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Consultation: Draft Plan of Action prepared pursuant to Decision VIII/8h of the Meeting of the Parties to the Aarhus Convention.

1. Introduction

1.1 I welcome the opportunity to comment upon Ireland's Draft Plan of Action prepared pursuant to Decision VIII/8h of the Meeting of the Parties to the Aarhus Convention.

1.2 This submission is confined principally to paragraph 2(a) of Decision VIII/8h concerning the extension of permits for activities falling within Article 6 of the Aarhus Convention.

1.3 It is respectfully submitted that the Draft Plan of Action does not fully implement Ireland's obligations under Articles 6 and 9 of the Aarhus Convention, Article 47 of the Charter of Fundamental Rights of the European Union, Article 11 of Directive 2011/92/EU (the EIA Directive), Articles 6(3) and 6(4) of Directive 92/43/EEC (the Habitats Directive), or the principles established by the jurisprudence of the Court of Justice of the European Union ("CJEU"), the European Court of Human Rights ("ECtHR"), and the Aarhus Convention Compliance Committee ("ACCC").

1.4 The Draft Plan of Action continues to permit competent authorities to determine, through domestic classifications of "material" and "non-material" amendments or extensions, whether members of the public may exercise rights guaranteed by Article 6 of the Convention. Such an approach reverses the legal position established by the Convention. The existence and scope of Convention rights cannot depend upon an administrative characterisation adopted under national law but must instead be determined by the substantive environmental effects of the decision under consideration.

1.5 Proper implementation of Decision VIII/8h therefore requires legislation which guarantees, rather than merely permits, public participation whenever the duration of a permit authorising an Article 6 activity is extended beyond the limited exception expressly recognised by the Meeting of the Parties.

2. Failure to Properly Implement Decision VIII/8h and Article 6 of the Aarhus Convention

2.1 Paragraph 2(a) of Decision VIII/8h requires Ireland:

"*to ensure that permits for activities subject to article 6 of the Convention cannot be extended, except for a minimal duration, without ensuring opportunities for the public to participate in the decision to grant that extension in accordance with article 6 (2)-(9) of the Convention.*"

2.2 The wording adopted by the Meeting of the Parties is both clear and mandatory. The obligation is directed towards **permits** authorising activities falling within Article 6 of the Convention. It does not distinguish between "material" and "non-material" extensions, nor does it permit domestic legislation to qualify Convention rights by reference to administrative classifications created under national law.

2.3 Under Article 31 of the Vienna Convention on the Law of Treaties, treaties are to be interpreted in good faith in accordance with the ordinary meaning of their terms, read in their context and in light of their object and purpose. The object and purpose of the Aarhus Convention is to guarantee effective public participation in environmental decision-making and to ensure that environmental procedural rights are practical and effective rather than theoretical or illusory.

2.4 The Court of Justice of the European Union has consistently held that procedural rights conferred by Union environmental law must be interpreted so as to ensure their practical effectiveness (*effet utile*). National procedural rules or administrative classifications cannot be applied in a manner which deprives individuals of rights guaranteed by Union law or by the Aarhus Convention as implemented through Union legislation. Similarly, Article 47 of the Charter of Fundamental Rights requires Member States to provide effective judicial protection in fields governed by Union law. This reflects the settled principle that national procedural autonomy is limited by the principles of equivalence and effectiveness, and that domestic procedural rules may not render the exercise of rights conferred by Union law impossible or excessively difficult.

2.5 The Draft Plan of Action does not fully implement these principles. Instead, it proposes a legislative scheme whereby a competent authority may first determine whether an extension is "material" or "non-material", with public participation arising only where the authority considers that the statutory threshold has been crossed. This reverses the legal position established by Decision VIII/8h. The existence of Convention rights cannot depend upon the prior exercise of administrative discretion.

2.6 The Compliance Committee found Ireland to be in non-compliance because permits authorising Article 6 activities could be extended without renewed opportunities for public participation. The proposed legislative response continues to preserve that possibility by allowing the competent authority to determine, through a finding of non-materiality, that no public participation is required. The discretion which gave rise to the finding of non-compliance is therefore not removed but is instead preserved in another form.

