

Right to Know comments on Ireland's progress report dated 24 November 2023

14 January 2024

Executive Summary

1. The Party Concerned has not identified the root causes of the delays and practice issues that gave rise to the findings of non-compliance.
2. OCEI Decisions (including interim decisions) are now taking 440 days on average, 40% longer than the worst year referred to by the Compliance Committee in its report
3. In 2023 OCEI made 75 decisions covering approximately 120 appeals. In 2022 it received 369 appeals but closed only 227 cases making 129 decisions. Therefore there is a growing backlog of cases in the OCEI.
4. The public authority decision was annulled in 93% of decided appeals in 2022 and 85% in 2023 indicating that poor public authority decision making is contributing to significant delay.
5. IN 2023 70% of OCEI decisions which allowed the appeal were merely interim decisions requiring a new decision of the public authority, which radically increases delay.
6. No proposal to change the work practices of the OCEI
7. Court delays have increased since the communication was made
8. Courts still not giving directions to ensure an adequate and effective remedy.
9. Right to Know is deeply sceptical that the proposed legislative changes are sufficient to bring Ireland into compliance with the Convention and that what is proposed will have any material effect on the underlying issues.

Introduction

10. Right to Know refers to the excerpt from the addendum to the report of the seventh session of the Meeting of the Parties recording Decision VII//8i concerning compliance by Ireland with its obligations under the Convention¹.
11. Right to Know refers in particular to paragraph 2 of Decision VII/8i whereby the Meeting of the Parties endorsed the findings of the Aarhus Convention Compliance Committee (the **Compliance Committee**) with respect to communication ACCC/C/2016/141, which was made by Right to Know.
12. Right to Know refers to paragraph 4(b) whereby the Meeting of the Parties recommended that Ireland take the necessary regulatory and legislative measures to ensure that:
 - (i) Appeals under the Access to Information on the Environment Regulations to the Office of the Commissioner for Environmental Information or the courts, whether commenced by the applicant or any other person, are required to be decided in a timely manner, for instance by setting a specified deadline;
 - (ii) There are mandatory directions in place to ensure that, should a court rule that a public authority or an information request falls within the scope of the Access to Information on the Environment Regulations, the underlying information request is thereafter resolved in an adequate and effective manner.
13. Right to Know refers to paragraph 5(a) of Decision VII/8i whereby the Meeting of the Parties requested Ireland to submit a plan of action including a time schedule to the Compliance Committee by 1 July 2022. This plan of action was submitted on 30 June 2022² with a time schedule of Q3 2022.
14. Right to Know refers to paragraph 5(b) of Decision VII/8i whereby the Meeting of the Parties requested Ireland to provide a detailed progress report to the Compliance Committee by 1 October 2023. This report, in relation to case ACCC/C/2016/141 was submitted on 24 November 2023.
15. Right to Know refers to its letter of 31 August 2023 sent to the Party Concerned with a request for it to be included with the progress report referred to in paragraph 5(b) of Decision VII/8i. This letter was, for reasons that are not clear, sent directly to the Compliance Committee secretariat and was neither included with nor referred to in the progress report.

¹ https://unece.org/sites/default/files/2022-01/Decision_VII.8i_eng.pdf

² <https://assets.gov.ie/219219/f60c6390-6832-446a-92b3-886887521d10.pdf>

16. Right to Know refers to the new consultation on proposed amendments to the AIE Regulations which was initiated on 14 November 2023 and which included the publication of draft Regulations³ which purport to address the request from the Meeting of the Parties referred to above.

17. In light of the above, Right to Know has the following observations to make.

The Compliance Committee's reasoning

18. There are a number of elements of the Compliance Committee findings that are of note.

19. The Communication from right to know concerned, in essence, a complaint that the review procedures under the first paragraph of Article 9(1) of the Convention were not timely and that there were systematic delays. This was based firstly on data which showed that for the years 2016, 2017, 2018 and 2019 the Commissioner for Environmental Information (**OCEI**) took an average of 316, 262, 279 and 249 days respectively to close a case⁴, which times did not include the two-month period following the adoption of a decision during which either party may appeal. The communication was based secondly on data concerning three statutory appeals to the High Court on jurisdictional issues⁵ which also evidenced significant delays in court procedures and a failure of courts to ensure adequate and effective remedies.

