Submission to the

Consultation response on Draft Action Plan from Ireland to comply with Decision VII/8i

Version Final May 10th 2022

From: [redacted], Environmental Law Officer, IEN

Introduction and overarching remark:

This submission has been prepared by the Environmental Law Officer of the Irish Environmental Network, the coalition on national eNGO's in Ireland. However it does not necessarily reflect the views of the IEN or it's individual members, while they may share them in whole or in part.

I firstly wish to acknowledge the work done by the Department in preparing this draft plan, and for their engagement with the compliance mechanism of the Convention – which is most appreciated.

I also wish to welcome this consultation on the draft action plan from Ireland to respond to finding's of the Aarhus Convention Compliance Committee, ACCC, of non-compliance with the Convention against Ireland, and the decision in that regard in respect of three communications which was adopted by the Meeting of the Parties to the Convention, MoP . This all follows on from many years of engagement of communicants, observers, Ireland as the Party Concerned, and of course the ACCC and the diligent assistance of the secretariat to the compliance committee, the Aarhus Secretariat, and the important oversight of the Parties to the Convention.

However, at the outset it must be said it is very regrettable that the action plan has been developed it seems in isolation and absent engagement with the communicants, and observers to the process and other stakeholders who could have provided insight on suggestions on the preparation of this draft. Instead it has it seems been solely developed with and by the establishment.

While this consultation may serve to mitigate against this to some extent – the opportunity for a robust collaborative response and constructive engagement and active dialog and consideration has been lost, or at least has been severely compromised.

The timeframes available to rectify what are in fact very serious failings in the action plan, before it needs to be submitted by 1 July 2022, are now challenging. This is particularly given the need to implement that response by Oct 2022 – and all the timeframes helpfully indicated in the document prepared by the ACCC: *"Preparing the plan of action Information note by the Aarhus Convention Compliance Committee, February 2022".*

Therefore following on from the constructive engagement I have endeavoured to provide on these matters throughout - a core recommendation in this submission is to:

- Provide for opportunities for constructive dialog and discussion with key stakeholders and communicants to resolve serious issues with the proposals in the draft action plan, in order to build a participative approach to robustly resolving the issue of non-compliance prior to it's submission.

This is particularly necessary given that the detail of some of the legislative changes have only come to light and detailed scrutiny during this consultation. Therefore it is not possible in this consultation response to specify in detail alternatives, or to explore fully the rationale for such a limited and problematic changes, or to understand the rationale behind the vagueness of other legislative proposals. These concerns are set out further below in a very brief highlevel commentary on the actions proposed in respect of each of the three communications in turn, and I would very much welcome an opportunity to engage further to assist any clarification necessary on these concerns and to explore changes needed

Each of the sections in the document is commented on below with a view to constructively assisting Ireland develop not just a robust action plan but in becoming compliant, in the spirit of it's full ratification of the entire Aarhus Convention. *

Comments on A "Description of the process by which the plan of action has been prepared"

It is noted that an unspecified list of stakeholders were notified of the consultation, and I wish to express appreciation for that as an active observer on a number of these communications. However given the significance of the consultation repeated and further publication by the Department on the consultation would have been welcome.

It is also welcome that this section A "Description of the process by which the plan of action has been prepared" does envisage the draft would be changed following the consultation – albeit in respect of communication ACCC/C/**/107 – it presents the response as being effectively completed. As will be clear from below – the most serious concerns arise in respect of the legislative changes made, and other issues arise in respect of the narrow view of complementary measures specified and the actors who will be engaged, and the vagueness and inadequacies of some of the other legislative changes proposed for other communications.

It is therefore recommended that:

- This section is updated to reflect the overarching recommendation above – and be amended to add something along the following lines:

> "Following the consultation – further active dialog and engagement with Stakeholders and the Communicants was conducted in order to discuss concerns and to facilitate constructive engagement to resolve issues and concerns in the action plan and to share perspectives with a view to building a robust participatory approach to Ireland's action plan to bring it into compliance."

Comments on B. General character of the measures that will be needed to implement the recommendations in the MoP decision"

The only measures detailed are "Legislative measures" and "Training to public Authority Officials"

It is **<u>very disappointing</u>** and indeed not appropriate that the implementation measures in no way reflect any outreach or measures touching on the wider public and the public concerned, communicants and eNGOs, and other stakeholders such as developers and the Courts. The non-compliance issues have served to impact and compromise on rights under the Convention and it is important that if and when rectified the "rights holders" are appraised properly and encouraged to take up their rights.