2.7 Decision VIII/8h requires legislation that guarantees public participation whenever permits for Article 6 activities are extended, save only for the limited exception expressly recognised by the Meeting of the Parties. Any legislative framework which enables public participation rights to be displaced through domestic concepts of materiality risks perpetuating the very non-compliance identified by the Compliance Committee.

3. Convention rights cannot be circumscribed by domestic administrative classifications

3.1 It is a well-established principle of both the Aarhus Convention and European Union law that procedural rights intended to protect the environment must be practical and effective rather than theoretical or illusory. The Court of Justice has consistently held that Member States may not rely upon domestic procedural rules or administrative classifications in a manner which undermines the effectiveness (effet utile) of rights conferred by Union environmental law.

3.2 Decision VIII/8h must therefore be interpreted in accordance with that principle. The question is not whether national legislation characterises an extension as "material" or "non-material", but whether the administrative decision has the effect of extending a permit authorising an activity falling within Article 6 of the Aarhus Convention.

3.3 If the exercise of Convention rights depends solely upon a competent authority's administrative determination that an extension is "material", the authority is effectively empowered to determine whether Convention rights arise. Such an approach reverses the structure of the Convention itself. Convention rights arise from the nature of the decision and the environmental significance of the authorised activity, not from classifications adopted under domestic law.

3.4 The principle of effectiveness, together with Article 47 of the Charter of Fundamental Rights of the European Union, requires national legislation to

guarantee effective public participation and access to justice. Those guarantees cannot lawfully be displaced through domestic procedural terminology.

4. An Extension of duration constitutes a fresh administrative decision engaging article 6 rights.

4.1 Where a development originally required Environmental Impact Assessment, Appropriate Assessment or another decision falling within Article 6 of the Aarhus Convention, the public acquired legally protected rights to participate in the decision-making process governing that development. Those rights form part of the legal framework applicable to the permission itself and cannot subsequently be curtailed through domestic procedural classifications.

4.2 An extension of the duration of a planning permission is not merely an administrative or procedural exercise. In law, the original permission is subject to a finite lifespan prescribed by the planning legislation. Upon expiry, the legal entitlement to implement the development ceases. An extension therefore constitutes a fresh administrative decision conferring a renewed legal entitlement upon the developer to continue implementing development which would otherwise become unlawful.

4.3 The legal effect of the extension is therefore constitutive rather than merely administrative. It creates, or preserves, development rights which would otherwise lapse by operation of law. As such, it is itself a decision capable of affecting the environment and falls to be considered in light of the procedural guarantees contained in Article 6 of the Aarhus Convention, Article 11 of the EIA Directive, Articles 6(3) and 6(4) of the Habitats Directive and Article 47 of the Charter of Fundamental Rights.

4.4 It follows that the decision to extend a permission cannot properly be characterised as a purely procedural matter. Rather, it is a substantive environmental decision because it authorises the continued implementation of development beyond the period originally authorised. In practical terms, it permits environmental effects to occur during a period in which, absent the extension, the development could no longer lawfully proceed.

4.5 Furthermore, the environmental baseline against which the original permission was assessed cannot be assumed to remain static throughout the lifetime of the consent.

Conservation objectives may have been revised, protected species distributions may have altered, ecological conditions may have changed, Water Framework Directive objectives may have evolved, cumulative developments may have been authorised and scientific knowledge may have materially advanced since the original permission was granted. It is precisely because these matters are capable of changing over time that Article 6 requires effective opportunities for public participation whenever a fresh administrative decision is taken authorising continued implementation of environmentally significant development.

4.6 The Draft Plan of Action proceeds on the assumption that the administrative characterisation of an extension as "non-material" removes the decision from the scope of Article 6. Respectfully, that approach is legally unsustainable. The legal character of the decision derives from its effect, namely the conferral of a renewed legal entitlement to undertake environmentally significant development, rather than the terminology applied by the competent authority.

