

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

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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 3(1), 4(1), 4(1)(a), 9(1), and 9(4) of the Convention by:
 - a. Requiring requests for access to environmental information to be made in writing or electronic form.
 - b. Requiring requests for access to environmental information to state that the request is made under the Irish legislation implementing Article 4 of the Convention.
 - c. Taking into account the interest of the Communicant when holding against it on a judicial review of a refusal to grant it access to environmental information.
 - d. Not clearly defining the limits of the jurisdiction of the Commissioner for Environmental Information on the one hand and the Courts on the other hand in relation to the review procedure established by the first paragraph of Article 9(1) of the Convention.
 - e. Alternatively, providing that the Commissioner for Environmental Information has limited jurisdiction and therefore cannot rule on all issues of law and fact arising when a person exercises their right to a review procedure established by Article 9(1) of the Convention.
 - f. Alternatively making access to a remedy for that alleged invalidity of legislation

implementing Article 4 of the Convention subject to requirement to first make an appeal to the Commissioner for Environmental Information who lacks jurisdiction and/or to the discretion of the Commissioner for Environmental Information Ireland to ask the High Court to rule on the validity of the legislation.

- g. Providing for court procedures which are neither fair nor timely where at appellate stage a court can rule for the first time that a member of the public exercising their right to a review procedure under Article 9(1) has chosen the incorrect jurisdiction to commence proceedings without having regard to the appropriateness of the alternative jurisdiction.

Relevant Law

2. Ireland has implemented Article 4 and Article 9(1) of the Convention via the European Communities (Access to Information on the Environment) Regulations 2007 to 2018¹ (the **AIE Regulations**). This is secondary legislation which transposes Directive 2003/4/EC on public access to environmental information² (the **AIE Directive**), which is primary European Union law harmonising the implementation of Article 4 in the European Union.
3. The Convention, in its recitals, recognizes that public authorities hold environmental information in the public interest and that every person has the right to live in an environment adequate to his or her health and has a duty both individually and in association with others to protect and improve the environment for the benefit of present and future generations. The Convention also recognizes that citizens must have access to information and access to justice to assert these rights and duties.
4. The AIE Directive acknowledges in recital 9 the necessity that public authorities make available and disseminate environmental information to the general public to the widest extent possible, in particular by using information and communication technologies.

Requests for Access to Environmental Information

5. Neither Article 4 of the Convention nor Article 3 of the AIE Directive specify the form that a request for access to environmental information must satisfy to be valid, these provisions simply require public authorities to make available environmental information held by or for them to any applicant at his or her request and without him or her having to state an interest. The Compliance Committee has already ruled in Case ACCC/C/2007/21 concerning compliance by the European Community that the Convention does not require a person making an information request to explicitly refer to (a) the Convention itself, (b) the implementing national legislation or (c) even the fact that the request is for environmental information³.
6. In Ireland Regulation 6(1)(a) of the AIE Regulations requires a request to be made in writing or in electronic form and Regulation 6(1)(b) requires the requestor to state that the request is

¹ An official consolidated version is included at **Annex 1**

² OJ L 41, 14.2.2003, p. 26-32 (**Annex 2**)

³ ECE/MP.PP/C.1/2009/2/Add.1, paragraph 35

made under the AIE regulations - in other words the applicant must state specifically and in writing or electronic form that they are invoking the AIE Regulations for a valid request to be made.

7. Regulations 6(1)(a), 6(1)(b) and 6(2) of the AIE Regulations read as follows:

6. (1) A request for environmental information shall—

(a) be made in writing or electronic form,

(b) state that the request is made under these Regulations,

...

(2) An applicant shall not be required to state his or her interest in making the request.

8. Ireland operates a parallel regime for access to official information under the Freedom of Information Act 2014⁴ (the **FOI Act**) whereby members of the public may request access to records held by or for certain public bodies which are specified in the legislation (defined as **FOI Bodies**). There are many public authorities which are not FOI Bodies. The FOI Act imposes restrictions and exceptions which go far beyond those permitted by the Convention.

