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## Economic Commission for Europe

Meeting of the Parties to the Convention on  
Access to Information, Public Participation  
in Decision-making and Access to Justice  
in Environmental Matters

### Compliance Committee

#### Seventieth meeting

Geneva, 12–16 April 2021

Item 9 of the provisional agenda

#### Communications from members of the public

## Findings and recommendations with regard to communication ACCC/C/2016/141 concerning compliance by Ireland

Adopted by the Compliance Committee on 9 November 2020

### I. Introduction

1. On 19 August 2016, a non-governmental organization (NGO), Right to Know, (the communicant) submitted a communication to the Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging a failure by Ireland to comply with its obligations under articles 3, 4 and 9 of the Convention with respect to requests for access to environmental information and review mechanisms thereof.
2. At its fifty-fourth meeting (Geneva, 27–30 September 2016), the Committee determined on a preliminary basis that the communication was admissible.
3. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 6 December 2016 with a deadline for its response of 6 May 2017.
4. On 5 May 2017, the Party concerned provided its response to the communication.
5. On 18 and 27 October 2018, respectively, the Environmental Pillar, a network of Irish environmental NGOs, and Mr. Stephen Minch, a member of the public, submitted statements as observers.
6. On 24 October 2018, the Party concerned submitted additional information.
7. The Committee held a hearing to discuss the substance of the communication at its sixty-second meeting (Geneva, 5–9 November 2018), with the participation of representatives of the communicant, the Party concerned and the Environmental Pillar.



8. On 21 August 2019, the communicant provided an update. On 23 August 2019, the Committee invited the Party concerned to provide any comments it had on that update. No comments were received from the Party concerned.

9. The Committee completed its draft findings through its electronic decision-making procedure on 5 August 2020. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were forwarded on 7 August 2020 for comments to the Party concerned and the communicant. Both were invited to provide comments by 25 September 2020.

10. On 17 September 2020, the Party concerned requested an extension until 20 October 2020 of the deadline to comment on the draft findings. On 18 September 2020, the Chair of the Committee granted the requested extension to both parties.

11. The communicant and the Party concerned provided comments on the Committee's draft findings on 20 and 21 October 2020 respectively. The observer Irish Environmental Network provided comments on the draft findings on 20 October 2020.

12. After taking account of the comments received, the Committee adopted its findings through its electronic decision-making procedure on 9 November 2020 and agreed that they should be published as a formal pre-session document to its seventieth meeting (12–16 April 2021).

## II. Summary of facts, evidence and issues<sup>1</sup>

### A. Legal framework

#### Access to environmental information

13. The European Communities (Access to Information on the Environment) Regulations (the AIE Regulations) govern access to environmental information in the Party concerned.<sup>2</sup>

14. Article 6 (1) (b) of the AIE Regulations provides that environmental information requests must state that they are made under those Regulations.<sup>3</sup>

15. Article 7 (2) requires a public authority to make a decision on an environmental information request within one month. If, because of the volume or complexity of the environmental information requested, the public authority is unable to make a decision within one month, it shall give notice to the applicant and specify the date, not later than two months from the request, by which the response will be made.

16. Article 10 (7) provides that, where a decision is not notified to the applicant within the relevant period specified in article 7, a decision refusing the request shall be deemed to have been made on the date of expiry of the specified period.

#### Review of environmental information requests

17. Under the AIE Regulations, applicants dissatisfied with the way in which their request for access to environmental information was dealt with are required to first lodge an application for internal review with the public authority concerned before appealing to the Office of the Commissioner for Environmental Information (OCEI) and lastly to the courts.

#### *Internal review of refusal*

18. Article 11 of the AIE Regulations sets out the procedures for the internal review of refusals of environmental information requests. Article 11 (1) provides that, where the applicant's request has been refused, in whole or in part, the applicant may, not later than one month following receipt of the decision of the public authority concerned, request the public

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<sup>1</sup> This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

<sup>2</sup> Party's response to the communication, para. 2.1.

<sup>3</sup> Communication, annex 1.

authority to review the decision, in whole or in part. The one-month deadline for seeking internal review also applies in the case of a deemed refusal.

19. Article 11 (2) provides that, following the receipt of a request for a review under article 11 (1), the public authority concerned shall designate a person unconnected with the original decision whose rank is the same as, or higher than, that of the original decision-maker to review the decision and that person shall:

(a) Affirm, vary or annul the decision;

(b) Where appropriate, require the public authority to make available environmental information to the applicant, in accordance with these Regulations.

20. Pursuant to article 11 (4), if the request for internal review results in a decision refusing the information request in whole or in part, the public authority shall specify the reasons for the decision to refuse, and inform the applicant of his or her right of appeal.

21. According to article 11 (3), a decision under article 11 (2): “shall be notified to the applicant within one month from receipt of the request for the internal review”.<sup>4</sup>

#### *Appeal to the OCEI*

22. Article 12 of the AIE Regulations establishes the OCEI. Pursuant to article 12 (4), the applicant may appeal against an internal review decision not later than one month from receipt of the decision (or, in the case of a deemed refusal of a request for internal review, one month from the time when the decision should have been notified), unless the OCEI is satisfied, in the circumstances of a particular case, that it is reasonable to extend the time limit.

23. Article 12 (5) states that, in case of receipt of an appeal under this article, the OCEI shall:

(a) Review the decision of the public authority;

(b) Affirm, vary or annul the decision concerned, specifying the reasons for his or her decision;

(c) Where appropriate, require the public authority to make available environmental information to the applicant.

24. Article 12 (7) requires a public authority to comply with a decision of the OCEI within three weeks of its receipt. Article 12 (8) provides that, where a public authority fails to do so, the Commissioner may apply to the High Court for an order directing the public authority to comply with that decision and, on the hearing of such an application, the High Court may grant such relief.

25. The OCEI has the power to conduct a full factual and legal review of any decision taken by the public authority. However, the OCEI cannot suspend a decision-making procedure that is subject to public participation. There is no statutory obligation to take a decision within a certain time frame.<sup>5</sup>

26. Paragraph 14 (2) of the OCEI Procedures Manual states that:

Cases will not be dealt with solely by reference to age. In some circumstances, more recent cases may be dealt with before older cases. The circumstances in which this may arise include:

...

- where the appellant seeks priority for a specific pressing reason; however, as most appellants will be anxious, understandably, to have their cases expedited, this ground will apply in exceptional circumstances only and only where resources allow

<sup>4</sup> Party’s response to communication, annex 7, pp. 70 and 78.

<sup>5</sup> Communication, pp. 3, 8 and 9.

– time-consuming cases involving a large volume of records and/or complex issues are unlikely to be considered suitable for expedited processing.<sup>6</sup>

27. By virtue of article 12 (2) of the AIE Regulations, the Commissioner for Environmental Information (CEI) is also the person who acts as Information Commissioner under the Freedom of Information Act (FOI Act). The FOI and AIE legal regimes are, however, independent of each other, as are the roles of Information Commissioner and Commissioner for Environmental Information.<sup>7</sup> The FOI Act applies to information requests not made under the AIE Regulations.

