

Format for communications to the Aarhus Convention Compliance Committee

I. Information on correspondent submitting the communication

Full name of organization or person(s) submitting the communication

Right to Know CLG
[REDACTED] Ireland

Address for correspondence/authorized representative

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II. Party concerned

Ireland

III. Facts of the communication

Introduction

1. This communication arises from a failure by Ireland to comply with Articles 1, 3(1), 4(8), 5(3), 6(6) and 9(4) of the Convention by:
 - a. Permitting public authorities in Ireland to charge for the indirect costs of supplying environmental information;
 - b. Permitting public authorities to charge unreasonable material costs for supplying environmental information which are far in excess of the actual costs incurred by the public authorities;
 - c. Failing to take necessary legislative, regulatory or other measures to implement the provisions of the Convention identified in this communication and in particular to remedy the same non-compliances in its own system after non-compliances were identified by the Compliance Committee (i) in Moldova in case No ACCC/C/2017/147, namely the charging of indirect costs for supplying environmental information and (ii) noncompliance by Spain in case no ACCC/C/2008/24, namely charging unreasonable material costs.
 - d. Not ensuring that public authorities provide for a waiver of charges for supplying environmental information or any other safeguards to prevent such charges from interfering with the rights guaranteed by the Convention;
 - e. Permitting An Bord Pleanála (also referred to as the **Board**) to charge for supplying

electronic access to copies of documents on planning files that are open to public inspection and/or to charge for electronic access to copies of information which is required by Article 5(3)(d) to be made available on the internet and/or to effectively refuse to provide free electronic copies on the basis that the information is available for inspection free of charge;

- f. Permitting public authorities to charge for taking copies of files which are subject to public participation under Article 6 and therefore must be made available free of charge under Article 6(6); and
 - g. Not adopting measures to ensure that administrative appeals to the Commissioner for Environmental Information are not prohibitively expensive.
2. The communicant relies in part on the Compliance Committee's findings of non-compliance with Article 4(8) by Moldova in Communication ACCC/C/2017/147¹. In that case the Committee held that there is a presumption that environmental information is to be supplied free of charge; and that where there are charges that they must be reasonable, that no indirect costs can be charged and only the material costs of supplying environmental information can be charged (e.g. postage or copying costs). As this communication will show, public authorities in Ireland charge for search and retrieval costs, which are indirect costs.
 3. The communicant also relies on the Compliance Committee's findings in Communication ACCC/C/2008/24² concerning Spain where it approached the concept of reasonableness for materials charges from the point of view of the actual material costs. As this communication will show, where public authorities in Ireland charge material costs, they are set at many multiples of the actual costs that they incur. In addition to this, planning authorities have a two-tier charging system with higher material costs charged for supplying environmental information on planning files compared to other categories of environmental information.
 4. Ireland is or ought to be aware of these findings yet still maintains a system where the vast majority of public authorities charge for indirect costs and where public authorities do not calculate their charges by reference to the actual material costs.
 5. Ireland has also failed to adequately monitor and measure the effect and implementation of its regulations, and the obligations which are required to be implemented, in order to inform the necessary legislative, regulatory and other measures necessary to both establish and maintain a clear, transparent and consistent framework to implement the provisions of the Convention.
 6. In relation to the Commissioner for Environmental Information (the **Commissioner**), the Committee has already determined in case ACCC/C/2016/141³ that its jurisdiction is derived from the first paragraph of Article 9(1).
 7. The communicant claims that appeals to the Commissioner concerning disputed requests for access to environmental information are not "not prohibitively expensive". Whereas Ireland

¹ https://unece.org/sites/default/files/2021-09/ece_mp.pp_c.1_2021_30_eng.pdf

² https://unece.org/fileadmin/DAM/env/pp/compliance/CC-26/ece_mp.pp_c.1_2009_8_add.1_e.pdf

³ https://unece.org/sites/default/files/2021-04/ece_mp.pp_c.1_2021_8_eng.pdf

has adopted measures to ensure that court procedures under Article 9(1) are not prohibitively expensive under Article 9(4), it has not put in place equivalent measures to ensure that proceedings before the Commissioner are not prohibitively expensive. This is the case both in terms of a €50 appeal fee which is not recoverable or refundable even if the appellant succeeds, and also the fact that there is no possibility for the appellant to recover other costs necessarily incurred or seek repayment of unlawful charges for supplying environmental information. Whereas public authorities have dedicated resources and public funding to engage lawyers to respond to appeals, the public must bear their own costs, even where they succeed, and in essence must pay to secure access to environmental information where an appeal to the Commissioner is necessary. This is manifestly unfair, and effectively penalizes the public for upholding their rights under the Convention.

8. This communication additionally relies on (a) the text of the relevant Irish legislation which will be cited by hyperlink in the footnotes⁴; (b) the results of a series of surveys of Irish planning authorities using the right of access to environmental information under Article 4 which are included as annexes; (c) other information included in the annexes which is in the public domain to illustrate the alleged non-compliance; and (d) the most recent National Implementation Report submitted by Ireland⁵; (e) access requests and correspondence with the relevant Minister, and correspondence with the Commissioner's office.