9. Section 12 of the FOI Act imposes formalities for a valid request to be made, including that the request must be made in writing and must state that the request is being made under the FOI Act.

10. There is no obligation on an FOI Body to handle a request made under the FOI Act for access to environmental information according to the provisions of the AIE Regulations. Instead, there is a discretion on a public body allowing it to simply inform the requestor that the information may be accessed under the AIE Regulations (Section 12(7)).

11. Conversely where a request is made to a public authority which could reasonably be regarded as a request for environmental information, but which is not a request made in accordance with Regulation 6(1) or under the FOI Act, then the public authority is required to inform the requestor of their right of access to environmental information and the procedure by which that right can be exercised. There is no obligation on a public authority to handle a request that it identifies as a request for environmental information, but which does not comply with the formalities in Regulation 6(1) or is made under the FOI Act.

Access to Justice

12. Article 9(1) of the Convention requires Ireland to ensure within the framework of its national legislation, that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

⁴ Annex 3

13. Regulation 6(2) of the AIE Directive provides that Member States shall ensure that an applicant has access to a review procedure before a court of law or another independent and impartial body established by law, in which the acts or omissions of the public authority concerned can be reviewed and whose decisions may become final.
14. Article 12 of the AIE Regulations establishes the Office of the Commissioner for Environmental Information (the **Commissioner**) who is empowered to handle appeals against decisions of public authorities. The Commissioner may review the decision of the public authority, affirm, vary or annul the decision and where appropriate require the public authority to make available environmental information to the applicant. The Commissioner is not given powers to invalidate legislation, nor may it grant injunctive relief, for example to order the preservation of information subject to a request. Similarly the Commissioner lacks to power to join other parties to its appeals, which would be necessary under Irish law if the validity of legislation were impugned. Such powers are exclusively those of the courts in Ireland.
15. The High Court of Ireland, which is established under the Constitution, has two specific functions under the AIE Regulations. Under Article 12(9)(a) the Commissioner may refer any question of law arising in an appeal to the High Court for determination. In addition, a decision of the Commissioner may be appealed on a point of law to the High Court under Article 13 of the AIE Regulations.
16. The AIE Regulations do not make its jurisdiction the exclusive jurisdiction for all matters of law and fact arising from a decision of a public authority in relation to a request for environmental information.
17. The case law has determined that the powers vested in a body such as the Commissioner are strictly limited to those expressly given to it by legislation. Therefore, the Commissioner does not have jurisdiction over all matters and law and fact arising on appeal. Specifically, it is not empowered to strike down legislation as unlawful, rule on the Constitutionality of legislation or its compatibility with EU law⁵. It is also doubtful that the Commissioner can make a preliminary reference to the Court of Justice which is an important part of the legal order given that the implementation of Article 4 has been harmonised at EU level.
18. While the Commissioner may make ask the High Court to rule on a point of law arising in an appeal, this jurisdiction (in comparison to the applicant's right of judicial review) is entirely at the discretion of the Commissioner and has only been exercised once in the 16 years since the Commissioner's office was established. When the judicial review referred to in this communication was initiated, the Commissioner had never made such a request to the High Court.
19. The High Court, which has been vested under the Irish Constitution with full jurisdiction over all points of law and fact, has a parallel and general jurisdiction to judicially review acts and omissions of public authorities, including acts and omissions relating to requests for access to environmental information.
20. There is a doctrine established in case law which applies generally to public law litigation that

⁵ An Taoiseach v Commissioner for Environmental Information [2010] IEHC 241, paragraph 7.2 (**Annex 4**)

an applicant should exhaust any administrative remedy before bringing judicial review proceedings. This doctrine is subject to exceptions also defined broadly and only at the level of principle in the case law⁶. There is no clear or unambiguous statement as to when an applicant seeking to exercise rights under the first paragraph of Article 9(1) should exhaust the administrative review procedure before the Commissioner, or when it may directly seek judicial review to challenge the acts or omissions of public authorities.