28. According to section 22 (3) of the FOI Act, the Information Commissioner is required to rule on appeals: “as soon as may be and, insofar as practicable, not later than four months after the receipt by the Commissioner of the application for the review concerned”.<sup>8</sup>

#### *Appeal to a court of law*

29. Under article 13 (1) of the AIE Regulations, “a party to an appeal under article 12 or any other person affected by a decision” of the Commissioner for Environmental Information may appeal against that decision to the High Court on a point of law.

30. Appeals proceed according to the general rules for statutory appeals.<sup>9</sup> Challenges to OCEI decisions can alternatively be brought by way of judicial review.<sup>10</sup> The court’s jurisdiction in an application for judicial review is similar to that for statutory appeals in limiting consideration of questions of fact.<sup>11</sup>

31. The High Court cannot order interim measures pending its review, nor can it issue an order to release the requested information.<sup>12</sup> However, it has jurisdiction to uphold a refusal to provide information or refer the matter back to the OCEI for further consideration.

32. The OCEI, in turn, may again remit the matter to the public authority for further consideration.<sup>13</sup>

## **Facts**

### **Statistics on AIE requests**

33. Table 1 below reflects the number of AIE requests received by public authorities in the Party concerned between 2013 and 2017, their outcome and any resulting review procedures.<sup>14</sup>

Table 1

#### **Number of AIE requests received between 2013 and 2017**

<i>Year</i>	<i>Requests received</i>	<i>Requests granted in full</i>	<i>Requests granted in part</i>	<i>Requests refused</i>	<i>Internal reviews</i>	<i>Appeals to OCEI</i>	<i>Appeals to High Court</i>
2013	374	192	60	91	40	7	0
2014	608	325	97	124	61	13	0
2015	658	322	94	174	57	23	1
2016	670	338	104	170	96	52	2

<sup>6</sup> Ibid., annex 3, pp. 10 and 11.

<sup>7</sup> Additional information from the Party concerned, 24 October 2018, annex 1b, pp. 11 and 77.

<sup>8</sup> Communication, p. 3, footnote 8.

<sup>9</sup> Ibid., p. 6, and Party’s response to communication, para. 6.1.

<sup>10</sup> Party’s response to communication, para. 6.9.

<sup>11</sup> Ibid., para. 6.6.

<sup>12</sup> Communication, pp. 1, 9 and 10.

<sup>13</sup> Update from the communicant, 9 October 2018, p. 2.

<sup>14</sup> Additional information from the Party concerned, 24 October 2018, p. 2.

<i>Year</i>	<i>Requests received</i>	<i>Requests granted in full</i>	<i>Requests granted in part</i>	<i>Requests refused</i>	<i>Internal reviews</i>	<i>Appeals to OCEI</i>	<i>Appeals to High Court</i>
2017	606	276	128	141	91	52	2

### Appeals to the OCEI

34. The percentage of requests for environmental information made to public authorities that were subsequently appealed to OCEI was 3 per cent in 2013 and 2014, 5 per cent in 2015, 8 per cent in 2016, 9 per cent in 2017 and 8 per cent in 2018.<sup>15</sup>

35. Table 2 below sets out the outcomes of the decisions issued by OCEI in 2016, 2017 and 2018:

Table 2

### Outcomes of OCEI decisions in 2016, 2017 and 2018

<i>OCEI decisions</i>	<i>Appeal upheld by OCEI in full or in part</i>	<i>Public authority granted full access during OCEI review</i>	<i>OCEI ordered public authorities to provide all or some of the requested information</i>	<i>OCEI remitted case to public authority for new decision</i>
2016 <sup>16</sup>	27	19	-	12
2017 <sup>17</sup>	35	18	-	2
2018 <sup>18</sup>	40	15	3	9

36. In 2016, 2017, 2018 and 2019, the OCEI took an average of 316, 262, 279 and 249 days respectively to close a case.<sup>19</sup> These times do not include the two-month period following the adoption of the decision, during which either party may appeal against it (there is no obligation on a public authority to give effect to the decision until the two-month deadline for appeal expires).<sup>20</sup>

### Court appeals on points of law

37. As set out in table 1 above, from 2013 to 2017, a total of five appeals against OCEI decisions were lodged with the High Court under article 13 of the AIE Regulations. In addition, five of the decisions made by the OCEI in 2018 were appealed against before the High Court under the same provision. Three of these were appealed by the public authority and two were appealed by the applicant.<sup>21</sup>

38. In addition to the five appeals to the High Court under article 13, there was one judicial review in 2018 of a decision made by a public authority (the Department of the Taoiseach (the Prime Minister)) under the AIE Regulations.<sup>22</sup>

39. In 2018, one High Court decision was appealed against before the Court of Appeal.<sup>23</sup>

<sup>15</sup> Update from the communicant, 21 August 2019, annex, p. 67.

<sup>16</sup> Additional information from the Party concerned, 24 October 2018, annex 1a, p. 86.

<sup>17</sup> Ibid., annex 1b, p. 88.

<sup>18</sup> Update from the communicant, 21 August 2019, annex, p. 76.

<sup>19</sup> Additional information from the Party concerned, 24 October 2018, annex 1b, p. 79; update from the communicant, 21 August 2019, annex, p. 68; and letter from the communicant, 26 June 2020, annex, p. 73.

<sup>20</sup> Update from the communicant, 9 October 2018, p. 2.

<sup>21</sup> Update from the communicant, 21 August 2019, annex, p. 72.

<sup>22</sup> Ibid., p. 74.

<sup>23</sup> Ibid., p. 72.

*Relevant case law*

40. In *National Asset Management Agency v. Commissioner for Environmental Information*,<sup>24</sup> Mr. Gavin Sheridan, the communicant's director, had requested information from the National Asset Management Authority (NAMA) on 3 February 2010.<sup>25</sup> On 13 September 2011, the OCEI determined that NAMA was a public authority under the AIE Regulations. In November 2011, NAMA appealed against the OCEI determination; the High Court upheld the OCEI decision on 27 February 2013. NAMA then appealed to the Supreme Court on 19 April 2013, which dismissed the appeal on 23 June 2015.<sup>26</sup>

41. On 9 August 2016, Mr. Sheridan asked the OCEI for an update on what action had been taken following the Supreme Court's judgment of 23 June 2015. The OCEI replied on 18 August 2016 that he would need to contact NAMA directly because the Supreme Court had simply dismissed the NAMA appeal without issuing any order or directions.<sup>27</sup> NAMA refused Mr. Sheridan's request on 30 August 2016 on the grounds that the information did not constitute environmental information within the meaning of article 3 (1) of the AIE Regulations.<sup>28</sup> He was informed that he was entitled to submit a request for the information under the FOI Act.<sup>29</sup>