Duty of Parties to implement Compliance Committee findings of non-compliance concerning other Parties

9. Articles 1 and 3(1) read together, establish an obligation for Parties to take all the necessary legislative, regulatory and other measures necessary, not just to establish, but also to maintain a clear, transparent and consistent framework to implement the provisions of the Convention.
10. In this regard, it is the communicant's view that the maintenance requirement obliges the Parties to the Convention to have regard to findings and recommendations of the Compliance Committee concerning compliance by other Parties, and where non-compliance is identified each Party must adapt its own implementation of the Convention to take into account and indeed remove similar non-compliances in its own system.
11. The failure to pursue equivalent implementation which has been determined to be required in another Party, in findings endorsed by the Meeting of the Parties, leads at the very least to fragmentation and divergence between the Parties and is contrary to both the letter and spirit of the Convention⁶.
12. It should not fall to the public to make communications which ask the Compliance Committee to make a new finding of non-compliance in a Party where that non-compliance has manifestly been decided in an earlier communication. This places an unnecessary additional burden on the Compliance Committee and is contrary to the spirit of cooperation between the Parties to ensure compliance.

⁴ However copies of the key legislation will be annexed or quoted in the body of the communication.

⁵ <https://assets.gov.ie/194000/5b01a967-9f6c-4a9a-bbd0-44bfb814562f.pdf>

⁶ See also the 9th recital to the Vienna Convention which recognises the principle of peaceful cooperation between nations in the context of international treaties such as the Aarhus Convention.

13. The circumstances of this communication illustrate this very well. The findings in case ACCC/C/2015/147 very clearly show that charges for indirect costs for supplying environmental information are contrary to Article 4(8), yet Ireland has not taken any steps, legislative or otherwise, to restrain Irish public authorities which levy these charges. Ireland, in fact, maintains in force a circular informing them that they are in fact permitted to charge indirect costs.
14. Similarly the findings in ACCC/C/2008/24 concerning Spain (which predates Ireland's ratification by almost three years) set out the basis for how public authorities may charge reasonable material costs for supplying environmental information, yet Ireland has not ensured by legislative, regulatory or other means (for example by monitoring charges) that its public authorities calculate their charges by reference to the actual material costs incurred.
15. The Compliance Committee itself draws on its own case law when preparing its findings. In the communicant's view the Compliance Committee's case law is an important element of the evolving interpretation of the Convention and therefore Parties themselves are required by Articles 1 and 3(1) to actively monitor the Compliance Committee's reports, in particular findings and recommendations that are adopted by the Meeting of the Parties, and where necessary implement them without being asked to or forced to do so by a member of the public. The requirement not only to establish but also to maintain an implementation framework supports this view.
16. The facts of this communication show that Ireland has failed to do this.

Charging for supply of environmental information – Indirect Costs and Unreasonable Costs

Legal Framework for charges

17. Ireland has implemented Article 4 of the Convention through the European Communities (Access to Information on the Environment) Regulations 2007 to 2018⁷ (the **AIE Regulations**) which themselves purport to be a transposition of Directive 2003/4/EC on Public Access to Environmental Information⁸ (the **AIE Directive**).
18. Regulation 15 of the AIE Regulations provides for charges for the supply of environmental information as follows:

15. (1) (a) A public authority may charge a fee when it makes available environmental information in accordance with these Regulations (including when it makes such information available following an appeal to the Commissioner under article 12), provided that such fee shall be reasonable having regard to the Directive.

(b) Notwithstanding sub-article (a), a public authority shall not charge a fee for access to any public registers or lists of environmental information pursuant to article 5(1)(d).

⁷ An official consolidated version can be accessed at <https://revisedacts.lawreform.ie/eli/2007/si/133/revised/en/html> (copy also attached at **Annex 1**)

⁸ OJ L 41, 14.2.2003, p. 26–32 <https://eur-lex.europa.eu/eli/dir/2003/4/oj>

(c) Notwithstanding sub-article (a), a public authority shall not charge a fee for the examination in situ of information requested.

(d) Where an applicant examines information in situ and wishes to obtain copies of that information, a public authority may charge a fee, consistent with the list of fees specified under article 15(2), for the provision of such copies.

(1) Where a public authority charges a fee pursuant to sub-article (1), it shall make available to the public a list of fees charged, information on how such fees are calculated and the circumstances under which they may be waived.

19. In Part VII of the latest implementation report dated May 2021⁹, Ireland identifies this Regulation in its response to point (g) concerning measures taken to ensure that the requirements on charging are met:

“Under Article 15 charges applicable under the Regulations are limited to costs associated with making the information available. Any such charge must be reasonable. Article 15(2) requires a public authority to make available to the public a list of any fees charged, information on how they are calculated and the circumstances under which they may be waived.”

20. Part VIII of the implementation report does not identify any obstacles to the implementation of Article 4(8), and Part IX provides no further information on charges under Article 4(8) of the Convention.

21. Ireland has therefore devolved to the public authorities through Regulation 15 of the AIE Regulations the task of ensuring that in each case their charges meet the requirements of Article 4(8) and has not adopted any system of governance and control to ensure that each public authority is adhering to the requirements. The relevant Ministry’s response to a request for details about Ireland’s implementation of Article 4(8) which is included in **Annex 2** confirmed that there is no national information available on the reasonableness of charges.

22. Not only has it devolved such authority, it has failed to do so with appropriate oversight. The implementation report also fails to evidence examination of the implementation in practice – and falls far short of the analysis necessary to inform the standard of actions required under Article 3(1), and to deliver on the guarantees required under Article 1.

23. Guidance published by Ireland in May 2013¹⁰ had originally indicated that public authorities could only charge for the material costs required to supply environmental information and in particular could not charge for indirect costs such as checking whether information was “discoverable” or for searching and retrieving information. This position was consistent with several decisions of the Commissioner for Environmental Information¹¹. These guidelines were

⁹ <https://www.gov.ie/en/publication/a85dc-aarhus-convention-national-implementation-reports/>

¹⁰ Guidance for Public Authorities and others on implementation of the Regulations (May 2013), para 16.4 (**Annex 3**)

¹¹ See for example decision of 26 May 2008, Case CEI/07/0006 *Open Focus and Sligo County Council* (**Annex 4**)

not identified by Ireland in its implementation report concerning Article 4(8).