Background to this Communication

21. The background to this communication stems from the Communicant's desire to have Regulation 6(1)(b) of the AIE Regulations declared invalid as contrary to EU law and Irish law. To do this it made a written request to the office of An Taoiseach (the Irish Prime Minister who holds the records of the Irish government) via email which it considered valid under both EU Law and the Convention but which did not comply with the formal requirement of Regulation 6(1)(b) because it did not state that it was made under the AIE Regulations.
22. The Communicant is an information rights non-governmental organisation established as a non-profit company limited by guarantee. Its main object is to improve, promote and advocate for increased privacy rights and rights of public access to information including the promotion of environmental protection through access to environmental information.
23. The Communicant through its work became concerned that the requirement for an applicant to state that a request for access to environmental information was made under the AIE Regulations was a barrier to accessing environmental information. In the applicant's view this arose in a number of ways.
24. First a requestor might be completely unaware of the AIE Regulations and while seeking access to environmental information wouldn't know that they had to say the "magic words" to turn an informal request for environmental information into one that triggered a public authority's obligations under the AIE Regulations. Thus, informal inquiries to public authorities seeking access to environmental information are at risk of not being handled according to the law.
25. Second, the Communicant has identified that many requests for access to environmental information made under the FOI Act are being handled exclusively under that regime. The FOI Act does not purport to implement Article 4 of the Convention and therefore does not meet the standards set down in the Convention. There are many exceptions to the right of access not provided for in Articles 4(3) and 4(4) of the Convention; there are some exceptions that are mandatory and cannot be overridden in the public interest; and there is no concept of emissions into the environment. The independent review function for FOI appeals is vested in the Information Commissioner which is not competent to carry out reviews under the AIE Regulations. In addition, the access to justice standards are also less favourable under FOI compared to AIE since court proceedings in relation to the FOI Act are not required to comply with Article 9(4) of the Convention, and are prohibitively expensive due to the high costs of litigation in Ireland and the general rule that the losing party must pay all of the costs.

⁶ See *Right to Know v Commissioner for Environmental Information* [2023] IECA 68

26. By way of illustration the Communicant presents⁷ a comparison of the relative numbers of FOI and AIE Requests for selected bodies which are both FOI Bodies under the FOI Act and Public Authorities under the AIE Regulations and which have functions relating to the environment. It can be seen from this data that even for public authorities which have exclusively environmental functions, for example An Bord Pleanála, Irish Water, Commission for Regulation of Utilities, Inland Fisheries Ireland etc there were many multiples more FOI requests compared to AIE requests in 2022.
27. To illustrate the issue further we also present the subject matter of selected appeals to the Information Commissioner under the FOI Act where the subject matter was environmental information⁸. Each of these cases represents a request for access to environmental information which was refused by a public authority under the FOI Act and was not considered under the AIE Regulations. Similarly, each appeal was handled by the Information Commissioner who is not competent to handle appeals against refusal to provide access to environmental information.
28. The Communicant believes this data is representative of the situation in Ireland, where the requirement that the applicant nominates the legal basis for their request, results in numerous requests for environmental information not being handled under the AIE Regulations or given equivalent treatment.

Other Jurisdictions

29. The Communicant has carried out a limited survey of whether there are requirements in other jurisdictions for requests to be made in writing and/or for the requestor to cite the relevant national law implementing the AIE Regulations. This survey is limited by virtue of the author of this communication not being a specialist in the law of the other parties and the reliance on machine translation in some instances. This analysis is presented as a sample only, but it does serve to illustrate that Ireland appears to be an outlier by requiring written requests which cite the legal basis for making a request.
30. In the United Kingdom neither requirement is present. Guidelines published by the Information Commissioner's Office state that "*An individual does not have to mention the Environmental Information Regulations when making a request and the request does not have to be directed to a specific member of staff. Under the Regulations, requests can be made verbally or in writing*".⁹ The UK recommends that public authorities should maintain a register of verbal requests so that there is a record of the details necessary to handle the request in accordance with the applicable legislation¹⁰.
31. In the European Union access to environmental information is governed by Regulation