42. Mr. Sheridan was also the information requester in *Irish Bank Resolution Corporation Limited (formerly Anglo Irish Bank) v. Commissioner for Environmental Information*. On 1 April 2010, he submitted an appeal to the OCEI against the bank's refusal to provide information. The OCEI issued its decision on 1 September 2011, finding that the bank was not justified in refusing the request on the grounds that it is not a public authority under the AIE Regulations.<sup>30</sup> Irish Bank Resolution Corporation (IBRC) Limited appealed against the OCEI decision to the High Court and, on appeal, the High Court stayed the proceedings pending the outcome of *National Asset Management Agency v. Commissioner for Environmental Information*. In its reply of 18 August 2016 to Mr. Sheridan's request for an update, the OCEI indicated that neither the OCEI nor IBRC Limited had applied to reactivate the proceeding following the outcome of *National Asset Management Agency v. Commissioner for Environmental Information* and the High Court's stay remained in effect.<sup>31</sup>

43. *Minch v. Commissioner for Environmental Information* concerned a request made by Mr. Minch on 18 May 2013, which was refused on appeal by the OCEI on 15 December 2014 on the grounds that the information requested was not environmental information.<sup>32</sup> On 16 February 2016, the High Court quashed the OCEI decision, finding that the OCEI had applied an incorrect legal test. Both the OCEI and the public authority appealed. The Court of Appeal assigned an "early" hearing date of 16 June 2017.<sup>33</sup> On 28 July 2017, the Court of Appeal found that the request concerned environmental information and, in the subsequent court order of 6 October 2017, set aside the contested decision. It remitted the matter to the OCEI to determine whether the exemptions on disclosure raised by the public authority at the request stage should apply. In January 2018, the appellant was provided with a redacted copy of the information requested. On 15 February 2018, the OCEI delivered its decision finding that the remainder of the information requested could be withheld on the grounds of commercial confidentiality. No further appeal was lodged against that decision.<sup>34</sup>

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<sup>24</sup> High Court of Ireland, *National Asset Management Agency v. Commissioner for Environmental Information*, [2013] IEHC 166.

<sup>25</sup> Party's response to the communication, annex 12, pp. 1 and 2.

<sup>26</sup> *Ibid.*, para. 6.11.

<sup>27</sup> Communication, annex 5.

<sup>28</sup> Party's response to communication, para. 6.12.

<sup>29</sup> *Ibid.*

<sup>30</sup> Communication, annex 2.

<sup>31</sup> *Ibid.*, annex 5.

<sup>32</sup> Party's response to communication, p. 2, and annex 19.

<sup>33</sup> Party's response to communication, para. 6.15.

<sup>34</sup> Additional information from the Party concerned, 24 October 2018, pp. 6 and 7, and observer statement by Mr. Minch, 27 October 2018, p. 1, footnote 1.

### **Resources and capacity-building**

44. To enable public authorities to process requests for information more rapidly, the Department of the Environment, Climate and Communications arranged training days on the AIE Regulations in 2014, 2015, 2016, and 2018 for their staff.<sup>35</sup>

45. Prior to 2015, the OCEI relied on the subsidies granted to the Information Commissioner, leaving the holder of the two offices to apportion those sums between them as he or she saw fit. In 2015, the OCEI was allocated dedicated funding for the first time.<sup>36</sup>

## **B. Domestic remedies and admissibility**

46. The communicant submits that its communication concerns systemic problems in the Party concerned regarding access to environmental information.<sup>37</sup> As well as his court cases summarized above, Mr. Sheridan, the communicant's director, has made repeated submissions to the OCEI regarding its review of refusals of access to environmental information requests. The communicant argues that seeking any further domestic redress would be pointless as legislative changes are needed to ensure expeditious and timely decisions by courts and the OCEI.<sup>38</sup>

47. The Party concerned has not challenged the admissibility of the communication.

## **C. Substantive issues**

### **Article 4 (2) and (7)**

48. The communicant claims that there is a systemic failure by public authorities in the Party concerned to comply with the maximum two-month period prescribed under article 4 (2) and (7) of the Convention when requests for access to environmental information are refused on "narrow threshold jurisdictional points" (i.e. whether the body concerned constitutes a public authority or whether the requested information is environmental information). The communicant also maintains that a public authority "can comfortably refuse a request on a narrow jurisdictional point" knowing that, if there is an appeal to the OCEI, it will be more than a year before the matter returns to it.<sup>39</sup>

49. The communicant submits that, even where a public authority rejects a request on jurisdictional grounds, it should still be required to deal in its decision with all issues arising unless it would be prejudicial to do so.<sup>40</sup> The communicant states that this would ensure that all these points could be considered in any subsequent appeals so that there would be no need for OCEI to remit the appeal to the public authority, if the latter's jurisdictional argument was rejected.

50. The Party concerned refutes the communicant's allegation concerning "narrow" threshold jurisdictional points, claiming that the communicant has not provided a definition of this concept. According to the Party concerned, questions as to whether institutions are public authorities and whether information requested is environmental information are not "narrow" and they are more properly to be seen as "substantive determinations" on the application of the Convention and the AIE Regulations.<sup>41</sup>

51. The Party concerned claims that the communicant has not provided any evidence that public authorities are "deliberately" making determinations on threshold jurisdictional issues in the knowledge that it may take some time for an appeal to be determined.<sup>42</sup>

<sup>35</sup> Party's response to communication, para. 2.10.

<sup>36</sup> Communication, p. 2.

<sup>37</sup> Ibid., p. 10.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid., p. 8.

<sup>40</sup> Ibid., p. 4.

<sup>41</sup> Party's response to communication, para. 3.1.

<sup>42</sup> Ibid., para. 3.2.

52. Moreover, the Party concerned claims that a majority of requests for environmental information are granted by public authorities, while only a very small percentage are appealed to OCEI, with still fewer being appealed to the High Court on a point of law. It considers that the statistics concerning AIE requests received by public authorities support its claim (see table 1 above).<sup>43</sup>

53. Concerning the communicant's contention that public authorities should be required to deal with "all issues arising", the Party concerned maintains that it would be illogical to require public authorities to deal with the substance exhaustively when they believe that a request falls outside the scope of the AIE Regulations. The Party concerned maintains that this would entail an unreasonable use of the authorities' time and resources<sup>44</sup> and that there is no basis in the Convention for the communicant's contention on this issue.<sup>45</sup>

54. With regard to the claim of the Party concerned contained in paragraph 51 above, the observer the Environmental Pillar submits that it would be nearly impossible for the communicant to provide evidence of this and the Party concerned has not established evidence to the contrary. The Environmental Pillar claims that, in any case, the issue of substantiation is a distraction; the real issue is that the system as implemented is vulnerable to the abuse identified by the communicant, and the review process, instead of preventing it, in fact facilitates it. All a public authority need do is refuse a request, refuse again under the internal review procedure and then the request will be "neutralized" once it goes to appeal, because the appeal process takes so long that the information will be irrelevant and useless by the time a decision is received.<sup>46</sup>

#### **Article 9 (1) – expeditious**

55. The communicant contends that the Party concerned fails to ensure expeditious review in accordance with article 9 (1) of the Convention, since there is no statutory requirement for the OCEI to take an expeditious decision.<sup>47</sup> The communicant claims that the OCEI takes more than 10 months on average to take a decision (see para. 36 above).<sup>48</sup> It points out that these time frames do not include the additional two months granted to the parties to appeal against the decision of the OCEI during which the public authority concerned is under no obligation to release information.<sup>49</sup>

56. Furthermore, the communicant contends that there is no reason for the OCEI to take significantly longer than the public authority to adopt decisions normally taken within two months by public authorities, especially when the OCEI has almost 10 years' experience and access to more resources than the public authority.<sup>50</sup>

57. The Party concerned submits that neither article 9 of the Convention nor the AIE Regulations specify a specific time frame for appeal decisions, but merely state that they must be "expeditious", meaning that decisions must be reached within a reasonable period of time.<sup>51</sup> It claims that, while there may have initially been some difficulties with decisions being taken in an appropriate time frame, with the improving economic situation of the Party concerned, more resources have been allocated to the OCEI, allowing for more investigations to be undertaken and decisions issued.<sup>52</sup>

58. The Party concerned claims that the information presented in annex 2 to the communication to illustrate the length of time for OCEI appeals does not provide a complete

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<sup>43</sup> Ibid.