4.7 If the extension had been refused, the development could not lawfully continue. The decision to grant the extension therefore changes the legal position of both the developer and the public. It is accordingly a substantive administrative decision with independent legal and environmental consequences.

5. Particular deficiencies in respect of permissions subject to Environmental Impact Assessment and Appropriate Assessment.

5.1 The Draft Plan of Action is particularly deficient in relation to permissions which were originally granted following Environmental Impact Assessment, Appropriate Assessment or other procedures falling within Article 6 of the Aarhus Convention. It proposes that such permissions may nevertheless be extended without public participation where the competent authority considers the extension to be "non-material".

5.2 That approach is inconsistent with the precautionary principle underpinning Article 191(2) TFEU, Articles 6(3) and 6(4) of the Habitats Directive, the Environmental Impact Assessment Directive and the jurisprudence of the Court of Justice. Where a project has already been found to require EIA or Appropriate Assessment, it has already been established that the project is capable of giving rise to significant effects on the environment or, in the case of the Habitats Directive, effects upon the integrity of a European site. That legal conclusion cannot subsequently be disregarded merely because the application concerns an extension of duration rather than physical alterations to the project.

5.3 An application to extend the duration of a permission necessarily requires the competent authority to determine that the environmental assessments underpinning the original permission remain legally and scientifically capable of supporting continued implementation of the project. That determination is itself an environmental assessment requiring consideration of whether the factual, scientific and legal circumstances have materially changed since the original permission was granted.

5.4 Environmental baselines are not static. Since the original permission may have been granted, conservation objectives may have been revised, protected species distributions may have altered, ecological conditions may have changed, Water Framework Directive classifications may have deteriorated or improved, climate change obligations may have evolved, cumulative developments may have been authorised and scientific understanding may have advanced. These matters are directly relevant to whether the original environmental assessments remain reliable.

5.5 It follows that an extension application is not simply a request to extend a period of time. It is, in substance, a request that the competent authority continue to rely upon environmental assessments prepared under conditions which may no longer exist. The public must therefore be afforded an effective opportunity to examine whether those assessments remain legally and scientifically adequate.

5.6 To permit such determinations to be made without public participation would undermine both the precautionary principle and the preventive purpose of the environmental assessment regimes established under Union law. It would also be inconsistent with Decision VIII/8h, which seeks to ensure that permissions authorising environmentally significant activities cannot continue beyond their original duration without renewed opportunities for public participation.

6. Legal certainty, effective judicial protection and the Rule of Law

6.1 The Draft Plan of Action raises a broader issue concerning legal certainty and the effective protection of procedural environmental rights. By making public participation dependent upon a prior administrative determination that an extension is "material", the proposed legislative framework permits the competent authority to determine, in the first instance, whether the procedural rights guaranteed by the Aarhus Convention arise at all.

6.2 Such an approach is inconsistent with the rule of law. Rights guaranteed by the Aarhus Convention, the Charter of Fundamental Rights of the European Union and Union environmental legislation must be capable of objective determination according to law. Their existence cannot depend solely upon the exercise of administrative discretion or upon classifications created by domestic legislation.

6.3 The Court of Justice has consistently recognised that Member States are required to ensure effective judicial protection of rights derived from Union law and that national procedural rules must not render the exercise of those rights impossible or excessively difficult. Similarly, Article 9 of the Aarhus Convention requires review procedures which are fair, equitable, timely and effective.

6.4 If the competent authority may, by determining that an extension is "non-material", remove the decision entirely from the public participation requirements of Article 6, the public is effectively deprived of the very procedural safeguards which the Convention seeks to guarantee. In such circumstances, the existence of Convention rights depends not upon the legal character of the decision but upon the authority's own assessment of whether those rights should arise. That is incompatible with the principle of legal certainty and undermines effective judicial protection.

6.5 This concern is particularly acute where the decision relates to a permission which was originally granted following Environmental Impact Assessment or Appropriate Assessment. Once it has been established that a project is capable of giving rise to significant environmental effects, or effects capable of adversely affecting the integrity of a European site, any subsequent administrative decision extending the legal life of that permission necessarily engages environmental rights capable of affecting the public. Those rights should arise as a matter of law and should not depend upon a preliminary administrative classification.

