Upcoming Threats and Developments in Access to Justice at Member State and EU level. – Summary Statement

Item 4 Stocktaking of recent developments and upcoming.

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The following statement on behalf of the Environmental Justice Network of Ireland will highlight some key recent challenges to Access to Justice and upcoming developments. These include the presentation of a Bill in Ireland that seeks to drastically reduce access to justice in environmental matters, in the name of speeding up the planning process, a review of the missed opportunities for access to justice in the Fit for 55 package, some upcoming challenges to access to justice posed by the RePower EU, and the threat to cross-border environmental protection on the island of Ireland posed by the UK "Bonfire of the Regulations", a bill to automatically revoke all EU law in force by the end of the year. Also, recent proposals from the EU Commission that do enshrine access to justice are highlighted as positives, and the possible reopening of the EU Governance Regulation in 2024 for improved public participation and inclusion of explicit access to justice clauses is flagged as an opportunity.

1. Ireland : Planning and Development Bill 2022 (the Bill) was released by the Irish Government on the 26th Jan 2023, and is currently in pre-legislative scrutiny. Its purpose is root and branch reform of the planning system in order to increase efficiency and speed up development consent processes by centralising power and restricting access to justice in order to remove perceived impediments to housing development and renewables projects. Unfortunately, it is likely to backfire and lead to years of satellite litigation. Firstly, because it is based on a flawed premise, i.e. that there is a tsunami of judicial reviews holding up projects, when figures indicate that only around 1% of the circa 30k planning decisions made annually are ever judicially reviewed (and around 3.65% of An Bord Pléanála decisions). Some of the changes proposed by the Bill include (see full analysis here):
    - Section 5 declarations, a process for asking the planning authority to determine if proposed works or use would be development, would be replaced with Section 8 declaration which could no longer be sought by the public.
    - Changes to the requirements to NGO standing for judicial review that would severely limit the involvement of smaller NGOs and was explicitly targeted at resident groups.
    - The criteria laid down for NGO access to justice are that NGOs must be constituted as limited liability companies, with two directors, and 10 members, in existence for 12 months, pursuing environmental objectives, who have passed a corporate resolution to take the litigation. This restricts unincorporated associations from suing as the association which conflicts with International (Aarhus Convention, Art 2(5) & 9(3)) and EU law obligations (Art 47 EU Charter/Art 11 EIA Directive) obligations to afford wide access to justice and to exercise any discretion to set down criteria on access to the courts in a manner that does not excessively restrict

the number and types of organisations that can avail of the deemed locus standi provisions.

- Lack of detail in the Bill – significant areas are left to be constructed by Ministerial order, making it impossible to truly assess the full impacts of the Bill.
- Lack of public consultation in the preparation of the draft bill, failing to adhere to international law obligations under Article 8 of the Aarhus Convention.
- Lack of any rationale provided for the Bill, no explanatory memorandum for these massive changes to our land use law, no clear identification of the problems the Bill is supposedly trying to address, and no evidence base for the necessity for the changes. This impairs the public's ability to engage with the Bill, and makes it difficult to assess the proportionality of the approaches adopted.
- Changes to the costs rules that would eliminate "no-foal, no-fee" litigation. The provision in s.250 of the Bill providing both sides would bear their own costs with no discretion to award costs to the successful party, creates a barrier for litigants not in keeping with States' access to justice obligations under EU/International law. Also, no-foal, no-fee provision acts as a filter on weak claims, with legal professionals selecting cases based on strength/likelihood of success (therefore likelihood that they will be awarded costs and get paid). It seems strange that a bill seeking to reduce unmeritorious claims would dismantle this.
- Sufficient Interest Test definition – addition of "materially affected" requirement: s.249(10)(c)(i) of the Bill attempts to change the definition of sufficient interest, introducing a requirement of being "materially affected" in order to have locus standi. This appears to be an attempt to raise the threshold for individuals standing to judicially review planning decisions and is unlikely to be compatible with Ireland's EU and International law obligations.
- Designation of certain projects as presumed IROPI (imperative reasons of overriding public interest) derogation for the purposes of the Habitats Directive (s.190/s.191): The Bill attempts to override the balancing assessment by introducing a presumption in s.190/s.191 that certain projects (renewables, grid connections for these, storage) meet the IROPI requirement. This would likely breach the Habitats Directive, the precautionary principle and the principle of effectiveness of EU law.

2. Fit for 55 failures on access to justice.

The Fit for 55 package represents a missed opportunity by EU to achieve improved compliance with the Aarhus Convention in the area of access to justice.

None of the proposals put forward by the EU Commission as part of the package contained access to justice provisions (where there were none already).

The package included:

- LULUCF (Land-Use and Land-Use Change and Forestry Regulation)
- ESR (Effort Sharing Regulation)
- CBAM (The carbon border adjustment mechanism).
- ETS (Emissions Trading Scheme)
- SCF (Social Care Fund)
- RED (Renewable Energy Directive)
- EPBD (Energy Performance of Buildings Directive)
- Taxonomy Regulation
- Alternative Fuels Directive
- Energy Efficiency Directive
- CO2 Emissions standards for cars/light commercial vehicles
- ReFuelEU Aviation Initiative

- FuelEU Maritime initiative

None of the EU Commission proposals in the Fit for 55 package of regulations or directives contained provisions dealing with access to justice. Provisions dealing with public participation were in many cases inadequate. Provisions covering access to information were generally present, but needed refinement.