<sup>44</sup> Ibid., paras. 3.3 and 3.4.

<sup>45</sup> Party's oral submission during hearing at Committee's sixty-second meeting.

<sup>46</sup> Observer statement from the Environmental Pillar, 18 October 2018, pp. 4 and 5.

<sup>47</sup> Communication, p. 8.

<sup>48</sup> Update from the communicant, 9 October 2018, p. 2.

<sup>49</sup> Ibid.

<sup>50</sup> Communication, p. 9.

<sup>51</sup> Party's response to communication, para. 4.16.

<sup>52</sup> Ibid., para. 4.16.

picture of the work completed by that body. That is because it relates only to formal decisions taken, and therefore excludes appeals withdrawn following the intervention of the OCEI.<sup>53</sup>

59. Furthermore, the Party concerned contends that the procedures followed by the OCEI are designed to ensure that all parties are afforded appropriate and fair procedures, while also permitting decisions to be reached without undue delay. The Party concerned highlights the fact that certain appeals raise complex issues of domestic and European law that require engagement with the relevant parties and careful assessment, and that, in some circumstances, it may be necessary to notify third parties and permit them to make submissions on appeal.<sup>54</sup>

60. Lastly, the Party concerned contests the communicant's assertion that the time frames for OCEI appeals should not be significantly longer than the two-month time frame for public authorities to consider requests. It submits that the roles played by these two bodies are very different and therefore not comparable.<sup>55</sup>

61. The Environmental Pillar states that the data on time frames for review provided by the communicant cannot be considered "expeditious" under article 9 (1). It further submits that this provision cannot be read in isolation from the requirements of article 9 (4).<sup>56</sup> Lastly, it claims that the delays are due to the deliberate decisions of the Party concerned, the most notable being the decision not to transpose into law a requirement that the OCEI review be undertaken within a prescribed period, or even "expeditiously", in contrast to the FOI Act.<sup>57</sup>

#### *FOI Act appeals prioritized*

62. The communicant alleges that, because the same person acts in the capacity of both Commissioner for Environmental Information and Information Commissioner, the OCEI prioritizes requests for information under the FOI Act, which imposes a four-month deadline.<sup>58</sup> It points out that, between 2007, when the OCEI was established, and 2014, the OCEI was not allocated any funding and had to rely upon resources from the Information Commissioner's office. It acknowledges that the situation partially changed in December 2014.<sup>59</sup>

63. The Party concerned states that resources are allocated to the Office of the Information Commissioner by the Department of Public Expenditure and Reform according to the Commissioner's different roles and volume of requests received.<sup>60</sup> A lump sum is granted to the Information Commissioner, who is at the same time Commissioner for Environmental Information, which he divides between his two functions as he sees fit. There are four investigators and clerical support dedicated to the OCEI. Office and administrative services are shared between the Commissioner for Environmental Information and the Information Commissioner only to ensure the most efficient use of limited state resources.<sup>61</sup>

64. The Environmental Pillar submits that the issue of resources is not just one of staff, but also extends to the financial resources necessary to pursue litigation to defend OCEI decisions if challenged by public authorities and to pursue clarification in courts.<sup>62</sup>

#### *OCEI decisions on threshold jurisdictional issues*

65. The communicant challenges the OCEI practice of making preliminary decisions on "threshold jurisdictional issues". The communicant states that, because of this practice, two or three rounds of decision-making may be required before a final decision on the information

<sup>53</sup> Ibid., para. 4.12.

<sup>54</sup> Additional information from the Party concerned, 24 October 2018, pp. 5 and 6.

<sup>55</sup> Party's response to communication, para. 4.14.

<sup>56</sup> Observer statement from the Environmental Pillar, 18 October 2018, p. 3.

<sup>57</sup> Ibid., p. 6.

<sup>58</sup> Communication, p. 8.

<sup>59</sup> Ibid., pp. 2 and 3.

<sup>60</sup> Party's response to communication, para. 4.5.

<sup>61</sup> Ibid., para. 4.6.

<sup>62</sup> Observer statement from the Environmental Pillar, 18 October 2018, p. 6.

request is reached.<sup>63</sup> The communicant highlights the High Court's statement in the *National Asset Management Agency v. Commissioner for Environmental Information* case that refusals on jurisdictional grounds have the effect of neutralizing requests. The communicant contends that, despite this judgment, the OCEI continues to make decisions on jurisdictional grounds and to remit requests to public authorities, thereby neutralizing requests.<sup>64</sup>

66. The Party concerned asserts that the Convention imposes no requirement on the OCEI to review an information request's substantive merits where the request has been determined to fall outside the scope of the Convention and the AIE Regulations.<sup>65</sup> Moreover, the communicant has not identified an article of the Convention allegedly breached by the OCEI approach.<sup>66</sup>

67. Furthermore, the Party concerned disputes the communicant's interpretation of the High Court's comments in the *National Asset Management Agency v. Commissioner for Environmental Information* case. It states that the Court's comments were made in the particular context of its decision refusing the NAMA petition for an interim stay. Upon its refusal of the stay, since the Court had determined that NAMA was a public authority under the AIE Regulations, NAMA should be required to proceed to consider whether the information was "environmental information".<sup>67</sup>

#### *Appeals to the High Court on a point of law alone*

68. The communicant claims that an appeal to the High Court of an OCEI decision is limited to reviewing the interpretation of the law in that decision and not the acts or omissions of the public authority concerned. Accordingly, the usual outcome is that either the refusal is upheld or there is an order remitting the matter to the OCEI for further consideration. Thereafter, OCEI may also remit the matter to the public authority for further consideration.<sup>68</sup>

69. The Party concerned contests the argument that the nature of the review provided by a statutory appeal on a point of law is in breach of the Convention. Article 9 of the Convention only mandates that there be access to a "review procedure" but does not lay down the standard of review.<sup>69</sup> Thus, article 9 does not require courts to have jurisdiction to consider both factual and legal aspects of an appeal in circumstances where such "full" jurisdiction is vested in an administrative body created for the purpose of reviewing cases concerning requests for environmental information.<sup>70</sup> Accordingly, the review procedure established by the AIE Regulations complies with the requirements of the Convention.

