



TO THE COMPLIANCE COMMITTEE OF THE AARHUS CONVENTION

**COMMUNICATION TO THE AARHUS CONVENTION COMPLIANCE
COMMITTEE FROM RIGHT TO KNOW CLG CONCERNING
COMPLIANCE BY IRELAND WITH ARTICLES 3, 4 AND 9 OF THE
CONVENTION IN RELATION TO ITS SYSTEM FOR REVIEWING
DECISIONS TO REFUSE ACCESS TO ENVIRONMENTAL INFORMATION
(ACCC/C/2016/141)**

**SUBMISSIONS OF IRELAND ON THE DRAFT FINDINGS MADE BY THE
COMPLIANCE COMMITTEE**

Introduction

1. On 7 August 2020, the Party Concerned was provided with the draft findings of the Compliance Committee on the Communication made by Right to Know CLG concerning compliance with Articles 3, 4 and 9 of the Aarhus Convention (*the Convention*). The Party Concerned submits this response in accordance with Paragraph 34 of the Annex to Decision I/7.
2. The Party Concerned notes, and welcomes, the findings made by the Committee that there has been no failure to comply with the Convention by the Party Concerned as regards:
 - (i) Article 4(1), (2) and (7) in relation to ‘threshold jurisdictional issues’
 - (ii) Article 9(1) in relation to the provision of an expeditious review
 - (iii) Article 9(1) in relation to the scope of the review which can be carried out of the acts or omissions of public authorities



- (iv) Article 9(4) in relation to the provision of an adequate and effective remedy pursuant to Article 12 of the AIE Regulations
- (v) Article 9(4) in relation to injunctive relief
- (vi) Article 3(1)
- (vii) Article 3(2)

3. The Party Concerned also notes that there are three grounds upon which the Committee has found there to be non-compliance with the Convention. It is proposed to address each of these grounds in turn.

Article 9(4) – Timely Review Procedure (Office of the Commissioner for Environmental Information)

- 4. It is necessary to make a number of comments with regards to the findings made by the Committee at paragraphs 102 – 109 in relation to the availability of a timely review procedure before the OCEI.
- 5. The Party Concerned acknowledges that the Committee has welcomed the improvements in the timelines taken for the OCEI to make decisions.
- 6. The opening sentence of paragraph 108 that ‘...*the disparity between the two schemes means that, by definition, the person who exercises the two functions is under pressure to give priority to appeals lodged under the FOI Act*’ suggests that there is a policy whereby requests made under the FOI Act are prioritized over AIE requests. This is not correct. The affidavit relied upon to support this statement is from 2014 and does not reflect the arrangements currently in place.
- 7. Since 2015, the OCEI has been provided with specific resources for the purpose of processing AIE appeals. This has resulted in the creation of a



dedicated team who work exclusively on AIE appeals. Therefore the time in which FOI appeals are processed by the Information Commissioner has no bearing on the time taken to process AIE appeals.

8. The Party Concerned notes the views of the Committee on the provision of a clear deadline for the determination of AIE appeals. The Party Concerned intends to amend the AIE Regulations to introduce a requirement which will bring Ireland into conformity with the draft findings in respect of decisions of the OCEI.

Article 9(4) – Timely Review Procedure (Decisions of the Superior Courts)

9. The Party Concerned notes the draft findings reached by the Committee at paragraph 116, wherein it is stated that there has been a failure “*to ensure that its judicial procedures to review access to information requests are timely as required by article 9(4) of the Convention*”.
10. The Party Concerned intends to introduce a requirement that Courts hearing an appeal brought pursuant to Article 13 of the AIE Regulations act ‘*as expeditiously as possible*’. The manner in which this requirement will be enacted is under consideration by the Party Concerned.
11. In this context, the Party Concerned draws the Committee’s attention to certain provisions of national law which place similar requirements on the Courts with regards to decisions taken under the Planning and Development Act, 2000 as amended and decisions taken by public authorities relating to consents granted in respect of developments which are subject to the EIA Directive.
12. Section 50A(10) of the Planning and Development Act 2000 provides that



(10) The Court shall, in determining an application for section 50 leave or an application for judicial review on foot of such leave, act as expeditiously as possible consistent with the administration of justice.

13. Section 50A(11)(b) contains a similar requirement regarding appeals to the Supreme Court (which, as a matter of national law, also extends to the Court of Appeal).
14. The European Union (Access to Review of Decisions for Certain Bodies or Organisations promoting Environmental Protection) Regulations 2014 (S.I. No. 352/2014) made amendments to the Arterial Drainage Act 1945; the Environmental Protection Agency Act 1992; the European Communities (Assessment and Management of Flood Risks) Regulations 2010, the Fisheries (Amendment) Act 1997; the Foreshore Act 1933; the Gas Act 1976; the National Monuments Act 1930; the Petroleum and Other Minerals Development Act 1960 and the Waste Management Act 1996 to introduce a similar requirement in respect of challenges brought to decisions taken under those consent schemes.