6.6 Decision VIII/8h sought to remedy precisely this deficiency. The obligation imposed upon Ireland is to ensure that permits for Article 6 activities cannot be extended, save for a minimal duration (which in itself should be strictly defined), without opportunities for public participation. It is respectfully submitted that this obligation cannot be satisfied by legislation which continues to confer upon competent authorities a discretion to determine whether Convention rights arise in the first place.

6.7 Accordingly, in order to comply fully with Decision VIII/8h, the legislation should establish objective statutory criteria which automatically require public participation whenever the duration of a permission originally subject to Article 6 procedures is extended, rather than permitting those rights to depend upon administrative concepts of materiality.

6.8 It would be contrary to the principles of good administration and effective public participation if the very authority whose decision is subject to scrutiny were first permitted to determine whether members of the public possess any procedural rights in relation to that decision. Such an approach risks creating a self-referential decision-making process whereby the scope of Convention rights depends upon the unilateral opinion of the decision-maker rather than upon objective legal criteria established by law.

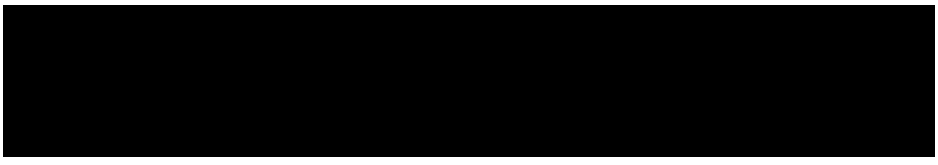
7. Convention Rights Must Derive from Law Rather than Administrative Opinion

7.1 While these arguments may be received as repetitive, the concern arising from the Draft Plan of Action is that it effectively transfers the threshold for the application of Article 6 of the Aarhus Convention from the legislation itself to the opinion of the competent authority. Rather than establishing objective statutory criteria which guarantee public participation where permits for Article 6 activities are extended, the proposed framework permits the competent authority to determine, as a preliminary matter, whether the extension is sufficiently "material" to engage those rights.

7.2 Respectfully, this approach reverses the constitutional and legal relationship between legislation and administrative decision-making. Rights conferred by law should be ascertainable from the legislation itself and should not depend upon the discretionary opinion of the decision-maker whose decision is subject to those very rights. The role of the competent authority is to apply the law enacted by the Oireachtas, not to determine whether statutory or Convention rights arise in the first instance.

7.3 This distinction is of particular importance in the field of environmental law, where the Aarhus Convention, the Environmental Impact Assessment Directive and the Habitats Directive are founded upon objective legal obligations designed to secure effective public participation and scientific scrutiny. Those obligations cannot be reduced to matters of administrative discretion or convenience.

7.4 The Court of Justice has consistently held that rights derived from Union environmental law must be practical and effective and that national procedural arrangements must not render the exercise of those rights impossible or excessively difficult. A legislative scheme which enables a competent authority to decide whether Convention rights arise by classifying an extension as "non-material" risks undermining that principle and diminishing the effectiveness of Article 6 of the Convention.



7.5 In practical terms, if an application to extend the duration of a permission is refused, the legal entitlement to undertake the development expires. Conversely, if the application is granted, the applicant acquires a renewed legal entitlement to continue implementing development that would otherwise become unlawful. The decision therefore alters the legal rights and obligations of both the developer and the public. It follows that the availability of public participation cannot lawfully depend upon the decision-maker's prior opinion as to whether the extension is "material". The legal consequences of the decision, rather than its administrative label, determine whether Article 6 is engaged.

7.6 Accordingly, the legislation should define, in clear and objective terms, those circumstances in which public participation is mandatory. Convention rights should arise directly from the operation of law and not from the subjective assessment or opinion of the competent authority. The rule of law requires that legal rights be determined by objective legal criteria established by the legislature, rather than by the discretionary opinion of an administrative decision-maker.