#### **Article 9 (4) – timely**

70. The communicant submits that, taken as a whole, the review of refusals to provide access to environmental information in the Party concerned is not timely as required by article 9 (4) of the Convention.<sup>71</sup> Since the OCEI and the courts lack the power to order interim measures pending the review of a refusal of an environmental information request, environmental information requests remain unresolved even after the public participation procedure for which the information was requested has closed.<sup>72</sup>

71. According to the communicant, statutory appeals to the High Court take between 12 and 18 months, with a further 1 to 2 months to deal with ancillary issues such as the wording of any orders and costs.<sup>73</sup> It asserts that the courts do not have the jurisdiction to make a final decision ordering the release of information. Thus, the usual outcome from a court appeal is either for a refusal to be upheld or for an order to be issued remitting the matter to the OCEI

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<sup>63</sup> Communication, p. 4.

<sup>64</sup> *Ibid.*, pp. 4 and 5.

<sup>65</sup> Party's response to communication, para. 3.4.

<sup>66</sup> *Ibid.*, para. 3.5.

<sup>67</sup> *Ibid.*, para. 5.3.

<sup>68</sup> Communication, p. 6.

<sup>69</sup> Party's response to communication, para. 6.2.

<sup>70</sup> *Ibid.*, para. 6.2.

<sup>71</sup> Communication, p. 8.

<sup>72</sup> *Ibid.*, pp. 9 and 10.

<sup>73</sup> *Ibid.*, p. 6.

for further consideration, which may in turn remit the matter to the public authority for further consideration, leading to further delays.<sup>74</sup>

72. The communicant acknowledges that there is no serious backlog of cases at the High Court level but contends that there are serious delays at the appellate stage. Due to the backlog of cases in the Court of Appeal, at the time the communication was submitted, it was likely that appeals would require more than two years to be concluded. Even if the Supreme Court does not hear the case, an applicant can typically expect to wait three to four years for the court procedures to conclude and the best outcome that can be expected is for the matter to be remitted to the OCEI or the public authority for further consideration, with the possibility of at least one more round of appeals and remittal.<sup>75</sup>

73. Lastly, the communicant claims that the court appeals referred to in its communication demonstrate delays. For example, in the *National Asset Management Agency* and *Anglo Irish Bank* cases, despite the final judgment being issued by the Supreme Court, no action was taken by either the public authority or the OCEI to progress the environmental information requests. It states that Mr. Sheridan, the applicant, had sought an update while preparing this communication, and thereby learned that the authorities had neither acted to implement the *National Asset Management Agency* judgment nor planned to reactivate the *Anglo Irish Bank* case proceedings following the *National Asset Management Agency* judgment.<sup>76</sup>

74. The Party concerned maintains that the Convention does not require it to empower the OCEI to suspend a decision-making procedure involving public participation, nor does it require the courts to enjoy broader jurisdiction or to be empowered to order interim measures pending review. The Party concerned contends that the communicant puts forward no basis for the contention that the Convention mandates Parties to empower national authorities in the manner described. A determination that there has been non-compliance by reason of the failure to empower the OCEI with powers of that nature would be to extend the nature and scope of the Convention beyond its terms.<sup>77</sup>

75. The Party concerned furthermore contests the communicant's assertion that a large fraction of OCEI decisions are appealed and a high proportion of these cases concern jurisdictional issues. It states that, by 2017, there had been only four appeals to the High Court under article 13 of the AIE Regulations and one judicial review of an OCEI decision. This constitutes a very small number of appeals given the number of decisions by the OCEI since it was established.<sup>78</sup>

76. The Party concerned maintains that, following the judgment of the Supreme Court in the *National Asset Management Agency* case, the applicant took no action until 18 August 2016, when he contacted NAMA to inform them that he wished to continue with his access to environmental information request. It states that NAMA subsequently rejected this access to environmental information request on the grounds that it was not environmental information. According to the Party concerned, the applicant was informed that he could pursue the request under the FOI Act and there has been no further correspondence from him.<sup>79</sup>

77. The Environmental Pillar submits that the time frames provided by the communicant cannot be considered "timely" under article 9 (4). It claims that "effectively" providing for access to justice requires that all of the requirements of article 9 (4) apply to all reviews under article 9 (1), as these requirements are necessarily mutually supporting. A review cannot provide for "adequate and effective remedies" if it is not also "timely," which should be understood as "within an appropriate period of time". Moreover, it claims that the system as implemented is not fit for purpose, as evidenced by the length of time required to complete an OCEI appeal and the time to subsequently reach a final decision. This is compounded by the narrow jurisdiction of the courts, which cannot order the release of information. Lastly,

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<sup>74</sup> Ibid., pp. 6 and 8.

<sup>75</sup> Ibid., p. 7.

<sup>76</sup> Ibid., p. 10.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid., para. 6.9.

<sup>79</sup> Ibid., paras. 6.11 and 6.12.

the observer points to the lack of a legislative requirement for timely review of environmental information requests.<sup>80</sup>

78. Observer Mr. Minch, who was the party requesting information in *Minch v. Commissioner for Environmental Information*, claims that he did not appeal the OCEI decision of 15 February 2018 not to release all information originally requested in his information request of 28 May 2013, inter alia, because the plan for which information had been sought had changed substantially since his original request and the remaining information was at least six years old and thus by then irrelevant.<sup>81</sup>

### Article 3 (1)

79. The communicant claims that the alleged non-compliance with articles 4 and 9 consequently entails non-compliance with article 3 (1).<sup>82</sup>

80. The Party concerned claims that the AIE Regulations establish a clear, transparent and consistent framework for implementing the Convention,<sup>83</sup> through which public authorities are obliged to release environmental information within strict time frames.<sup>84</sup>

81. Environmental Pillar submits that the delays in the review procedures for environmental information requests contravene article 3 (1), as they compromise the integration of the Convention's three pillars needed to enable the public and environmental NGOs to protect their interest in a healthy environment.<sup>85</sup> The delays are of particular concern for those seeking to participate in time-limited consultation processes or when deciding whether to apply for judicial review of decisions, acts or omissions within the eight-week time limit.<sup>86</sup>

## III. Consideration and evaluation by the Committee

82. Ireland deposited its instrument of ratification of the Convention on 20 June 2012, and the Convention entered into force in Ireland on 18 September 2012, i.e. ninety days after the date of deposit of its instrument of ratification.

### Article 4 (1), (2) and (7) - "threshold jurisdictional issues"

83. The communicant alleges that the Party concerned fails to comply with article 4 (2) and (7) of the Convention due to a systemic failure by its public authorities to comply with the maximum two-month period prescribed in those provisions when requests for access to environmental information requests are refused on the basis that the entity to which the request is made is not a public authority or the information requested is not environmental information. In the Irish context, these two issues are referred to as "threshold jurisdictional issues".

84. As regards the allegation that the Party concerns fails to comply with the Convention because requests are refused on the above grounds, the Committee considers that it does not relate to article 4 (2) or (7), as the communicant argues. Rather, a failure to make environmental information held by a public authority available on these grounds would amount to non-compliance with article 4 (1). However, as explained below, this has no impact on the Committee's findings in the present case.

