



Ms Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee
United Nations Economic Commission for Europe
Palais des Nations, Room 429-4
CH-1211 GENEVA 10
Switzerland

16 Feb 2024

RE: Communication to the Aarhus Convention Compliance Committee concerning compliance by Ireland with respect to charges for access to environmental information (ACCC/C/2023/199)

- Response of Ireland on Case ACCC/C/2023/199 Right to Know CLG

Dear Ms Marshall,

Please see below the response of Ireland on Case ACCC/C/2023/199 Right to Know CLG.

I. Introduction

1. A Communication has been received from Right to Know CLG (“the Communicant”) to the Aarhus Convention Compliance Committee (“the Committee”) dated 30 April 2023 in which it has been alleged non-compliance by Ireland 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 the Communication and in particular to remedy the same non-compliances in its own system after non-compliances were identified by the 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 Communication was received on 30 April 2023 and was considered by the Compliance Committee at its 79th meeting on 13 June 2023. By email dated 6 June 2023, Ireland indicated that it would not be challenging admissibility at that stage but reserved the right to respond to the Communication and the Communicant's statement on preliminary admissibility. By preliminary determination dated 16 June 2023, the Committee decided that the Communication was admissible.
3. Ireland does not accept that it has breached or acted in non-compliance with the Convention in the manner alleged by the Communicant. The fact that any particular allegation contained in the Communication may not be separately addressed herein should not be taken as acceptance of same. The Communication is premised on an erroneous interpretation or understanding of national law.
4. More fundamentally, the allegation of non compliance is not supported by any, or any sufficient, evidence. It is notable that the Communicant does not identify any specific situation in which it has been required to pay unreasonable or excessive fees in respect of a specific AIE request. While the Communicant has carried out various "surveys" of planning authorities, there does not appear to have been any further engagement with individual planning authorities. It is also of note that the surveys carried out are only in respect of 31 planning authorities where there exist 286 public authorities in the State.



5. The Communicant issued one letter to the Department of Environment, Climate and Communication (“the DECC”) on 29 March 2023 (Annex 18 of the Communication) in respect of the issues complained of and then proceeded to issue a Communication to the Committee on 30 April 2023. Insofar as the Communicant’s aim may be to seek to improve the operation of systems in Ireland, it is both disappointing and surprising that it elected to move straight to making a complaint to this Committee rather than seeking to engage with relevant domestic agencies or await a substantive response from the Department.
6. Ireland submits that the Communication does not disclose any non-compliance with the Convention. It is not accepted that there is systemic non-compliance as alleged by the Communicant. The Communication is generalised, vague and hypothetical in nature. Accordingly, this Communication should be dismissed.

II. Implementation of the Aarhus Convention in Ireland

7. Before addressing the specific complaints contained in the Communication, it is necessary to outline the manner in which the Convention has been transposed into Irish law. The Convention was signed by Ireland on 25 June 1998 and ratified by Ireland on 20 June 2012, with it coming into force in Ireland in September 2012. Ireland has given effect to the relevant provisions of the Convention that relate to requests for access to environmental information by way of the transposition of Council Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 and public access to environmental information and repealing Council Directive 90/313/EEC (“**the AIE Directive**”). This transposition is effected by the European Communities (Access to Information on the Environment) Regulations 2007 (SI No. 133/2007) as amended by the European Communities (Access to Information on the Environment) (Amendment) Regulations 2011 (S.I. No. 662/2011) and the European Communities (Access to Information on the Environment) (Amendment) Regulations 2014 (SI No. 615/2014) and the European Communities (Access to Information on the Environment)(Amendment) Regulations 2018(SI No. 309/2018). Those Regulations will, throughout this document, be cited collectively as “**the AIE Regulations**”. A consolidated version of the AIE Regulations is available online on the Law Reform Commission’s website¹ and is included in Appendix 1.
8. The AIE Regulations require that environmental information held by or on behalf of a public authority be made available in accordance with the Regulations. The AIE Regulations establish the procedure for making a request for environmental

¹ <https://revisedacts.lawreform.ie/eli/2007/si/133/front/revised/en/html> - updated to 1 November 2022.



information in accordance with Article 6. Article 7 sets out the manner in which a request shall be dealt with by a public authority. Article 15(1) provides that a public authority may charge a fee when it makes available environmental information *“provided that such fee shall be reasonable having regard to the Directive”*.