24. More particularly, and problematically however, it has not been identified by Ireland in its most implementation report (the first since the circular was issued) that on 7 February 2017, the Minister responsible for Ireland's compliance with the Convention issued a circular to all public authorities in relation to charges for supplying environmental information¹². The purpose of this circular was to notify public authorities of a judgment of the Court of Justice in Case C-71/14, *East Sussex County Council v Information Commissioner*¹³ which held that as a matter of EU law, the AIE Directive could be interpreted as allowing charges for the overheads attributable to the time spent by staff of the public authority on answering individual requests for information. The 7 February 2017 circular purported to amend the May 2013 ministerial guidelines by "discounting" the fourth bullet point of paragraph 16.4 and replacing it by the "instruction" in the circular. This circular was not identified by Ireland in the most recent Implementation Report and is not made publicly available by the responsible ministry.
25. The May 2013 guidelines were not updated or reissued following the issuing of this circular, and there is no indication in them that they have been varied. The guidelines are available on the internet, but the 2017 circular is not, nor is it even referenced on the Ministry's webpage on access to environmental information¹⁴, and is variably found albeit hard to identify on the sites of some local authorities. The communicant notes that neither this circular nor the May 2013 guidelines were identified by Ireland in the implementation report. It should be noted that the text of the implementation report on these sections was clearly updated by the Department with responsibility for the Convention in a number of respects, as is evident from the tracked changes version of the implementation report¹⁵, but it still entirely failed to reflect a circular issued by its own Minister.
26. Thus Ireland initially implemented Article 4(8) by correctly disallowing indirect charges, but subsequently regressively changed its implementation on 7 February 2017 so as to allow public authorities to levy this charge. As shown by the results of surveys carried out by the communicant, the vast majority of public authorities in Ireland followed this circular and now charge indirect charges for searching and retrieving environmental information. The results of these surveys are included in the annexes and summarized below.
27. Regulation 14(1) of the AIE Regulations provides that the Minister may publish guidelines in relation to the implementation of the regulations by public authorities, and Regulation 14(2) provides that public authorities should have regard to guidelines published. The use of an unpublished circular to effectively amend published guidelines, does not meet the standard required by Ireland even under its own legislation. This also indicates non-compliance with the requirement for clarity and transparency in the measures implementing the Convention as required by Article 3(1).
28. As a final point of clarification of Ireland's legal framework for access to environmental

¹² Circular AIE/2/2017 (**Annex 5**)

¹³ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62014CJ0071>

¹⁴ <https://www.gov.ie/en/organisation-information/1e52cb-access-to-information-on-the-environment-aie/> As (28 April 2023)

¹⁵ <https://www.gov.ie/en/publication/a85dc-aarhus-convention-national-implementation-reports/#2017> (28 April 2023)

information, Ireland has parallel legislation governing access to planning files held by Planning Authorities and An Bord Pleanála (including files on procedures which fall within the material scope of Article 6). Section 38¹⁶ of the Planning and Development Act 2000 concerns access to planning files held by Planning Authorities. Section 38(4) provides “Copies of documents under this section shall be available for purchase on payment of a specified fee not exceeding the reasonable cost of making such a copy.”. Section 146(6)¹⁷ is a similar provision for obtaining copies of the files of An Bord Pleanála “Copies of the documents referred to in subsection (5) and of extracts from such documents shall be made available for purchase at the offices of the Board, or such other places as the Board may determine, for a fee not exceeding the reasonable cost of making the copy”

Material costs in Ireland

29. By way of further background the communicant refers to typical material costs of supplying information in Ireland. The VAT-inclusive costs to FP Logue LLP for copying a single black and white A4 page is €0.007 to cover consumables and the printer service charge. A colour A4 page costs €0.07. Paper costs approximately €0.01 per sheet¹⁸. Therefore, an A4 copy should cost no more than €0.012 for black and white and €0.075 for colour, assuming double sided copying. In fact, it is likely that public authorities could negotiate lower rates given the economies of scale and the availability of a public procurement framework. Modern printers are extremely cheap and reliable, so that the cost of the printer itself is negligible on a per-page basis.
30. A pack of 50 compact discs costs €14 including VAT, which works out as €0.28 per disc¹⁹.
31. For electronic information, file transfer services are available and most modern organizations have subscriptions that incur zero marginal costs for usage.

Public Authority Survey- Charges Generally

32. The communicant carried out a survey of charges for supplying environmental information in Ireland’s 31 local authorities and the planning appeals Board, An Bord Pleanála. The local authorities have significant environmental responsibilities in relation to planning, waste, pollution, water quality, litter, derelict properties, sanitation and so on. An Bord Pleanála is a public authority with a hybrid function. It handles appeals against first instance planning decisions of the local authorities (acting as planning authorities) and is the authority competent to handle applications for planning permission for strategic infrastructure and certain proposed development by local authorities which require environmental impact assessment or appropriate assessment under the Habitats Directive which Ireland uses as an inadequate proxy²⁰ for activities which may have a significant effect on the environment.