85. The Committee considers that the fact that a proportion, even a substantial proportion, of requests are refused on the basis that the entity to which the request is made is not a public authority or that the request does not concern environmental information does not in itself amount to non-compliance with the Convention. Rather, the communicant would need to

<sup>80</sup> Observer statement from the Environmental Pillar, 18 October 2018, pp. 3-6.

<sup>81</sup> Observer statement from Mr. Minch, 27 October 2018, pp. 1 and 2.

<sup>82</sup> Communication, p. 8.

<sup>83</sup> Party's response to communication, para. 2.11.

<sup>84</sup> Ibid., para. 7.2.

<sup>85</sup> Observer comments from the Environmental Pillar, 18 October 2018, p. 4.

<sup>86</sup> Ibid., p. 3.

show that those cases were incorrectly refused on those grounds. The communicant has adduced no evidence to demonstrate that requests refused on the grounds that they did not relate to environmental information or were not requested from a public authority were wrongly decided. Thus, the Committee considers the communicant's allegation that the Party concerned fails to comply with article 4 (2) and (7) of the Convention due to the proportion of cases refused on "threshold jurisdictional issues" to be unsubstantiated. For the same reason, the communicant has not demonstrated a breach of article 4 (1) either.

86. In addition, the Committee does not accept the communicant's contention that, even where a public authority rejects a request on "threshold jurisdictional grounds", it should still be required to deal with all the substantive points exhaustively. The Convention does not require Parties to impose such a requirement on their public authorities. Such a step would be illogical, as it would mean that the Convention imposes obligations regarding requests that have been determined to be outside the scope of the Convention. Furthermore, this would be an unreasonable use of public authorities' time and resources.

87. Based on the above, the Committee finds the communicant's allegation that the Party concerned fails to comply with article 4 (2) and (7) of the Convention due to the proportion of requests refused on "threshold jurisdictional issues" to be unsubstantiated, and the evidence provided does not demonstrate a breach of article 4 (1) on this basis either.

#### **Article 9 (1) – expeditious review**

88. Article 9 (1), first subparagraph, requires each Party to ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused or inadequately answered has access to a review procedure before a court of law or another independent and impartial body established by law.

89. Pursuant to article 9 (1), second subparagraph, in the circumstances where a Party provides for the review of information requests by a court of law, it must also ensure that any person requesting information has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law. A Party is not required to ensure access to more than one expeditious review procedure fulfilling the requirements of article 9 (1), second subparagraph.

90. For the Party concerned, that procedure is the internal review carried out by the public authority concerned pursuant to article 11 (1) of the AIE Regulations, the initial procedure that must be requested by an applicant seeking review of an unsuccessful information request. A request for internal review under article 11 (1) is free of charge and, being laid down in article 11 of the AIE Regulations, is "established by law". Article 11 (3) imposes a one-month time frame on all requests for internal review, regardless of volume or complexity.

91. In its findings on communication ACCC/C/2013/93 (Norway), the Committee held that when considering "whether ... the procedure is 'expeditious' or 'timely' under article 9, paragraphs 1 and 4, respectively, the time limits set out in article 4, paragraphs 2 and 7, are indicative".<sup>87</sup> In line with those findings, the Committee considers that the time-limit for internal review under article 11 (3) of the AIE Regulations accords with the one-month limit set by article 4 (2) and (7) of the Convention.

92. Consequently, the Committee finds that the legal framework of the Party concerned does not fail to comply with the requirement in article 9 (1), second subparagraph, to provide access to an expeditious procedure established by law that is free of charge for reconsideration by a public authority.

#### **Article 9 (1) – scope of review**

93. The communicant alleges that the Party concerned fails to comply with the Convention because the Irish courts do not have full jurisdiction to review the acts or

<sup>87</sup> ECE/MP.PP/C.1/2017/16, para. 90.

omissions of public authorities in respect of AIE requests, but only review the decision of the OCEI on points of law.

94. The AIE Regulations provide for three tiers of review procedures of requests for environmental information. First, applicants may submit a request for internal review to the public authority concerned. Second, if they are dissatisfied with the outcome of the internal review, they can apply to the OCEI. Lastly, if they are dissatisfied with the OCEI decision, they can appeal to the High Court on a point of law. Alternatively, they can seek judicial review of the OCEI decision pursuant to Order 84 of the Rules of the Superior Courts.<sup>88</sup>

95. By virtue of article 12 (1) of the AIE Regulations, the Commissioner for Environmental Information is an independent and impartial body established by law, as envisaged in article 9 (1), first subparagraph. Pursuant to article 12 (5) and (7) of the AIE Regulations, decisions of the Commissioner for Environmental Information are binding on the public authority holding the information in accordance with the third subparagraph of article 9 (1).

96. The Party concerned has therefore provided for two review procedures under article 9 (1), first subparagraph: an appeal to the Commissioner for Environmental Information and then to the High Court. The Commissioner has jurisdiction to carry out a full factual and legal review of the public authority's decision. Nothing in article 9 (1), first subparagraph, requires more than one review procedure to be established for the purposes of that subparagraph.

97. Accordingly, the Committee finds that the system of the Party concerned, in which the review of OCEI decisions by the High Court is limited to "points of law", does not fail to comply with article 9 (1) of the Convention.

#### **Article 9 (4) – timely review procedures**

98. Article 9 (4) requires that the procedures referred to in article 9 (1), among other things, be timely and provide adequate and effective remedies. As noted in its previous findings, when considering compliance with article 9 (4), the Committee considers the system as a whole and in a systemic manner.<sup>89</sup>

99. Under a scheme such as that of the Party concerned, where the available review procedures are to be used sequentially, and not as alternatives,<sup>90</sup> the Committee makes clear that the requirements of article 9 (4) apply to each such review procedure.

100. In addition, under article 12 (3) of the AIE Regulations, not only the information requester but also persons who would be incriminated by the disclosure of the environmental information concerned may appeal to the OCEI against the public authority's internal review decision. Likewise, under article 13 (1) of the AIE Regulations, any party to the OCEI appeal, including the public authority concerned, or any other person affected by the OCEI decision, may appeal to the High Court on a point of law. The Committee makes clear that the rights set out in article 9 (4) apply not only to the review procedures under article 9 (1) initiated by the information requester, but also in the context of any challenge by other persons to set aside the outcome of those review procedures.

101. Having determined that the requirements of article 9 (4) apply both to appeals to the OCEI and any subsequent appeals to the court regarding the OCEI decision, whether initiated by the applicant, the public authority or any other person, the Committee will consider below whether these review procedures are "timely" and "provide adequate and effective remedies" including "injunctive relief as appropriate" under article 9 (4) of the Convention.

#### *Timely review procedures*

##### Appeals to the OCEI

102. As regards the OCEI, one positive point emerges from the data set out in paragraphs 34 ff. above: as a result of its increased resources since 2015, the average time taken by that

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<sup>88</sup> Party's comments on Committee's draft findings, 21 October 2020, p. 6.

<sup>89</sup> ECE/MP.PP/C.1/2010/6/Add.3, para. 128.