20. The Compliance Committee found that the jurisdiction of the OCEI is derived from the first sentence of Article 9(1) of the Convention on the basis that the OCEI has jurisdiction to carry out “*a full factual and legal review of the public authority's decision*”⁶. The Compliance Committee made it clear that Article 9(4) applies to both the OCEI and to any subsequent appeals on a point of law⁷.

21. In relation to the timeliness of the OCEI procedure the Compliance Committee observed that “*time is an essential factor in many access to information requests, for instance because the information may have been requested to facilitate public participation in an ongoing decision-making procedure*” and that the working practices of the OCEI failed to take account of this essential factor⁸. It pointed to the OCEI procedures manual and to the instances when a case might be given priority, nearly all of which related to the administrative convenience of the OCEI. Even where priority could be given for specific pressing reasons, this was caveated to the extent that the Committee concluded that it fell “*well short of recognizing that time will be an essential*

³ Please see **Annex 1** for a full copy of the proposed regulations which do not appear to have been included in the progress report by the Party Concerned (also available at <https://www.gov.ie/pdf/?file=https://assets.gov.ie/276559/c3a77cd8-7a90-4344-9cba-b9dc2dc1030c.pdf#page=null>)

⁴ Paragraph 36

⁵ Paragraphs 40 to 43

⁶ Paragraph 96

⁷ Paragraph 99

⁸ Paragraphs 103 and 104

factor whenever information has been requested for the purposes of an ongoing public participation procedure or when deciding whether to challenge a particular decision before the courts”.

22. The Compliance Committee observed that the average time taken for the OCEI to publish decisions on appeals of 279 and 249 days in 2018 and 2019 far exceeds the deadlines set for public participation or commencing court proceedings with a significant proportion of appeals taking far longer⁹.
23. The Compliance Committee observed that the fact that the OCEI carries out a full review of the facts and the law cannot justify systemic delays that prevent members of the public from exercising their rights under the Convention¹⁰.
24. The Compliance Committee found that the situation was “exacerbated” by the fact that Irish law does not make provision for the OCEI to make a decision within a certain time frame or even to act in a timely manner¹¹.
25. In relation to Court appeals the Compliance Committee noted that Ireland does not have a legal framework which requires the courts to deliver their decisions within a certain period of time or even that they do so in a “timely” manner. The Committee found that this failure has significant consequences, pointing to the four-years that it took to finally decide that NAMA was a public authority¹². The Compliance Committee also considered the *Anglo Irish Bank* and *Minch* cases which also involved serious court delays before concluding that “in no sense” could those review procedures be considered timely.
26. In relation to adequate and effective remedies, the Compliance Committee also criticised Ireland and found further non-compliance with Article 9(4) for failing to ensure that courts issue directions following a ruling that a request falls within the scope of the AIE Regulations for their adequate and effective resolution thereafter¹³.
27. There are therefore three distinct instances of non-compliance which need to be addressed in any proposed new legislation:
 - a. Timely decisions of the OCEI, in particular where access to information is required by a member of the public in order to exercise public participation or access to justice rights under the Convention.

⁹ Paragraph 105

¹⁰ Paragraph 106

¹¹ Paragraph 107

¹² Paragraph 116

¹³ Paragraph 127

- b. Timely decisions of the Courts, particularly for threshold jurisdictional issues
- c. Effective remedies of the Courts, which rule without issuing any directions for their adequate and effective resolution thereafter.