⁷ Annex 5

⁸ Annex 6

⁹ "The Guide to the Environmental Information Regulations", Information Commissioner's Office, 7 January 2021, page 20 (<https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/guide-to-the-environmental-information-regulations/receiving-a-request/>) Annex 7

¹⁰ Ibid. page 21

1049/2001¹¹ as applied by Regulation 1367/2006¹². Article 3 of Regulation 1367/2006 applies the terms of Regulation 1049/2001 to “any request for access to environmental information” and therefore is not limited to written requests. The Court of Justice of the European Union (CJEU) has confirmed that it is not necessary to state that the request is made under the applicable legislation. In case C-351/20 the CJEU held that “On the other hand, no provision of Regulation No 1049/2001 requires the applicant to specify the legal basis of his or her application The absence of any obligation to make express reference to Regulation No 1049/2001 in a request for access to documents is, moreover, consistent with the objective pursued by that regulation. It follows from Article 1(a) of that regulation that its purpose is to ensure ‘the widest possible access to documents’.”¹³

32. In Malta Article 4 of the Convention was originally implemented via the Freedom of Access to Information on the Environment Act 2005 which required a request to be in writing. However this legislation was amended by the Freedom of Access to Information on the Environment (Amendment) Regulations 2012 to remove this requirement. Equally there is no requirement for a request to cite the Maltese legislation¹⁴.
33. In the Walloon region of Belgium the legislation doesn’t require the citation of the applicable legislation and makes express provision for verbal requests¹⁵. This legislation, mandates public authorities to maintain a register of verbal requests (D14 §1).
34. In Cyprus there are no requirements for requests to be made in writing or to cite the applicable legislation¹⁶.
35. In Italy there are no requirements for requests to be made in writing or to cite the applicable legislation¹⁷.
36. In Luxembourg there are no requirements for requests to be made in writing or to cite the applicable legislation¹⁸.

Procedure

¹¹ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001 p 43-48 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001R1049>

¹² Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies OJ L 264, 25.9.2006 p 13-19 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32006R1367>

¹³ Judgment of 13 January 2020, Case C-351/20, *Dragnea*, ECLI:EU:C:2022:8 para 69 and 71 <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62020CJ0351>

¹⁴ <https://legislation.mt/eli/sl/549.39/20101221/eng>

¹⁵ <https://wallex.wallonie.be/sites/wallex/contents/acts/7/7351/1.html>

¹⁶ http://www.cylaw.org/nomoi/arith/2004_1_119.pdf

¹⁷ <https://net.cisl.it/~cisluniversita.lecce/FOV3-0008318B/FOV3-000760CA/Dlgs%2019%20agosto%202005,%20n.%20195.pdf?Plugin=Block>