<sup>90</sup> ECE/MP.PP/C.1/2016/10, paras. 74 and 75.

body to publish decisions on appeals has fallen from 713 days in 2015 to 249 days in 2019. This development is most welcome. However, that is not the end of the matter.

103. In its findings on communication ACCC/C/2013/93 (Norway), the Committee pointed out that: “time is an essential factor in many access to information requests, for instance because the information may have been requested to facilitate public participation in an ongoing decision-making procedure”.<sup>91</sup>

104. The working practices of the OCEI fail to take account of this essential factor. The passage of the OCEI Procedures Manual cited in paragraph 26 above sets out a long list of cases that might be given priority. Nearly all of them relate to the administrative convenience of the OCEI itself. The only relevant item in the list is the penultimate one, in which the OCEI states that account may be taken of an appellant’s request to be given priority “for a specific pressing reason”. But it then adds the following caveat: “however, as most appellants will be anxious, understandably, to have their cases expedited, this ground will apply in exceptional circumstances only and only where resources allow – time-consuming cases involving a large volume of records and/or complex issues are unlikely to be considered suitable for expedited processing”. This falls well short of recognizing that time will be an essential factor whenever information has been requested for the purposes of an ongoing public participation procedure or when deciding whether to challenge a particular decision before the courts.

105. Moreover, the average time taken by the OCEI in 2018 and 2019 to publish decisions on appeals (279 and 249 days, respectively) far exceeds the deadlines set for public participation in decision-making procedures or commencing court proceedings. In any case, this figure is only an average, so a significant proportion of the appeals decided by the OCEI take longer.

106. The Committee is aware that the OCEI carries out a full review of the facts and the law, but that cannot justify systemic delays that prevent members of the public from exercising their rights under the Convention to participate in decision-making or seek access to justice regarding the environment.

107. This situation is exacerbated by the fact that no provision of Irish law requires the Commissioner for Environmental Information to take a decision within a certain time frame or even to act in a timely manner. In contrast, when the very same official is acting as Information Commissioner, he or she is required by section 22 (3) of the FOI Act to rule on appeals “as soon as may be and, insofar as practicable, not later than four months after the receipt by the Commissioner of the application for the review concerned.”

108. Although the latter provision does not lay down an absolute rule, 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. Indeed, in an affidavit sworn in 2014, a member of staff of the Information Commissioner clearly stated that the office of the Commissioner did precisely that.<sup>92</sup> Admittedly, the situation may have improved since then because increased resources have been allocated. However, the fact remains that, even after the allocation of these additional resources, FOI appeals continue to be resolved significantly more quickly than Commissioner for Environmental Information appeals. In 2016, 60 per cent of FOI appeals were resolved in four months and 99 per cent in 12 months. In 2017, 63 per cent of FOI appeals were resolved in four months and 98 per cent in 12 months.<sup>93</sup> It is difficult to see why, if it was feasible for the Party concerned to establish a clear deadline for FOI appeals, there should not also be one set for appeals under the AIE Regulations.

109. Based on paragraphs 103 to 106 above, the Committee finds that, by failing to ensure that decisions by the OCEI on appeals under the AIE Regulations are timely, the Party concerned fails to comply with article 9 (4) of the Convention.

<sup>91</sup> ECE/MP.PP/C.1/2017/16, para. 88.

<sup>92</sup> Communication, p. 3, and annex 4, paras. 29–34.

<sup>93</sup> Additional information from the Party concerned, 24 October 2018, annex 1b, p. 27.

### Court appeals

110. As set out in paragraph 100 above, the requirement in article 9 (4) that review procedures for environmental information requests be timely applies not only to appeals brought by the applicant, but also to those brought by the public authority or any other person. The requirement also covers any subsequent appeals to higher courts. The Committee will therefore examine the evidence before it regarding the time frames for court appeals under the AIE Regulations below.

111. The communicant submits that first instance statutory appeals are dealt with according to Order 84C of the Rules of the Superior Courts and are: “Typically ... disposed of in between 12 and 18 months, with a further 1 to 2 months to deal with ancillary issues such as the wording of any orders and costs.”<sup>94</sup> This is not disputed by the Party concerned.

112. The Committee recognizes that many of the cases that reach the courts raise complex questions, usually as to whether a body is a “public authority” or whether the information sought is “environmental”. While this complexity obviously goes some way to explaining the length of litigation, the Committee notes that there is nothing in the legal framework of the Party concerned that requires the courts to deliver their decisions on appeals under the AIE Regulations within a certain time, or even that they do so in a “timely” manner. In this regard, the Committee notes that rule 7 of Order 84C of the Rules of the Superior Courts enables the court to make orders regarding timing as it sees fit. It does not however impose a mandatory requirement of this kind.

113. The failure to include such a requirement clearly has significant consequences in practice. In the *National Asset Management Agency* case, the OCEI issued its decision that NAMA was a public authority under the AIE Regulations on 13 September 2011. NAMA appealed the OCEI decision first to the High Court and then to the Supreme Court, which issued its decision confirming that NAMA was indeed a public authority on 23 June 2015, nearly four years later.

114. In the *Anglo Irish Bank* case, the OCEI decided on 1 September 2011 that the bank was not justified in refusing Mr. Sheridan’s information request on the ground that it was not a public authority under the AIE Regulations.<sup>95</sup> The bank appealed, whereupon the High Court stayed the proceedings pending the outcome of the *National Asset Management Agency* case. As noted above, the *National Asset Management Agency* case did not conclude in the courts until 23 June 2015, meaning that Mr. Sheridan’s successful appeal to the OCEI was suspended for four years.

115. Likewise, in *Minch v. Commissioner for Environmental Information*, Mr. Minch appealed the OCEI decision that the information requested was not environmental information to the High Court on 16 February 2015. On 16 February 2016, the High Court quashed the OCEI decision. The OCEI and the public authority appealed. On 28 July 2017, the Court of Appeal found that the request indeed concerned environmental information and, on 6 October 2017, remitted the matter to the OCEI to then determine whether any exemptions from disclosure would apply. The court procedures just to decide whether the request concerned environmental information, before the OCEI considered any possible exemptions, thus took more than two and a half years.<sup>96</sup>

116. The Committee considers that in no sense can the above review procedures be considered timely. Accordingly, the Committee finds that the Party concerned fails to ensure that its judicial procedures to review access to information requests are timely as required by article 9 (4) of the Convention.

### Conclusion on timely procedures

117. Considering review procedures for environmental information requests as a whole, the Committee finds that, by failing to put in place measures to ensure that the OCEI and the courts decide appeals regarding environmental information requests in a timely manner, the

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<sup>94</sup> Communication, p. 6.

<sup>95</sup> *Ibid.*, annex 2.

<sup>96</sup> Additional information from the Party concerned, 24 October 2018, pp. 6 and 7, and observer statement by Mr. Minch, 27 October 2018, p. 1, footnote 1.

Party concerned fails to comply with the requirement in article 9 (4) of the Convention to ensure timely procedures for the review of environmental information requests.