¹⁶ <https://revisedacts.lawreform.ie/eli/2000/act/30/revised/en/html#SEC38>

¹⁷ <https://revisedacts.lawreform.ie/eli/2000/act/30/revised/en/html#SEC146>

¹⁸ <https://www.huntoffice.ie/5-star-office-value-copier-paper-80gsm-500-sheets-per-ream-a4-white-5-reams-397921.html> (4 April 2023)

¹⁹ <https://www.huntoffice.ie/hp-cd-r-52x-700mb-wrap-pack-of-50-69300-hp69300.html> (4 April 2023)

²⁰ See case ACCC/C/2013/107

33. The communicant carried out a survey of these 32 public authorities and found²¹
- a. all but four of them charged for supplying environmental information under the AIE Regulations.
 - b. 26 of the 28 public authorities which charged for supplying environmental information charged an indirect cost for searching and compiling information. The median rate was €20/hour.
 - c. 27 of the 28 public authorities who charged, charged for photocopying at a median rate of €0.04 per copy but charges as high as €0.20 were charged in two cases. (between 3x and 17x the actual cost)
 - d. 20 of the 28 public authorities which charged, charged for supplying information on a compact disc at a median rate of €10 per disc (36x the actual cost)
 - e. Additionally An Bord Pleanála required the requestor to sign a form declaring that the information would only be obtained for personal use and imposing other restrictions.

No facility to waive charges in many cases, in particular for planning files

34. The communicant's survey also revealed that of the 28 public authorities which charge fees for general access to environmental information, 16 (68%) did not publish details as to how a fee may be waived. Of those that did allow for a waiver, none of them provided for a waiver in a way that is compatible with Article 4(8).
35. Five public authorities required a means test but did not specify how it would assess a waiver request in light of a person's means. A means test approach is only applicable to natural persons. Therefore legal persons and groups, organisations and associations could not avail of a waiver in those circumstances. It would also involve an invasive disclosure of sensitive personal information which could have a deterrent effect on the right of access. A person should not have to disclose sensitive personal information in order to avail of a waiver of charges.
36. Six public authorities said they would waive charges if they were below a certain amount, usually €10, many stressed that "full fees" would be charged if costs were above a certain amount, usually €700. This approach is entirely contrary to the requirement for a waiver which is to safeguard the right of access against high charges and seems to be more about the public authority's administrative convenience than anything else. It seems obvious that a waiver under Article 4(8) is intended to apply where fees exceed a reasonable amount, not when they are so low that the public authority couldn't be bothered collecting them.
37. Amongst the other public authorities, waivers were provided where the request was of "national importance" or in "extenuating circumstances based on management discretion". It is not clear how anyone can know in advance when or if a waiver can be obtained in these cases. In particular a requestor does not have to state an interest to make a request, so concepts of "extenuating circumstances" or "national importance" are entirely foreign to the considerations that can be taken into account under Article 4.

²¹ See **Annex 6** for a copy of the request, **Annex 7** for a compilation of the responses and **Annex 8** for a summary of the responses

38. Finally, it should be noted that in the parallel regime for accessing planning information (as described in the next section), none of the 31 planning authorities or the Board identified the possibility of a waiver compliant with Article 4(8) for charges for supplying access to copies of environmental information on planning files.

Planning authority charges – A two-tier system with higher charges for planning documents

39. Ireland’s 31 planning authorities and the Board operate a two-tier charging regime where higher costs are charged for accessing copies of publicly available planning files²². These costs are charged when a member of the public inspects a hard copy file in the office of a planning authority and wishes to take copies of documents. It seems that, administratively, the planning authorities do not treat access to copies of these files as coming within the AIE Regulations or Article 4(8) of the Convention and therefore consider themselves to be at large to set arbitrary fees without regard to any of the constraints on charging imposed by Article 4(8) of the Convention.
40. It appears that the legal basis for these charges is derived from Sections 38(4) and 146(6) of the Planning and Development Act which states “*Copies of documents under this section shall be available for purchase on payment of a specified fee not exceeding the reasonable cost of making such a copy*”.
41. The communicant’s survey²³ shows that the range of charges for copying information from planning files is as set out in the table below (for A3 and above colour price is shown):

Size	Median	Minimum	Maximum
A4 BW	€0.20	€0.10	€1.05
A4 Colour	€0.63	€0.15	€3.00
A3	€1.00	€0.25	€5.00
A2	€5.00	€2.00	€12.00
A1	€5.00	€2.00	€24.00
A0	€9.00	€2.00	€45.00

42. The communicant also found that 29 of the 32 public authorities surveyed charged for retrieving hard copy files at a rate that ranged from €5.00 to €63.50 with a median rate of €30.00 per file.
43. Only 34% (n=11) of the public authorities published details of these charges on their website, only 13% (n=4) provided for a waiver and none provided for a reduced or waived fee in the case of unreasonable or prohibitive costs. Where access to information concerned an activity which was governed by Article 6(6), none provided for free access, even for EIA Reports, with one authority actually charging 10% extra for a copy of an EIA Report.
44. As can be seen the charges for accessing planning files is on average far in excess of the charges

²² It is clear that planning files relate to land use and development and therefore contain environmental information.

²³ See **Annex 9** for a copy of the request, **Annex 10** for a compilation of the responses and **Annex 11** for a summary of the results

for other access to information requests which themselves are unreasonable and not compliant with Article 4(8).