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https://www.stradalex.lu/fr/slu_src_publ_leg_mema/toc/leg_lu_mema_200512_204/doc/mema_2005A3262
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37. Given that the requirement to cite the Regulations is not present in the AIE Directive, the Communicant decided to initiate a challenge to the validity of Regulation 6(1)(b) by making a request for environmental information without citing the Regulations with a view to bringing a judicial review seeking to have that provision declared invalid because it was incompatible with EU law or alternatively that the Regulations were unconstitutional because they introduced a provision in secondary legislation (i.e. delegated legislation) that was not required by EU law, and therefore could only be introduced in primary legislation.
38. The Communicant made a request to the office of the Irish prime minister (An Taoiseach) on 3 August 2018 seeking information relating to the environmental assessments of the National Planning Framework and the National Development Plan which concern the development of housing and related infrastructure in Ireland. The request, although made in writing, did not state that it was made under the AIE Regulations.
39. The public authority asked the Communicant to clarify whether it was made under FOI Act or under the AIE Regulations. The public authority stated that it needed this clarification in order to assign the request to the appropriate personnel. The public authority did not offer assistance under Regulation 12(7)(a) and did not inform the Communicant of its right of access to environmental information and how it could be exercised, it simply pointed to formalities required for requests under the FOI Act and the AIE Regulations and asked the Communicant to nominate which statutory process it wished to be invoked.
40. The Communicant refused to give this clarification on the basis that it had already made a valid request and asked for an internal review of the refusal to provide access to the requested information by email on 8 August 2018. No response was received to this request for an internal review giving rise to an implied refusal on 7 September 2018.
41. A copy of the relevant correspondence with the public authority concerned is included in **Annex 8**.
42. The Communicant did not appeal to the Commissioner for Environmental information since it wished to argue that Regulation 6(1)(b) of the AIE Regulations were invalid under EU Law and unconstitutional under national law and to have this provision declared invalid, which is outside of the Commissioner's jurisdiction.
43. The Communicant made an application for judicial review on 19 October 2018 seeking to quash the implied refusal of 7 September 2018 and in addition declarations that Regulation 6(1)(b) was invalid under EU law and national law. A copy of the Communicant's pleadings setting out the reliefs sought is included in **Annex 9**.
44. Under Irish procedure an applicant for judicial review must seek liberty from a judge to make its application. In this part of the procedure the judge checks that the applicant has satisfied the essential requirements to bring the application, including jurisdiction, time limits, standing etc. This application is made *ex parte* (i.e. with only the applicant being heard). Liberty to bring the application was granted by order of the High Court dated 22 October 2018 at which point the public authority and the Irish State was joined. Irish procedure provides a safeguard due to the one-sided nature of the leave application permitting other parties, once joined to apply to set aside the order granting liberty to make the application. In this case the responding parties did

not challenge this order on jurisdictional grounds for failure to exhaust administrative remedies or on any ground.

45. Following a written procedure, the matter was heard on 12 December 2019.
46. The High Court ruled against the Communicant and refused to grant the reliefs sought in a judgment dated 28 February 2020¹⁹. The Court ruled that *“the requirement under Regulation 6(1)(b) that a person seeking environmental information is to state that the request is made under the AIE Regulations does not in any way limit the environmental information that has to be disclosed. Rather, it seems to me that it is a practical step so as to ensure easy and efficient access to the information.”*
47. The Court ruled that the only way a request could be directed to an officer charged with dealing with it was by requiring the person seeking the information to state that they are relying on the AIE Regulations. The Court noted that environmental information could also be sought under the FOI Act where a different system is followed. The Court ruled essentially that the requirement in Regulation 6(1)(b) was one of the practical arrangements envisaged by Article 3(5)(c) of the AIE Directive (implementing Article 5(2)(b) of the Convention).
48. The High Court declined to rule on the threshold jurisdictional question as to whether the Communicant was entitled to bring judicial review proceedings by virtue of not having first appealed to the Commissioner for Environmental Information.
49. The Communicant appealed to the Court of Appeal on 2 November 2020.
50. Following the written procedure, a hearing took place on 24 June 2021.
51. By judgment dated 24 March 2023²⁰ the Court of Appeal ruled against the Communicant and upheld the decision of the High Court. While the Communicant is not raising it as an issue for the Compliance Committee to determine in this case, it observes in passing that a period of 21 months for an appellate court to deliver judgment is not compliant with the requirement under Article 9(4) of the Convention for procedures under Article 9(1) to be timely. The Compliance Committee is respectfully reminded that it has already ruled that a failure of Ireland to put in place measures to ensure that courts decide appeals in a timely manner constituted non-compliance by Ireland²¹.
52. Although the issue was not decided at first instance nor was it the subject of a cross appeal, the Court of Appeal nonetheless ruled on the exhaustion issue and held that Right to Know should have first appealed to the Commissioner for Environmental Information. It held (§59) that it was not sufficient for Right to Know to say that this appeal would have been futile because it had a right to appeal against a decision of the Commissioner on a point of law or to urge him to refer a case to the High Court. The Court did not examine the fairness of requiring an applicant to make a futile appeal to an authority which didn't have jurisdiction to grant the appropriate remedies, nor did it examine the fairness of ruling on a jurisdictional issue almost

¹⁹ Right to Know v An Taoiseach [2020] IEHC 226 (**Annex 10**).