It is therefore recommended that:

- This section is updated to reflect further measures in respect of communication and outreach to the public and other stakeholders so they are aware of the changes and the implications for their rights and a comprehensive communication, awareness, guidance materials, website updates and appropriate training materials prepared etc
- To support the specification of these further outreach and education measures – it will be important to consult further as proposed in the overarching recommendation above.
- The detailed measures specified for each of the communications will also need to be updated accordingly. It is not intended in this submission to reflect this recommendation in respect of each of the communications and it should be taken as read.

This recommendation is entirely consistent with the expectation outlined in the ACCC's information note in respect of point 2 of its section C – Detailed plan of action where it prompts consideration of practical measures taken to implement the recommendation.

It is also very disappointing that there is no proposals in respect **of monitoring and evaluation of the changes proposed, or on the efficacy of the measures proposed**.

It is therefore recommended that:

- This section is updated to reflect further measures in respect monitoring and evaluation of the changes proposed, or on the efficacy of the measures proposed.
- The detailed measures specified for each of the communications will also need to be updated accordingly. It is not intended in this submission to reflect this recommendation in respect of each of the communications and it should be taken as read.

It is also very disappointing that there is **no consideration at all of remedies required for the serious breaches of rights and environmental impacts associated with that**. I fully appreciate this is complex, and that in general terms the compliance mechanism's focus is forward looking. But I recommend

- In the proposed dialogs - further detailed consideration should be given to the issue of remedies required as a consequence of the failures occasioned through the non-compliances.

In this regard I would highlight that Ireland's obligations to remedy failures in respect of non-compliance with obligations in respect of EIA and Appropriate Assessment and the remedies required – arise as an EU law duty irrespective of the Aarhus Convention and therefore for completeness this should be considered or at least cannot be disregarded in the overall context of Ireland finally moving to solve these issues.

Comments on C Detailed plan of action.

These first comments pertain to the ACCC' findings and recommendations[1], and the responses to the recommendations detailed in the action plan in respect of ACCC/C/**/107.

For reference given it's importance the finding is set out here:

> "94. The Committee finds that, by failing to provide opportunities for the public to participate in the decision-making on the 2013 permits to extend the duration of Trammon quarry, the Party concerned has failed to comply with article 6 (10) of the Convention. Moreover, the Committee finds that, by providing mechanisms through which permits for activities subject to article 6 of the Convention may be extended for a period of up to five years without any opportunity for the public to participate in the decision to grant the extension, section 42 (1) (a) (i) and (ii) of the Planning and Development Act 2000 do not

[1] https://unece.org/fileadmin/DAM/env/pp/compliance/CC-65/ece.mp.pp.c.1.2019.9.e.pdf

meet the requirements of article 6 (10) and thus the Party concerned fails to comply with article 6 (10) of the Convention"

The various legislative changes associated with section 42 of the Planning and Development Act and the response to the communication have been torturous to follow, given the complex manner of how they have been made, sometimes not initiated for some time, over-written etc.

In my various observations on this communication – this has been documented already and it is not intended to rehearse that here, particularly given a new set of legislative responses has been developed rendering some of those earlier ones redundant.

However – what is clear is that the approach has been throughout entirely unsatisfactory both in how the proposals were developed, in terms of the level of confusion and lack of clarity in the overall legislation governing extensions of duration, and in their failure to respond adequately to the compliance issue at the heart of this communication.

Regrettably this latest set of changes is no different. It came as a surprise to many I expect interested in such matters in the wider public – that a whole range of further changes have been made, notwithstanding a late update to the ACCC by Ireland in October 2021. This is particularly because they have been made through regulations including to change primary legislation, and regulations changing regulations. Therefore the came without the Oireachtas oversight associated with primary legislation.

Given the extent of Planning Legislation which the Government pressed through the Oireachtas over the period this is disappointing, particularly as it would seem that questions may well arise as to the legality of the changes made to primary legislation through Statutory Instruments – a point to which I return below. Also given the lack of clarity on an overall legislative approach it has been also impossible to determine at points in time whether the legislative strategy was in fact changing, and a different path being followed particularly given the controversial introduction of s.42B and it's implications, and the failure of Ireland to communicate this as I highlighted in my observations in June 2021.

The action plan now sets out the actions as work done, rather than legislative changes to be made, and details the current legislative context. For ease of reference the Law Reform Commission's informal consolidation up to 17 Dec 2021 of the Planning and Development Act is referred to here[2], having checked it against the underpinning legislative changes.