An Bord Pleanála – a special case – charges for electronic access to information which must be published on the internet

45. The Committee will be aware that the communicant has also made Communication ACCC/C/2023/198 concerning compliance by Ireland with, *inter alia*, Article 5 of the Convention. Part of this communication alleges that An Bord Pleanála does not provide electronic access to its files in breach of Article 5(2)(b)(i) and 5(3)(d) of the Convention.
46. As the Compliance Committee will be aware, in the context of Article 4(1)(b), the Implementation Guide emphasizes that the form of access is an important element of the right of access to environmental information since it can lead to faster and less costly provision of information, assist people with disabilities and can make use of modern information systems²⁴. The Implementation Guide explains that public authorities must provide copies of documents when requested rather than just the opportunity to examine them. Specifically, the Implementation Guide, referring to case ACCC/C/2008/24, states that Spain was found to be in non-compliance because a public authority refused to provide electronic access and insisted on providing paper copies at a high, and ultimately unaffordable costs. The Guide further states in relation to Article 4(1)(b)(ii) that “publicly available” in another form means that the same reasonable costs standards are in place for the information as required under the Convention²⁵. In other words a public authority cannot use Article 4(1)(b) to impose unreasonable costs for supplying copies of information that is freely available for inspection.
47. Turning to An Bord Pleanála. This public authority does not actively disseminate its files electronically on the internet, even though in many cases it receives information electronically (or is entitled to require information in this format) it still only makes the information available in hard copy format for inspection in its office, which is located in Dublin. Despite this, when requested for electronic copies of its files under the AIE Regulations, An Bord Pleanála adopts a consistent approach of charging for the provision of electronic access.
48. The Board has two broad competencies. First it handles appeals against decisions of planning authorities on applications for planning permission. In this procedure the Board will request the planning authority to send it a paper copy of its planning file²⁶ and in addition additional submissions from the public or statutory consultees on the appeal as well as the Board’s internal documents will be placed in hard copy on the Board’s file. The vast majority of this information is in electronic format or could easily be converted to electronic format. For example, there is no reason the planning authority couldn’t scan in its file or use the electronic file that it is required to be made publicly available on the planning portals. This form of file is used regardless of whether the appeal concerns an activity which is likely to have a significant impact

²⁴ The Aarhus Convention, An Implementation Guide (UNECE, 2nd Edition, 2014) page 80

²⁵ Ibid. page 81

²⁶ The legislation does not prevent the Board from requesting an electronic copy, but the Board’s practice is to request a paper copy.

on the environment²⁷.

49. In relation to the Board's competency as first instance decision maker, it operates from a paper file but for projects within the scope of the EIA Directive it puts a copy of the application on its website²⁸. However it doesn't publish copies of any submissions or observations or other documents received following the lodging of the application.
50. A common feature of the Board's procedure is that an inspector prepares a report on the file which is presented to the Board during its deliberations. This report along with a copy of the decision itself is required to be published on the Board's website three working days after the decision. Often this does not happen²⁹.
51. An Bord Pleanála states on its website that the AIE Regulations do not apply at all to requests to access files that are required by another statutory provision to be made publicly available³⁰. This appears to be its interpretation of Regulation 4(1) of the AIE Regulations which states:

4. (1) These Regulations apply to environmental information other than, subject to sub-article (2), information that, under any statutory provision apart from these Regulations, is required to be made available to the public, whether for inspection or otherwise.
52. While it is true that there are statutory provisions under the Planning and Development Act 2000 (see §28) providing for public access to the files of An Bord Pleanála in decided cases starting from three days after a decision is made, these provisions require hard copy access and give a discretion to An Bord Pleanála over whether it will provide electronic access. Further issues arise also because these provisions are relied upon to restrict access to the file until after the decision is made.
53. Therefore, An Bord Pleanála has interpreted Regulation 4(1) of the AIE Regulations to mean that where its files are to be made available in one form and manner (i.e. in situ inspection of hard copies) then this information is excluded entirely from the ambit of the AIE Regulations even when a member of the public requests access in another form or manner (for example an electronic copy via file transfer). In the communicant's view this is an incorrect interpretation. Regulation 4(1) is intended to ensure that where national law provides for greater access rights, these may not be limited by the AIE Regulations as is clearly borne out by the guidance published in the Implementation Guide referred to at paragraph 46 above.
54. Second, An Bord Pleanála will also refuse to handle a request for electronic access on the basis that the requested information is available in another form and manner and it would be reasonable for the information to be accessed in this form and manner. This is based on

²⁷ See for example, case 315183 which is an appeal against an application decided using the EIA procedure, yet the Board does not publish the information on its website <https://www.pleanala.ie/en-ie/case/315183> (29 April 2023)

²⁸ See for example <https://www.pleanala.ie/en-ie/case/314550> (29 April 2023)

²⁹ The communicant can substantiate this if needed by reference to instances where the Board had to be requested to provide copies of these documents due to their unavailability on the website.

³⁰ [https://www.pleanala.ie/en-ie/access-to-information-on-the-environment-\(aie\)](https://www.pleanala.ie/en-ie/access-to-information-on-the-environment-(aie)) (5 April 2023) copy at Annex

Regulation 7(3) of the AIE Regulations (which reflects Article 4(1) of the Convention):

(3) (a) Where a request has been made to a public authority for access to environmental information in a particular form or manner, access shall be given in that form or manner unless—

(i) the information is already available to the public in another form or manner that is easily accessible, or

(ii) access in another form or manner would be reasonable.

