, accessible manner.

We would also note that many planning referrals made to An Taisce in our capacity as a prescribed body are not made until days before the five week period expires.

An Bord Pleanála faces similar implementation challenges. They cannot accept online payment for submissions, thereby forcing those making comments to either hand deliver their submissions (impractical for most people living outside of Dublin) or post them enough in advance of the deadline to ensure they arrive on time as submissions postmarked on the

deadline date are not accepted. This effectively shortens the timeframe available for public comments.

An Bord Pleanála's website is also ill-equipped to make documents easily accessible. For example, it does not upload appeal documentation, instead directing people to Local Authority websites. An Taisce has frequently found that appeal documents are not uploaded to Local Authority sites or uploaded inaccessibly as discussed above, leaving potential observers unable to view the grounds of appeal.

2.2 Access to Information on the Environment

An Taisce considers that implementation gaps also must be addressed with respect to the provisions for Access to Information on the Environment (AIE).

The Office of the Commissioner for Environmental Information is currently under-resourced, and this frequently results in the need for extensions to AIE decision appeals. Environmental information is often needed to inform policy submissions or significant planning cases, and therefore its timely delivery is essential. Furthermore, information provided in response to AIE appeals generally only covers the time period up to the date of the initial request and not the intervening period between that and final response. This can be problematic when there is a delay in the delivery of the information and where the situation about which information was requested has changed. An Taisce therefore submits that the NIR should review these issues and comment on plans to ensure the full resourcing of the Office of the Commissioner.

3. Recent Court Judgments

We would highlight the Supreme Court's judgment of 1st July 2020 in relation to the provisions for Substitute Consent (Supreme Court Record Nos. 9/19, 42/19 and 43/19). The cases queried the legality of the provision by which an applicant could seek leave to lodge a substitute consent application via internal communication with An Bord Pleanála in a pre-planning process that is not subject to public consultation. The judgment held that the lack of provision for public participation at the leave application stage for substitute consent does not comply with the public participation rights laid out in the EIA Directive and the Aarhus convention. We recommend that NIR address this and review the current legislative attempts to address this judgment.

4. Brexit

The Draft NIR does not address the post-Brexit implementation of Aarhus with regard to transboundary environmental issues impacting both the Republic of Ireland and Northern Ireland. An Taisce would therefore like to query what policies and cooperative arrangements will be put in place to ensure Aarhus implementation, access to justice, access to environmental information, and public participation in relation to transboundary issues now that Northern Ireland is no longer bound by European Directives.

Please acknowledge our submission and advise us of any further consultation periods.

Yours sincerely,