Current State of Play

Commissioner for Environmental Information

- 28. Right to Know analysed the OCEI decisions made in 2023 and has found that on average the appeals decided in 2023 took 444 days to reach a final decision on the appeal, and in many instances even after this length of time the OCEI did not make a final decision on the request. This is 40% longer than the 316 days in 2016 which was the worst year referred to by the Compliance Committee in its report.
- 29. It is also the case that 70% of the decisions annulling the public authority decision (46/65) in 2023 were only interim decisions which resulted in remittal to the public authority for a further decision and therefore did not result in a final decision on whether environmental information should be released meaning that the ongoing delay in these cases is far worse than the data would appear to suggest. Unlike the Courts, the Commissioner doesn't have powers to direct the public authority on remittal, therefore it is doubtful that remittal by the Commissioner is an adequate and effective remedy, given the concerns expressed by the Committee in relation to the lack of directions on remittal from the Courts.
- 30. Right to Know also notes that although more than 300 appeals were pending in 2023, only 75 decisions were made (on approximately 120 appeals). In 2022 the OCEI made 129 decisions, and completed 227 appeals but. Therefore, there is a growing backlog which inevitably will mean that decision times will continue to increase.
- 31. In 2022 OCEI received 369 appeals but closed only 227 cases making 129 decisions¹⁴. In that year 93% of decisions annulled the decision of the public authority.
- 32. In 2023, more than 85% decisions of the OCEI resulted in the public authority decision being annulled. This is an extraordinary rate of reversal and seems to indicate systemic issues in public authority decision making that has not been addressed by the training provided to public authorities referred to at paragraph 5 of the progress report. It appears that there is no review mechanism to ensure that this training is effective or any other governance measures in place to ensure good decision making in public authorities.

¹⁴ OCEI 2022 Annual Review, <https://www.ocei.ie/publications/annual-reports/OCEI-Final-Web.pdf> (note 2023 Annual Review not yet available).

33. It appears that no analysis has been done on the current state of play in Ireland as part of the consultation referred to at paragraph 6 of the progress report. Therefore, we don't actually know why there are so many bad decisions of public authorities, why OCEI decisions are taking so long, and why the OCEI cannot make final decision in such a large proportion of the appeals. It appears to Right to Know that at the very least the OCEI procedures are not efficient, do not have regard to the obligation of timeliness, and are not being appropriately managed or resourced. It also seems to be the case that the part-time nature of the Commissioner (who is also Ombudsman, Information Commissioner, Protected Disclosure Commissioner, and a member of SIPO) is contributing to delays.
34. Another root-cause seems to be endemic and systematic poor decision-making at public authority level, which is not being addressed at internal review or through implementation of OCEI decisions more broadly. This seems to involve lack of searching, blanket refusals, persistent application of exceptions and a lack of active dissemination. None of this has any consequences for public authorities despite the possibility for actual prejudice to applicants.

Courts

35. Right to Know notes that the *Anglo Irish Bank* case remains pending before the courts.
36. In the case of a request dated 14 July 2017 to *Raheenleagh Power DAC*, a publicly owned wind farm operator¹⁵, a final decision on whether it is a public authority remains pending before the Irish Supreme Court, where the hearing was held in May 2023. This six and half year delay is far longer than the four years taken to determine that *NAMA* was a public authority which was referred to by the Compliance Committee in its report¹⁶.
37. Right to Know refers to the case of *Bord na Móna v Commissioner for Environmental Information and Right to Know* which concerned the threshold issue of whether the environmental information was held for Bord na Móna, the state peat company. No directions were given following judgment and the public authority did not give effect to the judgment on its own initiative, but only after Right to Know asked the OCEI to intervene.
38. Right to Know also refers to *Right to Know v An Taoiseach* [2023] IECA 68 where a judgment took two years to issue following the hearing.
39. Therefore there remain serious delays in court procedures and Ireland has not ensured that there adequate and effective remedies following court decisions.

¹⁵ The ownership changed after the request was made and it is now 50% publicly owned.