55. The Board then directs the requestor to the “Public Access” service whereby in-situ examination can be arranged or otherwise there will be a charge for creating an electronic copy of the file.
56. An example of this is illustrated by the communicant’s legal advisor who sought an electronic copy of a file where An Bord Pleanála made a formal scoping decision on the contents of the Environmental Impact Assessment Report for a proposed housing development of 1,087 housing units and 23,400 sqm of non-residential floor space³¹. Under Irish law, such a development requires mandatory EIA and therefore comes within Article 6 of the Convention. Equally it is a decision which comes within Article 9(3) as forming part of national law relating to the environment. It is the communicant’s understanding that the applicant for the scoping determination was required to provide an electronic copy of the application documents.
57. The AIE Officer in An Bord Pleanála replied to the request for an electronic copy of the file to state that the request was refused since it was the policy of the Board to only make the file available for inspection or purchase through the “public access service”.
58. Subsequently Mr Logue was contacted by a representative of An Bord Pleanála and was told that it would cost €28.50 to purchase an electronic copy of the file and that he would have to sign a declaration form which *inter alia* required him to agree to use the file for “personal inspection” only and no other use.
59. In an internal review the original decision refusing the request was upheld where it was stated that An Bord Pleanála had not refused to grant electronic access, notwithstanding that the original decision had specifically invoked Regulation 7(3) of the AIE Regulations which permits a public authority to refuse to provide access in the form and manner requested.
60. On several occasions Mr Logue queried the basis for the charge and also the basis for the declaration form. An Bord Pleanála’s schedule of fees³² only refers to photocopying and CDs, so based on this it appears that the provision of an electronic copy by file transfer shouldn’t incur a charge. As of the date of filing this communication no satisfactory answer has been given by An Bord Pleanála to explain the charges or the imposition of “terms and conditions” on access.

³¹ <https://www.pleanala.ie/en-ie/case/315216> (5 April 2023)

³² An Bord Pleanála – Viewing a decided case file: Public Access - **Annex 13**

61. Copies of the relevant correspondence are included in **Annex 14**.
62. Additionally, the communicant requested electronic access to another file for a large housing development which was also handled using the EIA procedure. The communicant was quoted a fee of €3,234.20 with no explanation as to how this fee was calculated³³.
63. Thus the charging of fees for electronic access to this category of files gives rise to a number of compliance issues. These files come within the Article 6 procedure and therefore the Board's charges are contrary to Article 6(6) which prohibits charging for access to the information relevant to the decision making. In any event it is not permissible to charge for electronic access when there is no material cost to the public authority.
64. Apart from the excessive cost of supplying environmental information, the Board, in charging for electronic access to information which is required to be easily accessible electronically breaches Article 5(3) since, in contrast to Article 4(8) the Convention does not permit charging for the information which must be actively disseminated electronically³⁴.

Appeals to the Commissioner for Environmental Information

65. Article 9(1) of the Convention provides for access to justice in relation to decisions under Article 4.
66. The Compliance Committee has examined Ireland's implementation of Article 9(1) in its consideration of Communication ACCC/C/2016/141 which concerned *inter alia* whether the Irish procedures provided a timely remedy as required by Article 9(4). In its findings on that Communication, the Committee decided that the jurisdiction of the Commissioner for Environmental Information derives from the first paragraph of Article 9(1)³⁵.
67. The Committee also indicated that where the available review procedures are to be used sequentially, subsequent appeals to the Courts also have to satisfy the requirements of Article 9(4)³⁶.
68. In the Irish system, the Commissioner has full jurisdiction to make findings of fact and to review the lawfulness of the acts and omissions of the public authority concerned. Further appeals to the Courts are essentially limited to points of law arising from the Commissioner's decisions. Therefore, the Commissioner, in essence, plays the most importance role in terms of access to justice concerning requests for access to environmental information. This is borne out by the fact that on average the Commissioner handles several hundred appeals per year whereas appeals to the Courts are rare, usually in the low single digits per year.
69. The Commissioner is required to charge an appeal fee for appellants. Generally, this fee is €50 for first party appellants which is reduced to €15 for third party appellants or for natural persons

³³ Correspondence at **Annex 15**

³⁴ The Compliance Committee also indicated in ACCC/C/2015/131 that the concept of "easily accessible" in Article 5(3) meant that access was to be free of charge (para 102)

³⁵ Para 96 of the Compliance Committee's findings in ACCC/C/2016/141

³⁶ Para 99 of the Compliance Committee's findings in ACCC/C/2016/141

who have or who are dependent on a person with a medical card (which is an Irish measure to provide low cost or free medical care for persons of limited means). The Commissioner has discretion to waive the fee where the public authority has failed to make a first instance decision within the time limit prescribed, although there is no such waiver when the public authority has failed to make a timely internal review decision. In practice the Commissioner exercises this discretion where it applies.

70. The Commissioner may also waive the appeal fee where he “deems” an appeal to be withdrawn when the public authority makes the information available in whole or part prior to a “formal decision” or where the appellant withdraws the appeal.
71. It is not clear what purpose the appeal fee serves, having regard to the objectives of the Convention.

No measures to ensure the appeal fee is not prohibitive

72. The medical card, it seems, is a proxy for determining whether a natural person is of limited means and therefore would find the cost prohibitive. As such, this reduced fee appears to be aimed at satisfying the NPE requirements, at least in part, for natural persons. A legal person, group, organisation or association cannot qualify for a medical card and therefore these categories of the public can never avail of a reduced fee.
73. The communicant has spent thousands of Euros on appeals to the Commissioner for Environmental Information including for many appeals which have succeeded. In terms of the 26 appeals which are pending, Right to Know has spent in the region of €1,300 in appeal fees. These costs are a considerable drain on its resources and have a disproportionate impact on its ability to carry out its activities.
74. In addition to the disproportionate effect on Right to Know, Ireland has not introduced any safeguards to protect a legal person such as Right to Know from the prohibitive cost of the appeal fee. There is no facility where an argument can be made on a case-by-case basis that the fee may be generally waived or reduced. Similarly, Ireland has not introduced any scheme to assist with paying this fee even though it is required to consider assistance under Article 9(5). Any such scheme of course would also need to be administered in a way which does not impact on the timelines for participation and access to justice rights.