²⁰ Right to Know v An Taoiseach [2023] IECA 68 (**Annex 11**)

²¹ Case ACCC/C/2016/141 concerning Ireland, ECE/MP.PP/C.1/2021/8, para 133(b)

five years after the Communicant made its request for environmental information.

53. Despite ruling that the Communicant had not complied with an alleged requirement to exhaust the administrative remedy and its judicial review was therefore inadmissible *ab initio*, it nonetheless proceeded to uphold the appeal on the substantive issue of whether Regulation 6(1)(b) of the AIE Regulations was lawful and affirmed the decision of the High Court at first instance.
54. On 23 May 2023 the Communicant sought leave to appeal to the Supreme Court against the decision of the Court of Appeal, it also sought a preliminary reference to the Court of Justice, citing in particular the *Dragnea* judgment²² which had been delivered in the period between the Court of Appeal hearing and the judgment.
55. The Supreme Court has jurisdiction to hear appeals which raise points of law of general public interest and/or which serve the interests of justice. The Supreme Court has discretion over whether it accepts an appeal and this decision is made based on a written procedure.
56. The Supreme Court made a determination on 12 July 2023²³ and decided not to grant the Communicant leave to appeal against the decision of the Court of Appeal. It first said that the Irish law relating to the exhaustion of administrative remedies was well established. It considered that an intervening decision of the Court of Justice of the European Union in *Workplace Relations Commission*²⁴ had clarified that the Commissioner for Environmental Information could now disapply national laws that conflicted with EU law meant that a point of law of general importance no longer arose. In relation to the substantive issue, it indicated that this was an *obiter* comment of the Court of Appeal and said that the Communicant could not have unwittingly submitted an application on an incorrect basis and could simply have nominated the legal basis and have brought the matter to an early substantive response.
57. The Supreme Court did not address the validity of Regulation 6(1)(b) of the AIE Regulations or give reasons for its refusal to refer questions to the Court of Justice of the European Union.

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

58. Articles 3(1), 4(1), 4(1)(a), 9(1) and 9(4)

V. Nature of alleged non-compliance

59. Therefore the imposition of such a requirement in Ireland by way of Regulation 6(1)(b) of the AIE Regulations constitutes non-compliance by Ireland with **Article 4(1)** of the Convention.
60. In a similar vein the requirement under Regulation 6(1)(a) of the AIE Regulations for a request to be made in writing also constitutes non-compliance with **Article 4(1)**. This reflects the statement in the Implementation Guide that: “A ‘request’ can be any communication by a

²² Cited at para 31 above

²³ *Right to Know v An Taoiseach* [2023] IESCDET 93 (**Annex 12**)

²⁴ Judgment of 4 December 2019, Case C-378/17. *Workplace Relations Commission* ECLI:EU:C:2018:979 <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62017CJ0378>

member of the public to a public authority asking for environmental information. The Convention does not specify the form of the request, thus implying that any request meeting the requirements of article 4, whether oral or written, will be considered to be such under the Convention.”²⁵