¹⁶ Para 113

Illustrative case study

40. A good illustration of the virtual impossibility of obtaining an internal review of a decision refusing access to environmental information within a time-frame compatible with public participation and access to justice is illustrated by the case of *Dr Fred Logue and Department of Public Expenditure and Reform*¹⁷. In this case the public authority was the competent authority for a decision dated 12 March 2021 authorising a flood relief scheme that came within the EIA procedure under Article 6 of the Convention.
41. The lawyer for a potential litigant sought access to the file on 9 April 2021 and indicated that he wished to gain access urgently since the time limit to bring judicial review proceedings was due to expire on 11 June 2021. In this instance key documents, including an addendum to the environmental report had not been made available to the public concerned, including his client.
42. A decision on the request was made on 7 May 2021 despite the requestor making clear that he wished to access the information in a much short time scale. No reasons were given for why the requested time scale was not observed.
43. On 9 May 2021 the requestor asked for an internal review to be decided within a week in light of the urgent nature of the request. Despite this the internal review was not decided even within the 1 month time period provided for, a decision only issuing on 10 June 2021 and then only when it was specifically requested by the applicant.
44. Judicial review proceedings were issued on 8 June 2021¹⁸, in the absence of the complete file, which was only finally made available on 25 June 2021.
45. An appeal was brought to the Commissioner for Environmental information on 30 June 2021 against the implied decision refusing to grant access, on the basis that it was not timely, and failed to have regard to the applicant's timescales and other grounds.
46. The litigation was conceded by the public authority on 24 January 2022 which admitted that it failed to comply with the rules of public participation.
47. The Commissioner made his decision on 28 October 2022.

¹⁷ Case OCE-109717-K5Y2Z9, decision of 28 October 2022 <https://www.ocei.ie/decisions/dr-fred-logue-and-departm/index.xml> (Annex 2)

¹⁸ Moddy v Minister for Public Expenditure and Reform 2021/520 JR

Observations

48. First of all, the OCEI prioritisation procedures were criticised by the Compliance Committee, although this manual was updated in February 2020¹⁹, the prioritisation procedures remain unchanged. As far as Right to Know can ascertain, there is currently no proposal to modify these procedures, and this hasn't been identified in the action plan and/or progress report. It is concerning that the issues with the OCEI procedures manual have not been addressed by Ireland in its action plan or progress report given that the Compliance Committee raised concerns about the OCEI working practices.
49. In Right to Know's submission it has not been demonstrated by Ireland that the provisions referred to by it in its progress report will ensure timely procedures of the OCEI and the Courts under the first sentence of Article 9(1) read with Article 9(4).
50. The draft Regulations do not provide a statutory definition of "timely", particularly in specific cases where, for example, public participation and access to justice rights are involved and/or there are urgent threats to the environment. There are therefore no procedures provided to deal with instances where information is urgently required particularly in light of the ever-decreasing deadlines for these types of procedures.
51. The Compliance Committee itself noted that "*time will be an essential factor whenever information has been requested for the purposes of an ongoing public participation procedure or when deciding whether to challenge a particular decision before the courts*", this has not been reflected in the draft Regulations. A bare statutory requirement on the Commissioner to act in a timely fashion is ineffective if, for example, a member of the public is required to exhaust an internal review or wait one month for an implied refusal during which time the time limits for making observations on a decision file or issuing a judicial review will expire.
52. Timeliness, it might be added is necessarily context specific. This is not reflected in the draft Regulations and there will inevitably be disputes over what it means unless the concept is clearly and specifically defined in legislation taking into account as precisely as possible the various contexts that might arise. It is illustrative that the OCEI procedures manual already indicates that the OCEI's objective is to provide a timely and effective review procedure in all cases²⁰. It is hard to see what the proposed Regulation 10(8)(a) adds to what is already the OCEI's stated objective.
53. It is also regrettable that Ireland has not provided the Compliance Committee with the full text of the proposed AIE Regulations since key provisions have been omitted from the progress

¹⁹ <https://www.ocei.ie/Resources/OCEI-procedures-manual.pdf>

²⁰ Paragraph 14.1

report²¹. For example, proposed Regulation 10(8)(b) provides for a suspension of the timeliness requirement while the Commissioner has requested a statement of reasons from the public authority, proposed an amicable settlement or has requested further information. This is contrary to Article 9(4) and to the Compliance Committee's recommendations and findings which envisage timeliness as an overarching requirement for Article 9 procedures.