No measures to ensure that the appellant’s own costs are not prohibitive

75. In terms of an appellant’s own costs, the Commissioner does not have the power to order the public authority responding to an appeal to pay the appellant’s costs.
76. Ireland has not put in place any system to ensure that an appellant’s own costs are not prohibitively expensive. Unlike court procedures, there are no provisions in place for an award of costs to be made to a successful appellant. In addition, there is no assistance scheme to help pay for the appellant’s own costs either before the Commissioner or for litigation.
77. While Ireland may argue that it is not necessary to engage lawyers to bring appeals to the

Commissioner, many public authorities do engage lawyers to respond to appeals, and in any event, they have dedicated state-funded resources including in house legal advisers to assist them in responding to appeals. Therefore, it is not unreasonable, in the interests of a fair and equitable procedure (also required under Article 9(4) of the Convention), for an appellant to require legal assistance to handle at least some appeals before the Commissioner to ensure equality of arms.

78. In the absence of any rules on costs recovery or a scheme of legal assistance, it has fallen to this firm, FP Logue LLP, to act *pro-bono* for the communicant in many cases. We estimate that in addition to the appeal fee, it costs approximately €3,000 ex VAT for the work involved in a typical appeal. Clearly there are cases which are more complex and others that require several appeals to the Commissioner when threshold issues are raised. Relying on voluntary *pro-bono* representation does not constitute compliance with the Convention. Moreover, not all appellants are in a position to secure *pro-bono* support, or may not even consider such a possibility and thus are compromised in upholding their rights. Needless to say, Ireland, cannot rely on the discretion of lawyers to work for free on individual cases as even coming close to the establishment of a “clear, transparent and consistent” framework to implement the Convention.
79. The situation is to be contrasted with litigation (which also derives from Article 9(1) first paragraph). Court procedures come within the provisions of Section 5 of the Environment (Miscellaneous Provisions) Act 2011 (the 2011 Act) where an applicant is entitled to recover costs to the extent that it succeeds³⁷. The Irish courts have found this form of costs protection to comply with Article 9(4) since it provides a way of financing legal representation at a non-prohibitive cost³⁸. It is therefore inconsistent for Ireland not to have a similar costs regime (or indeed any measure to ensure non-prohibitive costs) for Commissioner appeals given that both types of procedure are derived from the same provision of the Convention.
80. As the Compliance Committee highlighted in case ACCC/C/2016/141, in respect of Ireland and its examination of the appeal before the OCEI “*Under a scheme such as that of the Party concerned, where the available review procedures are to be used sequentially, and not as alternatives, the Committee makes clear that the requirements of article 9 (4) apply to each such review procedure*”³⁹
81. The possibility of a costs award against an unsuccessful public authority would have a collateral benefit since it would have a disciplining effect on public authorities by introducing a financial incentive to make better decisions. It would also moderate the possibility for public authorities to abuse the system by repeatedly refusing requests which manifestly should be granted or which concern information which should be actively disseminated.
82. At the moment, in fact, it is more expensive for the appellant to bring an appeal than for the public authority to respond to one. This situation is patently at odds with both the letter and spirit of the Convention.

³⁷ Sections 3 and 5 of the Environment (Miscellaneous Provisions) Act 2011
<https://revisedacts.lawreform.ie/eli/2011/act/20/revised/en/html> (copy at **Annex 16**)

³⁸ *Friends of the Irish Environment v Legal Aid Board* [2023] IECA 19

³⁹ Para 99 of the Compliance Committee’s findings in ACCC/C/2016/141

IV. Provisions of the Convention with which non-compliance is alleged

83. 1, 3(1), 4(8), 5(3), 6(6) and 9(4)

V. Nature of alleged non-compliance

84. It is alleged that there is non-compliance with **Articles 1 and 3(1)** since the facts set out indicate that Ireland has failed to take the necessary legislative, regulatory and other measures, to establish and maintain a clear, transparent, and consistent framework to implement the provisions of the Convention and in particular has failed to identify and rectify in its own system the same or similar non-compliance found by the Compliance Committee in respect of:

- a. Moldova in case ACCC/C/2015/147 for allowing public authorities to charge indirect costs for supplying environmental information; and
- b. Spain in case ACCC/C/2008/24 for allowing public authorities to charge unreasonable material costs for supplying environmental information which were not calculated by reference to the actual costs incurred.

85. It is alleged that there is non-compliance with **Article 4(8)** since the facts set out indicate that Ireland permits public authorities:

- a. To charge for the indirect costs of supplying environmental information;
- b. To charge unreasonable fees for the material costs of supplying environmental information, particularly planning information

86. It is alleged that there is non-compliance with **Article 4(8)** since the facts set out indicate that Ireland permits An Bord Pleanála to charge for access to environmental information in electronic format when there are no material costs incurred by it.

87. It is alleged that, subject to the findings of the Compliance Committee in case ACCC/C/2023/198, that there is non-compliance with **Article 5(3)** since the facts set out indicate that Ireland permits An Bord Pleanála to charge for electronic access to environmental information which it is required to disseminate on the internet.

88. It is alleged that there is non-compliance with **Article 6(6)** since the facts set out indicate that the public concerned is not provided with access to the information listed in Article 6(6) free of charge.

89. It is alleged that there is non-compliance with **Article 9(4)** since the facts set out indicate that there are no measures in place to ensure that the appeal fee to the Commissioner for Environmental Information is not-prohibitively expensive.