61. Ireland is also in non-compliance with **Article 4(1)(a)** since both the Court of Appeal and Supreme Court had regard to what it viewed as the interest of the Communicant in making the request dated 3 August 2018 which gave rise to the issues upon which it had to decide. Both of these courts took into account when deciding against the Communicant that it was aware of how to comply with the formalities under Regulation 6(1)(b) and could have brought the matter to an end by simply complying with the public authority’s request to identify the legal basis for its request. It is clear from these findings that the Court of Appeal and Supreme Court took the view that the Communicant had no interest in accessing the requested information and deliberately refused to comply with Regulation 6(1)(b) and that this was a significant factor that weighed against it. It is manifestly clear that a requestor does not have to state an interest when requesting environmental information which it is entitled to as of right. Ireland is therefore in non-compliance with **Article 4(1)(a)** insofar as the alleged interest of the Communicant in making the request was a factor which weighed against it during the judicial review proceedings.
62. The facts of this communication illustrate that Ireland is in a state of non-compliance with **Article 3(1)** of the Convention because it has not established a clear, transparent and consistent framework to implement **Article 9(1)**, first paragraph of the Convention. The Communicant acknowledges that Ireland may chose an exclusively sequential approach or it can define parallel jurisdictions under this provision, whereby there is a general right of administrative appeal with certain issues such as the validity of legislation or injunctive relief reserved to the Courts. However, Ireland has not complied with Article 3(1) since it has not set out clearly and transparently which matters are within the jurisdiction of the Commissioner for Environmental Information and which are reserved exclusively to the Courts. In addition, Ireland has not adopted a consistent framework which is clearly seen in this Communication. The High Court decided that it did not need to rule on the admissibility of the judicial review whereas, based on the same facts and law, the Court of Appeal held against the Communicant on this sole ground.
63. The Compliance Committee has already ruled in case ACCC/C/2016/141 that the Commissioner for Environmental Information’s jurisdiction is derived from the first paragraph of Article 9(1)²⁶ and that where national law provides for sequential procedures to be used and not as alternatives that the requirements of Article 9(4) apply to each such review procedure²⁷. The Communicant takes no issue with the doctrine of exhaustion which requires sequential procedures and views this as a desirable element of any system of administrative and judicial remedies. However as set out in this communication this sequential approach cannot be used in Ireland to raise all issues of law that arise and in particular cannot be used to challenge the validity of legislation since the Commissioner at first instance doesn’t have full jurisdiction, in particular the jurisdiction to declare legislation to be invalid. As set out in the preceding paragraph, where the sequential system of remedies is incomplete and there is an alternative

²⁵ The Aarhus Convention: An Implementation Guide (2nd Edition, 2014), page 79

²⁶ ECE/MP.PP/C.1/2021/8, para 96

²⁷ Ibid. para 99

direct judicial remedy, the lack of a clear, transparent and consistent framework to indicate when the alternative direct judicial remedy should be availed of indicates non-compliance by Ireland with **Article 3(1)** read with **Article 9(1)** of the Convention.

64. In the alternative, if the absolutist approach of the Court of Appeal which was effectively endorsed by the Supreme Court holding that an appellant must use an administrative appeal even if it is futile or serves no purpose constitutes non-compliance with **Article 9(4)** since a requirement to appeal to a body which lacks jurisdiction is manifestly not an adequate or effective remedy and is also not fair and not timely given that the time and costs needed to handle this appeal serves no purpose. It also introduces unnecessary delay in accessing environmental information. The fact that a court of appropriate jurisdiction may eventually be accessed by this route is neither here nor there when Irish law already provides a parallel procedure of judicial review. If Ireland wishes to require an exclusively sequential approach, not only should it do so clearly, transparently and consistently it must also vest the first instance appeal body with jurisdiction and all of the powers that are necessary to provide a complete set of remedies and procedures which meet the requirements of **Article 9(4)**.
65. It was a breach of **Article 9(4)** the requirements of fairness and timeliness for the Court of Appeal to rule that the Communicant had not exhausted an administrative remedy when the court at first instance, the High Court, did not rule on this issue and essentially accepted the admissibility of the application for judicial review. Preliminary issues such as admissibility should be finally decided at the earliest possible point in a procedure and should not be agitated for the first time at appellate stage.
66. Insofar as the rulings of the Irish courts indicate that the Communicant should have avoided the litigation by simply complying with the formal requirements in national law, Ireland has not complied with **Article 9(1)** and **Article 9(4)** because it has failed to provide adequate or effective remedies for a member of the public seeking to challenge the validity of legislation such as that at issue in this communication. The imposition of a requirement that an applicant has to be deterred in practice from accessing environmental information for it to be entitled to challenge invalid provisions which prevent lawful access to environmental information means that no member of the public could access such a remedy because of the catch 22 situation set out in the paragraph 69 below. By way of contrast with Article 9(3), there is no provision allowing Parties to set criteria under national law which must be satisfied to entitle a member of the public to access the review procedures envisaged in the first paragraph of Article 9(1). It is also telling that no criticism was levelled against the public authority for refusing to handle a request for what is manifestly environmental information by insisting that the Communicant should formally comply with Regulation 6(1)(b). If the Communicant was to be criticized for insisting on strict compliance with its rights, then the public authority should equally have been criticized for doing exactly the same thing. The public authority could have avoided litigation simply by providing the information sought. Yet the Court of Appeal and the Supreme Court both pointed to the Communicant's behaviour without any examination of how the public authority dealt with the request.