8. The proposed legislative response does not fully remedy the non-compliance identified by the meeting of the parties

8.1 Decision VIII/8h does not merely require Ireland to amend its planning legislation. It requires Ireland to remedy the specific deficiency identified by the Compliance Committee, namely that permits for activities falling within Article 6 of the Convention could be extended without renewed opportunities for public participation.

8.2 While the Draft Plan of Action introduces additional procedural safeguards, it does not remove the central defect identified by the Compliance Committee. Public participation continues to depend upon a preliminary administrative determination that an extension is "material". Consequently, the legal entitlement to participate is not guaranteed by legislation but remains contingent upon the opinion of the competent authority.

8.3 The proposed amendments therefore alter the procedural mechanism without removing the underlying legal deficiency. The legislation continues to permit the extension of permits authorising Article 6 activities without mandatory public participation in circumstances where the competent authority concludes that the extension is "non-material".

8.4 It is respectfully submitted that such an approach does not constitute full implementation of paragraph 2(a) of Decision VIII/8h. The Meeting of the Parties required Ireland to ensure that permits for Article 6 activities cannot be extended,

save for a minimal duration, without opportunities for public participation. That obligation is expressed in mandatory terms and leaves no scope for domestic legislation to reintroduce administrative discretion which may have the effect of excluding Convention rights.

8.5 The Draft Plan of Action should therefore be amended so that legislation itself guarantees public participation whenever the duration of a permission authorising an Article 6 activity is extended, unless the extension falls within the narrow exception (which must be clearly defined) expressly recognised by Decision VIII/8h.

9. Conclusion

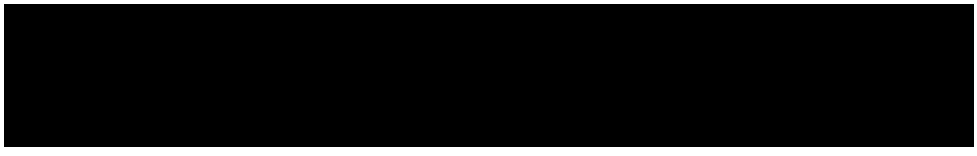
9.1 I respectfully submits that the Draft Plan of Action does not yet achieve full implementation of paragraph 2(a) of Decision VIII/8h of the Meeting of the Parties to the Aarhus Convention.

9.2 The material defect identified by the Compliance Committee was that permits authorising activities falling within Article 6 of the Convention could be extended without renewed opportunities for effective public participation. While the Draft Plan introduces additional procedural provisions, it continues to permit the availability of those rights to depend upon a preliminary administrative determination that an extension is "material". Consequently, the existence of Convention rights remains contingent upon administrative opinion rather than being guaranteed by law.

9.3 Such an approach is inconsistent with the wording and purpose of Decision VIII/8h, the objectives of the Aarhus Convention, the principle of effectiveness under European Union law, the requirement for effective judicial protection under Article 47 of the Charter of Fundamental Rights of the European Union and the principle of legal certainty which underpins the rule of law.

9.4 An extension of the duration of a planning permission is not merely an administrative exercise. It constitutes a fresh administrative decision conferring a renewed legal entitlement to undertake development that would otherwise become unlawful upon expiry of the permission. Where that permission originally required Environmental Impact Assessment, Appropriate Assessment or another Article 6 procedure, the decision to extend its duration necessarily engages environmental rights capable of affecting the public and should therefore attract renewed opportunities for public participation.

9.5 The legislation should therefore be amended to provide that any extension of the duration of a permission originally granted following Environmental Impact Assessment, Appropriate Assessment or another Article 6 procedure shall



automatically be subject to public notification, public participation and access to review procedures, save only for the limited exception expressly recognised by paragraph 2(a) of Decision VIII/8h.

9.6 Such an amendment would faithfully implement Ireland's obligations under the Aarhus Convention, give proper effect to the Decision of the Meeting of the Parties, strengthen legal certainty and ensure that public participation rights are guaranteed by law rather than dependent upon administrative discretion.

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