90. It is alleged that there is non-compliance with **Article 9(4)** since the facts set out indicate that there are no measures in place to ensure that the appellants own costs to appeal to the

Commissioner for Environmental Information are not-prohibitively expensive.

VI. Use of domestic remedies

91. Given that this communication concerns an alleged general and systemic failure by Ireland to comply with Articles 1, 3(1), 4(8), 5(3), 6(6) and 9(4) of the Convention, with examples covering 32 public authorities and thousands of individual requests for access to environmental information, there is no appropriate remedy available to the communicants.
92. Furthermore the decision of the Court of Justice of the European Union in *East Sussex*⁴⁰ that indirect costs are lawful as a matter of EU law, and in *Friends of the Irish Environment*⁴¹ that legal persons cannot avail of legal aid are binding on public authorities and mean that a domestic remedy would serve no purpose in light of this case law.
93. Theoretically, R2K could challenge actual charges for supplying information before the Commissioner on a case-by-case basis but this would do nothing to deal with the systematic non-compliance and in any event the cases where charges have been appealed have taken many months to be decided⁴². Serial appeals in individual cases would therefore introduce a disproportionate delay and cost without actually dealing with the root cause. In any event, the Commissioner has followed *East Sussex* in subsequent decisions⁴³ so an appeal to the Commissioner against charging indirect costs would fail.
94. In relation to the appeal fee, the Commissioner appears to have no general discretion to waive the fee which is set out in legislation, The communicant cannot identify any remedy to challenge the levying of this fee. Similarly, the Commissioner has no power to award costs and there is no legal basis which the communicant can identify which would allow it to recover the costs of an appeal to the Commissioner.
95. The communicant wrote to the Irish authorities in advance of making this communication calling on them to bring Ireland into compliance with the Convention through immediate temporary administrative measures to be followed by permanent legislative changes. It also asked Ireland to identify the domestic remedies available to the communicant and to give an indication as to their cost and how long they would take⁴⁴, and to set out how such alleged remedies could be used to deal with systemic non-compliance (**Annex 17**). No substantive response was received within the requested time limit.
96. The communicant also wrote to the Commissioner for Environmental Information asking him to consider deferring appeal fees while the communicant's request was under consideration (**Annex 18**). No substantive response was received within the requested time limit.
97. Based on the above it is reasonable for the Compliance Committee to decide that this communication is admissible since not only does the communicant consider that there are no

⁴⁰ Cited at paragraph 24.

⁴¹ Footnote 38

⁴² Case CEI/18/0038, eight months, Case OCE-105379, seven months, Case C-OCE-110723, five months

⁴³ E.g. Mr X, represented by Mr Y & Kerry County Council (Case C/18/0012, 13 December 2018)

<https://www.ocei.ie/decisions/mr-x-represented-by-mr-y/index.xml>

⁴⁴ Information on remedies was also requested separately – see response in **Annex 2**

effect domestic remedies, Ireland was offered the opportunity to identify them but has not done so.

98. In addition the communicant offered Ireland the opportunity to respond in advance to the issues raised and indeed asked it to accept that there was non-compliance and to agree to address it on an interim and permanent basis. Regrettably this offer was not taken up by Ireland. The non-response to the communicant's invitation to engage in advance of the communication should be taken into account by the Compliance Committee when considering admissibility.

VII. Use of other international procedures

99. None

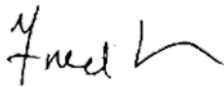
VIII. Confidentiality

100. Not requested

IX. Supporting documentation (copies, not originals)

101. See attached Annexes (irrelevant personal data redacted)

X. Signature



Dublin, 30 April 2023

XI. Sending the communication

1. Send the communication by email to the Secretary to the Compliance Committee at the following address:

aarhus.compliance@un.org

2. In the exceptional case that you do not receive an acknowledgement of receipt from the secretariat by email within one week, send the communication by registered post to the following address:

Secretary to the Aarhus Convention Compliance Committee
United Nations Economic Commission for Europe
Environment Division
Palais des Nations
CH-1211 Geneva 10, Switzerland

List of Annexes

No	Description	Paragraph where first mentioned
1.	Consolidated copy of the European Communities (Access to Information on the Environment) Regulations 2007 to 2018	17
2.	Response from Dept of Environment, Communications and Climate to AIE Request for details of Ireland's implementation of Article 4(8)	21
3.	Guidance for Public Authorities and others on implementation of the Regulations (May 2013)	23
4.	Decision of the Commissioner for Environmental Information of 26 May 2008, Case CEI/07/0006 <i>Open Focus and Sligo County Council</i>	23
5.	Circular AIE/2/2017	24
6.	Survey request for information on charges for supplying environmental information generally	33
7.	Compilation of responses (zip file, personal data redacted)	33
8.	Summary of responses	33
9.	Survey request for information on charges for supplying environmental information from planning files	41
10.	Compilation of responses (zip file, personal data redacted)	41
11.	Summary of responses	41
12.	Website of An Bord Pleanála giving information about requests for access to environmental information	51
13.	An Bord Pleanála – Public Access Guide	60
14.	Fred Logue AIE Request for electronic copy of EIA Scoping file	61
15.	Right to Know AIE Request for electronic copy of Planning File	62
16.	Part 2 of the Environment (Miscellaneous Provisions) Act 2011	79
17.	Letter to Minister for Environment, Communications and Climate dated 29 March 2023	95

18.	Letter to the Commissioner for Environmental Information dated 29 March 2023	96
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