This absence of access to justice provisions in all of the EU Commission Fit for 55 proposals conflicts with the stated approach of the EU Commission in its 2020 Communication on Improving Access to Justice COM2020/643Final, where in para 33 it highlighted introducing access to justice provisions in all EU legislative proposals as a priority area for action, and highlighted the Council's opposition to some attempts to do so. This was in order to address the ongoing and widespread issues identified with access to justice at Member State level e.g. in the 2022 EIRs or the the 2017 Notice on Access to Justice.

3. **RePowerEU (COM2020/230/final)** – this package of measures was a response to the Winter Energy Crisis and the war in Ukraine. There are provisions in it which emphasise streamlining of permitting procedures, and a recommendation on permitting streamlining (C/2022/3219final), which seem to emphasise to great degree an approach of presumptive granting of permits with the assessment process just there to make sure that they are safe and environmentally sound. This does not accord with the principle of early participation when all options are open, as the zero option is not available in this scenario. The framing of the provisions would seem to breach several principles of EU and International law such as the precautionary principle, the Convention on Biodiversity and the principle of effectiveness. Habitats protections are already ineffective, and studies show drastic declines in European biodiversity year on year. Habitats protections do not need further weakening. The RePowerEU proposal also calls for renewable and energy storage projects to be designated to be of presumed overriding public importance, so that they can be built in protected Habitats even where they are proven to harm that habitat, based on the "IROPI" (imperative reasons of overriding public interest) exception in Art 6 of the Habitats Directive. However, the designation of categories of projects in this manner is incompatible with the Habitats Directive as it is meant to involve a case-by-case examination of whether a particular project is in the public interest when balanced against the harm caused. See the proposal to amend the proposals for revising the Renewable Energy Directive (REDII), the EPBD and the Energy efficiency Directive in COM/2022/222final.

4. **The EU Governance Regulation** (2018/1999) contains no provisions regarding access to justice. It also contains excessively vague public participation requirements regarding participation in the NECPs and LTS which have already been addressed at length by the ACCC. This vague legal framework in relation to public participation makes it difficult to access justice at Member State level for breaches of the requirement to allow public participation. This should be remedied if the Governance Regulation is to be reopened next year, as is expected in order to align it with many of the changes brought about in the Fit for 55 package.

5. **State Aid and the Aarhus Regulation** – Access to justice at EU level (to challenge decisions directly before the CJEU) has yet to be provided in cases of State Aid despite the findings in ACCC/C/2015/128 ("C128"). The EU has carried out a consultation on options and published the results, but it is late in bringing forward proposals as per the political declaration to the Aarhus Regulation Revision and the timeline therein of 2022 for completing assessment of options, as that is still ongoing. According to that, the EU Com are to produce proposals

before the end of 2023. In the meantime, EU Commission State Aid decisions are not subject to environmental justice, other than through indirect challenge at Member State level.

6. **Good Practice in the EU**:
The EU Commission on the other hand has proposed some environmental laws that do attempt to enshrine access to justice rights:
   - Proposal for a Nature Restoration Law (Art 16) and Proposed revision of the Ambient Air Quality Directive (Art 27).

The EU proposals to deal with SLAPP litigation are also welcome and badly needed to protect the exercise of Aarhus Rights including access to justice. SLAPP has increasingly been a problem in the Irish judicial system, despite some strong judgements by the Irish Courts on the topic.

7. **Bonfire of the Regulations UK:**
UK "Bonfire of the Regulations Proposal", the Retained EU Law (Revocation and Reform) Bill, which is quite likely to impact on Habitats protections. In fact, EU Habitats protections were one of the main areas that were targeted by this initiative, being characterised as bureaucratic impediments.

This proposal would simply and dramatically revoke all EU law (currently estimated to be around 3745 pieces of legislation identified so far) on the 31st December 2023 (Section 1) (possibility of extension by the Minister of this date 2026 in relation to individual laws, but no further than this). This covers all secondary legislation implementing EU laws and all direct primary legislation like EU Regulations. It also targets EU-derived case law and legal principles.

The proposed law also contains sweeping "Henry VIII" clauses, which allow a Minister to change any retained EU law at the stroke of a pen (Section 20). The general principles of EU law are also abolished and are not permitted to be codified into UK law by restatement or revision, and are effectively to be rooted out by the Courts from domestic precedent (Section 9).

The area of the environment represents approximately half of the "Retained EU Law" or "REUL" that is set to be revoked on the 31st December 2023 unless specific steps are taken. Roughly 1800 environmental law instruments are vulnerable if this bill goes ahead.
This represents an existential threat to some fundamentals underpinning both the regulatory level playing field on which cross-border environmental cooperation is based and many provisions guaranteeing access to environmental justice. These include EIA, Habitats Protections, air quality and water quality laws.

Among the many rights affected may be the right of access to justice in environmental matters, and denial of public participation in many areas of environmental decision making might cease to be unlawful, effectively removing the right of access to justice in relation to that also.

This could potentially result in a shredding of the regulatory "level playing field", harming cross border access to justice and environmental protection on the island of Ireland.