54. In a similar vein Regulation 10(9) has not been referred to in the progress report which purports to give the Commissioner to power to force the withdrawal of an appeal even where the information requested has not been fully released to the requestor and issues remain in dispute or where there is a dispute over the format in which the information is made available.
55. In relation to court procedures, it should be recalled that the first part of the Compliance Committee's recommendations applied equally to the Commissioner and the Courts, yet this is not reflected in the draft Regulations. This requirement follows from the Compliance Committee's observation that where there are sequential instances of appeal, each instance must comply with Article 9(4). Logically Ireland must implement the same administrative and legislative provisions for both the Courts and OCEI since timeliness is an overarching requirement for both the Courts and the OCEI. In fact timeliness applies to the full procedure including appeals, the clock doesn't not get reset at each instance. This is not reflected in the proposed regulations. The Compliance Committee pointed out that the fact that the OCEI carried out a full review of the law and facts in each appeal could not justify systemic delays that prevent members of the public from exercising their Convention rights²².
56. For court procedures, the progress report refers only to Regulation 11(5) of the draft AIE Regulations and omits reference to the following articles which are also relevant. The proposed Regulations do not require court procedures to be timely and do not impose mandatory time limits, but simply require that the procedures be "as expeditious as possible" consistent with the administration of justice. There are no court procedures to deal with urgent requests involving public participation and access to justice rights.
57. Ireland has not explained why there is a divergence between Article 11 and Article 10 of the draft AIE Regulations and/or why there is no proposal to ensure that entirety of a procedure (including all instances of appeal) is timely. In addition, the concepts of "timeliness" and "expedition" are distinct under the Convention. Under Article 9(1), the requirement of expedition only applies to the procedure in the second paragraph, which was not at issue in this communication, and not to Court procedures which must be timely.

²¹ Annex 1

²² Paragraph 106

Conclusion

58. In Right to Know's view, the proposed draft AIE Regulations manifestly fail to address the Compliance Committee's recommendations. There is no substantive engagement with the Compliance Committee's reasoning, no analysis of the current situation in Ireland so as to understand why decision-making is so slow, or to set down a statutory definition of "timely" in the Irish system. In the absence of this Right to Know submits that the proposed changes are merely superficial and involve a high risk that they will fail.
59. Generally, in Ireland there is a trend for greater expedition of procedures for public participation and access to justice under Articles 9(2) and 9(3) including mandatory time limits for decision-making. None of this is reflected in the proposed legislation which appears to have been drafted without considering how it can be made compatible with the other pillars of the Convention as required by Article 3(1).
60. It is disappointing that, despite having had more than three years to do so, Ireland has not really got to grips with the Compliance Committee's findings and recommendations and has proposed draft measures without showing how they will work in practice, or whether they genuinely address the root causes of the issue that gave rise to Right to Know's concerns in the first place.
61. In light of this, Right to Know remains genuinely sceptical that the proposed amendments will have any effect at all.
62. Right to Know also expresses concern that the action plan does not provide for monitoring of its efficacy, in other words how will we know if the proposed changes are actually working? As already pointed out, the timeliness of OCEI and court decisions have drastically disimproved since the communication was made and therefore it is essential that this aspect should be subject to strict monitoring at national level, with remedial actions taken if necessary.

Annexes

Number	Description	Paragraph of first reference
1	Full text of draft Regulations on access to environmental information	16
2	Decision of the OCEI in case OCE-109717-K5Y2Z9	40