It also must also be said it is very disappointing that the Department did not see fit to provide links to consolidations to assist the public on the changes made given the torturous path there has been to the current version of s.42 and the new s42B, and the difficulties of navigating that through the IrishStatueBook.ie website, and the absence of a consolidation of the updated Birds and Habitats Regulations – the original version of which is SI 457*/2011. Also the circulars provided to the Public Authorities were not included as part of the consultation – to either be commented upon, or indeed to assist understanding of how all these various changes work together / or indeed don't

But even more fundamental concerns arise in respect of the changes as set out below.

I wish to highlight at the outset that in responding to some of the issues set out below the Department may seek to rely on. S.I. No 457/2021 – European Union (Planning) (Habitats, Birds and

[2] https://revisedacts.lawreform.ie/eli/2000/act/30/revised/en/pdf?annotations=true#page=258

Environmental Impact0 (No. 2) Regulations - https://www.irishstatutebook.ie/eli/2021/si/457/made/en/print

However, without prejudice to the view that issues still exist notwithstanding SI 457/2021, I wish to emphasise **the message which comes across when you look at s.42 <u>of the primary legislation</u> of the Planning and Development Act,** and the lack of clarity in that section around any further requirements of the Planning and Development Regulations and the extent to which they do or do not suffice to make clear when an extension of duration of a planning permission cannot happen under s.42 of the Planning and Development Act given the public participation required which is not provided for in the s.42 process. This is a particular issue given the lack of briefing to the public – but regardless the legislation should be sufficiently clear on its face to avoid confusing the public on their entitlements and rights under the Convention.

The overall effect of the current status of s.42 of the PDA can be seen in the LRC consolidation here: https://revisedacts.lawreform.ie/eli/2000/act/30/revised/en/pdf?annotations=true#page=258

with the associated explanatory F and C notes on the legislative changes involved

The changes to s.42(1) given the other parts of s.(42) deleted etc now operate to the effect that only one check in respect of public participatory obligations is provided for in s.42, and that is through the new subsection 8 in s.42 which provides as follows:

> "A planning authority shall not extend the appropriate period under this section in relation to a permission if an environmental impact assessment or an appropriate assessment would be required in relation to the proposed extension concerned."

It is not intended to rehearse here the set of legislative changes which has given rise to this – but I wish to highlight that SI 456/2021 – expressly deleted ss 42(1)(a)(i)(II) which expressly checked for the EIA and/or AA requirements for the original application, and this is highlighted in the F notes, see F371 in the LRC version.

Then, the language in the newly added ss(8) for s.42 is at best ambiguous, but it implies that the consideration for PP is **only made in respect of the extension to the project**.

Therefore it seems that s.42 now fails to unambiguously and clearly consider the original nature of the development and where EIA and/or AA were required for the original project, and thus fails to comply with the requirement of Article 6(10) of the Convention which provides: (bold emphasis added)

> "Each Party shall ensure that, when a public authority reconsiders or updates the operating conditions **for an activity referred to in paragraph 1**, the provisions of paragraphs 2 to 9 of this article are applied <u>mutatis mutandis</u>, and where appropriate. "

It is therefore clear from the Convention – that the original character of the activity must be considered when revisiting a permission. But the new s.41 now fails to do, and a very, very serious gap would appear to arise, between what the convention envisages as triggering public participatory requirements and what s.42 now provides for consequently.

Additionally also the entire character of the project/activity needs to be considered at the point where an application to extend the duration of the activity is made, and ss.8 appears to try to limit this to the consideration of the impact of the extension only. It is not even clear from the ambiguous

wording if the intention is to try to limit the consideration to just the impact of there being a temporal extension and the activity within that extended timeframe space.***

Again the reflections of the Hon Mr Justice Simons in the LNG case ** highlighted why there could not be a default approach to the scope of the project what needed to be considered in a screening determination for AA when considering extending the duration of a permission.

So in order to correctly determine the public participatory requirement both the historic and current character of the project need to be considered in terms of Article 6(1), and that means the effective screening determination required on participatory requirements needed under both Article 6(1)(a) and also 6(1)(b). The legislative approach in the action plan does not appear to address this.

Moreover the reliance on consideration of classes of project as opposed to impacts of the projects in the changes made to the Planning and Development Regulations through SI 457/2021 – further compounds the approach in the PDA. (Consider the fact that it was ancillary development to a project which triggered EIA requirements in case – not the project class itself).

Furthermore, the changes to SI 457/2021 in respect of EIA seem to relate only to screening for Part 2 of schedule 2 so non-mandatory EIA and there are multiple other issues with these regulations which I would be happy to elaborate on in a dialog where the Department clarifies what is the legislative intent and strategy to deliver on a solution where either Public Participation is provided for, or projects/activities which trigger such requirements under the Aarhus Convention are not allowed have extensions of duration of their permissions under s.42 of the PDA.