Article 9(1) scope of Review

15. The Party Concerned notes and welcomes the findings made at paragraph 97 that a review of the OCEI decisions by the High Court that is limited to “points of law” does not fail to comply with article 9(1) of the Convention. The Party Concerned believes this finding to be correct. However it is considered necessary to clarify certain points in the reasons of the Committee in reaching that finding.
16. With respect to paragraph 94 in addition to an appeal to the High Court on a point of law an applicant may also exercise the option of taking a Judicial



Review of the decision of the OCEI to review the substantive and procedural legality of the decision of the Commissioner.

17. The Party Concerned considers that the OCEI is an independent and impartial body established by law as envisaged in article 9(1), second sub-paragraph rather than the first subparagraph. It is therefore a body intended to provide access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority in addition to the review procedures made available in accordance with the requirements of the Article 9(1), first subparagraph. Subject to a possible appeal, decisions of the OCEI are binding upon the public authority.
18. It remains the case that the Party Concerned has provided for two review procedures within the meaning of article 9(1), first subparagraph. The Party concerned considers that it achieves compliance with its obligation in article 9(1), first subparagraph by providing for an appeal to the High Court on a point of law and also the possibility of a Judicial Review application to the High Court to review the substantive and procedural legality of the decision of the OCEI.
19. In the circumstances it remains the case that the review of the OCEI decision by the High Court whether by way of an appeal on a point of law or a judicial review of the substantive and procedural legality of the OCEI decision does not fail to comply with Article 9(1) of the Convention.

Article 9(4) Failure of the courts to provide an adequate and effective solution

20. At paragraphs 124 – 127 of the Draft Findings, the Committee addresses the jurisdiction of the Courts in appeals brought under the AIE Regulations and finds that *'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'. The Party Concerned considers that this finding may be based upon some misunderstandings with regards to how appeals under Article 13 of the AIE Regulations are addressed by the Courts.

21. The statement at paragraph 100 that *'the information requester will not be a named party to the court proceedings or any subsequent court appeal'* is not correct. A decision of the OCEI can either be the subject of an appeal to the High Court in accordance with Article 13(1) of the AIE Regulations or the subject of an application for Judicial Review in accordance with Order 84 of the Rules of the Superior Courts. In either case, where those proceedings are brought by a party who is not the information requester, the information requester will be named as a Notice Party to the proceedings. A Notice Party to proceedings before the High Court (or Court of Appeal or Supreme Court) has a full right of participation in the proceedings and has the same status as either the party bringing the proceedings or the OCEI. This includes the right to re-activate proceedings where they have been adjourned pending another action or event, such as in the case of the Irish Bank Resolution Corporation Ltd (formerly Anglo Irish Bank Corporation Ltd) v Commissioner for Environmental Information.

22. If the information requester is not named as a Notice Party, it has an entitlement to be joined to the proceedings as a Notice Party. Any party to an appeal before the High Court, Court of Appeal or Supreme Court is entitled to request, following the completion of a statutory appeal, that the Court make directions regarding the further consideration of an AIE request, where applicable. For the avoidance of doubt, the High Court, the Court of Appeal and the Supreme Court are not precluded by national law from making directions regarding the further consideration of an AIE request. The directions



that may be made by a Court at the conclusion of an individual appeal is a matter for that Court, having heard all relevant parties.

23. Even if an information requester is not a party to proceedings, he or she can be permitted to make submissions to the Court. For example, in the appeal brought by the National Asset Management Agency against the decision of the OCEI that it was a public authority, Mr. Sheridan was not a party to the appeal but was invited by the Court to, and did, make submissions to the High Court on the issue of whether a stay should be placed on its decision (see *National Asset Management Agency v. Commissioner for Environmental Information* [2013] IEHC 166).

24. It should also be recalled that in the case of the request made to NAMA following the decision of the Supreme Court, the information requester did not take any steps to reactivate his request until 18 August 2016. As outlined in the original submission of the Party Concerned, at that time the information requester informed NAMA that he wished to continue with his request but in a revised format. That request was then processed by NAMA and refused by decision of 30 August 2016. No internal review of that decision was sought, nor was any request for the information made under the Freedom of Information Act, 2014.

25. In light of the foregoing, the Party Concerned considers that the Recommendation made by the Committee at paragraph 134(b) of the Draft Findings is not necessary as national law already permits a court to give directions as to the manner in which a request may be resolved following the conclusion of a statutory appeal.



Conclusion

26. The Party Concerned respectfully requests that the Committee consider these additional submissions in the context of the finalisation of the Findings to be made in respect of this Communication.