VI. Use of domestic remedies

67. As set out in detail above, the Communicant sought to use domestic remedies to challenge the

validity of Regulation 6(1)(b) in light of EU law and the Irish Constitution. The High Court upheld the validity of this provision, and the Court of Appeal provided a detailed ruling affirming this decision, albeit *obiter*. The Supreme Court declined to accept the appeal and implicitly refused to make a reference to the Court of Justice of the European Union without giving reasons. The Communicant has exhausted domestic remedies and has no further avenue of recourse.

68. Moreover, even though the Communicant ultimately failed because its application for judicial review was deemed inadmissible for failure to appeal to the Commissioner for Environmental Information, it cannot re-agitate this issue before the Commissioner since the Commissioner is now bound by the High Court ruling which was affirmed by the Court of Appeal in a detailed decision.

69. It is clear from the rulings of the Court of Appeal and the Supreme Court that any similar challenge to the validity of Regulation 6(1)(a) requiring a request to be made in writing would be met with the same objection, namely that the Communicant knows how to make a request that complies with national law and therefore should comply with this law, even if it thinks it is invalid. Thus, neither the Communicant nor indeed any applicant could litigate the validity of legislation such as Regulations 6(1)(a) and 6(1)(b) since the informed member of the public will simply be expected to comply with the requirement whereas the unwitting member of the public will not be aware that their rights have been breached.

VII. Use of other international procedures

70. The Communicant requested the Supreme Court as the court of final instance to make a preliminary reference to the CJEU under Article 267 TFEU. This request was refused by the Supreme Court without giving reasons.

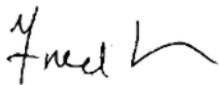
VIII. Confidentiality

71. Not requested

IX. Supporting documentation (copies, not originals)

72. See attached Annexes

X. Signature

A handwritten signature in black ink, appearing to read 'Fred', with a stylized flourish at the end.

Dublin, 1 August 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.	European Communities (Access to Information on the Environment) Regulations 2007 to 2018 (Consolidated)	2
2.	Directive 2003/4/EC on public access to environmental information	2
3.	Freedom of Information Act 2014	8
4.	Judgment of the High Court of Ireland, <i>An Taoiseach v Commissioner for Environmental Information</i> , [2010] IEHC 241	17
5.	Comparison of number of FOI and AIE requests in 2022 for selected public authorities	26
6.	Sample appeals handled by the Information Commissioner	27
7.	“The Guide to the Environmental Information Regulations”, Information Commissioner’s Office, 7 January 2021	30
8.	The Communicant’s request for access to environmental information 3 August 2018 and response	41
9.	The Communicant’s pleading seeking declarations that Regulation 6(1)(b) of the AIE Regulations was invalid	43
10.	Judgment of the High Court, <i>Right to Know v An Taoiseach</i> [2010] IEHC 228	46
11.	Judgment of the Court of Appeal, <i>Right to Know v An Taoiseach</i> , [2023] IECA 68	51
12.	Determination of the Supreme Court, <i>Right to Know v An Taoiseach</i> , [2023] IESCDET 93	56