The approach Ireland has taken has been to try to make extensions to durations an administrative exercise, and therefore moved to prohibit extensions where public participation was required.

However it seems clear this has driven it also to try to take the narrowest view of where participation is required. It has used a proxy of EIA and AA to determine that. I submit that is not sufficient to accord with the Convention Article 6(1)(a) and also 6(1)(b). The scope of the Conventions Annex 1 projects/activities which need to be considered under Article 6(1)(a) is of course not fully covered by the EU's EIA Directive, and Appropriate Assessment does not adequately cover the scope of activities & project falling within Article 6(1)(b), particularly given the deficiencies in consideration of sub-threshold EIA projects for likely significant effects, and certain transposition issues in SI 296/2018* of the EIA Regulations for Planning.

Also a question of legality of the changes relied upon in the action plan and the current status of the legislation presented within it for this communication also arises. This is consequent on the use of secondary legislation to amend primary legislation – where it has served to reduce and/or change the implementation of EU law rather than merely deliver on mandatory requirements of EU law. The limitations of the use of the European Communities Act 1972 were well aired and considered in the context of the changes to legislative requirements on peat by the Hon Mr Justice Gareth Simons in Friends of the Irish Environment ***. So this is a further serious concern.

Further issues also arise in respect of information, publication etc of the determinations to be made under ss(8), and the provisions of i.a. SI 457/2021 and the new regulation 46A it inserts into the Planning and Development Regulations. However, it is not intended to overly consider these here given the more fundamental discussion and rework needed to the approach in s.42 in order to bring it into compliance with the Convention and to address the recommendation in para 4(a)(i) of decision VII/8i from the MoP. *

Circular Letter: EUIPR 01/2021 provided by the Department of Housing Local Government and Heritage to Public Authorities is very carefully caveated stating:

“Please be advised that the above synopsis of the new legislative provisions has been prepared by the Department for ease of reference only and does not purport to be a legal interpretation of the legislation, which is a matter for planning authorities, in the first instance, and ultimately a matter for the Courts.”

I note this circular was provided to the ACCC in October 2021. Nothing equivalent has been put out to assist the public in this consultation or indeed to assist them in coming to grips with the new legislation and changes, and the multiple elements of them.

Given the complexity in following the legislation – sentences such as the following in the circular serve to further entrench the issue that it is the effect of extension which is being considered alone eg

> “In particular, AA screening and EIA screening (for extension applications that do not equal/exceed the EIA thresholds) shall now be required for all applications for extension of duration, including applications for further extensions under section 42(1B) as referenced above.”

Clearly a project may or not require EIA or AA originally, but overtime environmental circumstances and other factors may change and when revisited it may require either or both. The original and evolved context need to be considered, and it is not merely consideration of the impact of the extension, but the historic and current context and impact of the project which needs to be considered when determining public participatory requirements.

The changes made through SI 456/2021 to s.42 of the Planning and Development Act, PDA and the further requirements in the Planning and Development Regulations through SI 457/2021 and elsewhere – fail significantly to address compliance with the public participatory obligation under Article 6.10 of the convention which is the core issue in the findings as set out below – and it is that context the recommendations need to be read.

A. Main findings with regard to non-compliance

94. The Committee finds that, by failing to provide opportunities for the public to participate in the decision-making on the 2013 permits to extend the duration of Trammon quarry, the Party concerned has failed to comply with article 6 (10) of the Convention. Moreover, the Committee finds that, by providing mechanisms through which permits for activities subject to article 6 of the Convention may be extended for a period of up to five years without any opportunity for the public to participate in the decision to grant the extension, section 42 (1) (a) (i) and (ii) of the Planning and Development Act 2000 do not meet the requirements of article 6 (10) and thus the Party concerned fails to comply with article 6 (10) of the Convention.

If I have failed to understand the effect of the changes – I know I am not alone in this regard, and that my concerns are shared. This is therefore an indication on the need for further action to simplify

and make the legislation clearer and to also provide additional supports on the effect of changes so they can be implemented and leveraged appropriately.

As set out earlier – there is a need for complementary measures and a need to monitor and report on and react to the efficacy of the changes and the measures adopted, and this should be explicitly detailed in the action plan. The Actors involved needs also to include the Department of Environment, Climate and Communications, DECC, given it's overarching responsibility for the Aarhus Convention. It cannot leave this matter to the discretion of Dept of Housing Local Government and Heritage, HLGH, as that would be to abrogate DECC's responsibility, and be a failing in supporting HLGH in ensuring Ireland finally moves towards compliance on this matter, in circumstances where HLGH has wholly failed to respond in appropriate timescales.