#### **Article 9 (4) - adequate and effective remedies**

##### *Appeals to the OCEI*

118. Article 12 (5) of the AIE Regulations empowers the OCEI to “affirm, vary or annul the decision concerned” and also, “where appropriate, require the public authority to make available environmental information to the applicant”.

119. In 2016, the Commissioner for Environmental Information took 27 formal decisions on appeals under the AIE Regulations. In 19 of these cases he found that a refusal of a request was (at least to some extent) not justified. In 12 of the 19 decisions he required the public authority to provide access to some or all of the environmental information requested. In 9 cases, he remitted the request to the public authority for a new decision.<sup>97</sup>

120. In 2017, the Commissioner for Environmental Information made 35 formal decisions on appeals under the AIE Regulations. In 18 of these decisions, he found that the refusal of the request was (to some extent) not justified. In 2 of the 18 decisions, he required the authorities to provide the appellants with access to information.<sup>98</sup>

121. In 2018, the Commissioner for Environmental Information delivered 40 decisions on appeals under the AIE Regulations. In 15 decisions, he found that the refusal was not justified either in full or in part and in 9 of the 15 decisions, he required the public authorities to provide the appellants with access to environmental information. In three cases, the public authorities granted access in full to the environmental information requested during the OCEI review. In the remaining three cases, OCEI remitted the request to the public authority for a new decision.<sup>99</sup>

122. Article 12 (5) of the AIE Regulations gives the OCEI the power, where appropriate, to require the public authority to make available the requested environmental information. On the basis of the evidence before it, the Committee considers that the Commissioner for Environmental Information does indeed do so in a significant number of cases. In this regard, the Committee notes that the communicant has not put before the Committee any examples of cases regarding which it alleges that it would have been appropriate for the Commissioner to have ordered the public authority to release the requested information but the Commissioner did not do so.

123. In the light of the above, the Committee considers that the communicant has not adduced evidence that the OCEI fails to provide adequate and effective remedies in appeals under article 12 of the AIE Regulations. Accordingly, the Committee does not find that the Party concerned fails to comply with article 9 (4) of the Convention in this respect.

##### *Court appeals*

124. In its ruling of 25 June 2015, the Supreme Court upheld the OCEI decision of 13 September 2011 that NAMA was a “public authority” for the purposes of the AIE Regulations. When, in August 2016, more than a year later, Mr. Sheridan sought an update from the OCEI regarding the status of his case, the OCEI informed Mr. Sheridan that “the Supreme Court did not issue any order or directions following its judgment in the NAMA case... You may care to contact NAMA directly in connection with your outstanding AIE request.”<sup>100</sup> The NAMA appeals were brought against the OCEI, and Mr Sheridan was not a party to those proceedings. The Committee considers that the fact that the Supreme Court’s ruling lay dormant for more than a year without any action by the courts, the Commissioner for Environmental Information or the public authority concerned demonstrates a failure by

<sup>97</sup> Additional information from the Party concerned, 24 October 2018, annex 1a, p. 86.

<sup>98</sup> Ibid., annex 1b, p. 88.

<sup>99</sup> Update from the communicant, 21 August 2019, annex, p. 76.

<sup>100</sup> Communication, annex 5.

the Party concerned to ensure adequate and effective remedies for the review of environmental information requests.

125. In a similar vein, following the OCEI decision of 1 September 2011 that IBRC Limited (formerly Anglo Irish Bank) was a public authority under the AIE Regulations, that company appealed the OCEI decision to the High Court.<sup>101</sup> The High Court, however, stayed the proceedings pending the outcome of the *National Asset Management Agency* case. In its reply of 18 August 2016 to Mr. Sheridan's request for an update, the OCEI indicated that neither it nor IBRC Limited had applied to reactivate the proceeding since the outcome of the *National Asset Management Agency* case and the High Court's stay remained in effect.<sup>102</sup>

126. The Committee notes that, once again, the only parties to the court proceedings were the public authority (IBRC Limited) and the OCEI. The Committee considers the fact that neither the OCEI or the public authority concerned took any action to progress Mr. Sheridan's information request for more than 12 months after the *National Asset Management Agency* ruling again demonstrates a failure by the Party concerned to ensure adequate and effective remedies for the review of environmental information requests.

127. Consequently, the Committee 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.

#### **Article 9 (4) - injunctive relief as appropriate**

128. The Committee is not convinced by the communicant's submission that the OCEI and the court should be able to suspend a public participation procedure pending the outcome of their review of an environmental information request by a member of the public. Injunctive relief necessarily involves a balancing of interests, and the communicant has not explained how injunctive relief in such cases would achieve this in a satisfactory manner.

129. Since the communicant has also failed to explain what other interim relief would be appropriate in access to information cases, the Committee finds the communicant's claim that the Party concerned fails to comply with article 9 (4) of the Convention because it does not provide for interim relief in appeals of environmental information requests to be unsubstantiated.

#### **Article 3 (1)**

130. Article 3 (1) requires each Party, among other things, to: "take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention". The communicant simply asserts that "as a consequence of" the alleged non-compliance with articles 4 and 9 "there is also non-compliance with article 3 (1)", but does not elaborate its claim under article 3 (1) further.<sup>103</sup> The Committee accordingly finds that the communicant has not substantiated its claim that the Party concerned fails to comply with article 3 (1) of the Convention.

#### **Article 3 (2)**

131. The communicant claims that public authorities can refuse access to environmental information knowing that the matter may proceed through subsequent levels of review, due to which there will be a delay of two to three years. While the communication does not refer to article 3 (2), the Committee considers that the communicant's claim would most naturally concern the obligation that provision places on each Party to endeavour to ensure that officials and authorities assist the public in seeking access to information. However, as the

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<sup>101</sup> Ibid., annex 2.

<sup>102</sup> Ibid., annex 5.

<sup>103</sup> Ibid., p. 8.

Party concerned points out, no evidence of such a practice has been provided.<sup>104</sup> Accordingly, the Committee finds the communicant's allegation to be unsubstantiated.

## **IV. Conclusions and recommendations**

132. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs:

### **A. Main findings with regard to non-compliance**

133. The Committee finds that:

(a) By failing to put in place measures to ensure that the OCEI and the courts decide appeals regarding environmental information requests in a timely manner, the Party concerned fails to comply with the requirement in article 9 (4) of the Convention to ensure timely procedures for the review of environmental information requests;

(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.

### **B. Recommendations**

134. The Committee, pursuant to paragraph 36 (b) of the annex to decision I/7 of the Meeting of the Parties, and noting the agreement of the Party concerned that the Committee take the measures requested in paragraph 37 (b) of the annex to decision I/7, recommends that the Party concerned take the necessary legislative or regulatory measures to ensure that:

(a) Appeals under the AIE Regulations to the OCEI or the courts, whether commenced by the applicant or any other person, are required to be decided in a timely manner, for instance by setting a specified deadline;

(b) There are mandatory directions in place to ensure that, should a court rule that a public authority or an information request falls within the scope of the AIE Regulations, the underlying information request is thereafter resolved in an adequate and effective manner.

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<sup>104</sup> Party's oral submissions at hearing at Committee's sixty-second meeting.