I would also urge the Department to consider in time a much more proactive response – for example as highlighted in observations on ACCC/C/2013/107 – there are multiple other sections in the PDA which have the same and similar issue as s42 and these also need to be addressed in the sprit of a Party who has fully ratified the Convention, and where participation rights are compromised when revisting permissions, and the focus should not just be limited to Planning.

Comments on action plan for 4(b) and 4(c) of Decision VII/8i (ACCC/C/2016/141 and ACCC/C/2014/112)

Given limitations of time – some brief remarks are made here in the hope that the Department will pursue the recommendation of a constructive dialog to advance the details and specification of the draft action plan.

In respect of both paragraphs 4(b) and 4(c) of Decision VII/8i pertaining to these two communications in decision VII/8 - the same sort of comments in respect of the need to stipulated further actions and actors in respect of monitoring, evaluation, reporting on the efficacy of the changes and measures made in respect of the other communications stand here also.

Also in respect of the actions indicated for both of these paragraphs, there is no indication of any complementary implementation measures to communicate to the wider public the proposed changes once made to the AIE regulations in respect of new deadlines, and clarifications on rights to cost benefit analysis and obligations on the Courts. The public and other key stakeholders need to be appraised so they are in a position to be able to leverage their rights.

<u>Specifically then in respect of Par 4(b) (ii) of decision VII/8 – ***(ACCC/C/2016/141)***</u>

- It is very disappointing that the measures indicated again are so limited in scope being a legislative change only.
- Additionally they are entirely vague and only indicate a specific deadline will be included in the updated AIE regulations – there is no indication at all what that timeframe/deadline would be
- There is no discussion or indication of what considerations will informing the specification of that deadline.
- Very particularly there is no indication of or what other changes or wording would be used to ensure that the public's rights to participation or access to justice are not impacted

through a delay in accessing information. This was a core point made in the observations including the lead up to the ACCC's draft report on progress to the MoP. AIE is often not an end in itself and the timeframes for them to support the interplay within the pillars of the convention need to be compatible with other environmental decision-making processes as they are implemented in Ireland, and how ultimately compliance with Article 3(1) of the Convention will be assured and supported through this deadline.

- There is no discussion on the outcome of the consultation on the AIE Regulations or any wider context for the changes proposed within those regulations following on the consultation.
- There is no indication of what the legislation will provide for if the deadline is not met.
- There is no indication any complementary measures or changes to ensure that this deadline will be adhered to – for example

    There could be greater requirements on proactive dissemination so less AIE requests are necessitated, refused and appealed in the first instance, thus reducing the burden on the OCEI.

    There is no indication on additional resourcing to ensure the deadline will be met, particularly if faith in the process improves and the volume of appeals goes up.

<u>Specifically then in respect of Par 4(b) (ii) of decision VII/8 -</u>

The action plan fails to respond to the issue in the findings around the Court's failure to provide direction. Ireland needs to go beyond any perceived limitation in the Recommendation to address the failure identified in para 133 (b) of the findings which stated

> "133…
>
> (b) By maintaining a system whereby courts may rule that information requests fall within the scope of the AIE Regulations without issuing any directions for their adequate and effective resolution thereafter, the Party concerned fails to comply with the requirement in article 9 (4) of the Convention to ensure adequate and effective remedies for the review of environmental information requests."

So the non-compliance issue lay in the failure to provide direction – rather than in complying with the Court's direction. The recommendation is non-binding – but the compliance failure is absolute and is what must be addressed. The actions proposed in the draft action plan has focused on compliance with the Court's direction or order – which in the context is both missing the core point of the finding highlighted above. There may be some further benefit to making clear and express obligations in respect of complying with a court order – however it would be important not to trammel the discretion of the Court where it might wish to really provide for express responses from public authorities. The issue which needs to be addressed in the action plan would seem to be to appropriately impress upon the Courts the duty to ensure they provide for "adequate and effective" remedies in line with the Convention in the context of their review.

Conclusion:

I thank the Department for its consideration of these remarks, made somewhat under pressure.

It is unfortunate that time and lack of supporting discourse has impacted the response to the consultation at this juncture. However I am very hopeful that the Department might consider this commentary in the constructive spirit it is offered and seek to engage further so we can clarify the issues and work together to support the development of a robust and appropriate action plan to assist Ireland move into compliance on these matters.