9. Article 4(8) of the Aarhus Convention provides inter alia that:

“Each Party may allow its public authorities to make a charge for supplying information, but such charge shall not exceed a reasonable amount.”

10. This principle is given effect in EU law by Article 5(2) of Directive 2003/4/EC on public access to environmental information which states that:

“Public authorities may make a charge for supplying any environmental information, but such charge shall not exceed a reasonable amount.”

11. This is in turn given effect to by Article 15 of the AIE Regulations which provides for the right of a public authority to charge a fee when it makes available environmental information in accordance with the Regulations and also provides the fee that is charged for making an appeal to the Office of Commissioner for Environmental Information (“the OCEI”) under Article 12. Article 15, which will be dealt with in further detail below when dealing with the specifics of the within complaint, provides 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).

(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.

(2) 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.

(3) Subject to sub-article (4), a fee of €50 shall be charged for making an appeal to the Commissioner under article 12.

(4) In respect of an appeal pursuant to article 12 by—

(a) a holder of a medical card,

(b) a dependant of a holder of a medical card, or

(c) a person referred to in article 12(3)(b),

the fee charged shall be €15.

(5) The Commissioner may deem an appeal to be withdrawn if the public authority makes the requested information available, in whole or in part, prior to a formal decision of the Commissioner under article 12(5). In such circumstances, the Commissioner may waive or refund all or part of the appeal fee.

(6) In respect of an appeal pursuant to article 12 on a decision pursuant to article 10(7), the Commissioner may waive all or part of the appeal fee.

(7) Where an appeal pursuant to article 12 is withdrawn by an appellant, the Commissioner may waive all or part of the appeal fee.”

12. Article 14 provides that public authorities, in the performance of their functions under the AIE Regulations, shall have regard to any guidelines published by the Minister in relation to the implementation of the AIE Regulations by public authorities. To facilitate officials in public authorities in fulfilling their duties under the AIE Regulations, guidance notes on the Regulations have been published.² The *Guidance for Public Authorities and others on implementation of the Regulations* of May 2013 provides guidance in respect of fees in section 16.³ A further Circular AIE/2/2017 was circulated on 7 February 2017 to all public authorities in respect of fees. In response to this Communication, the 2017 Circular has been uploaded to the DECC website and therefore is now publicly available⁴. The Circular referred to the decision of the CJEU in *Case C-71/14 East Sussex* and the finding that a charge for supplying environmental information may include the overheads attributable to the time spent by the staff of the public authority on answering individual requests for information, properly taken into account in fixing the charge, provided that the total amount of the charge does not exceed a reasonable amount and clarified that charges may be incurred for search and retrieval costs. This guidance will be dealt with in further detail below.

² <https://www.gov.ie/en/organisation-information/1e52cb-access-to-information-on-the-environment-aie/#guidelines>

³ <https://www.gov.ie/pdf/?file=https://assets.gov.ie/76998/4d6c5e83-b377-493e-92c6-c76de9d2e0d8.pdf#page=null>

⁴ <https://www.gov.ie/pdf/?file=https://assets.gov.ie/283396/b083f461-073b-45d6-b556-9c453aff7d98.pdf#page=null>



13. As outlined in the Ireland's Aarhus Convention Implementation report of 2021⁵, in contributing to the overarching objective of raising awareness of the Aarhus Convention in Ireland, the DECC has provided training on the AIE Regulations and their application to public authority staff. The first training event took place in September 2014 with subsequent events held in November 2015, October 2016, March 2018, November and December 2019. No training event took place in 2020 but training events resumed in April 2021 and January 2024.
14. Ireland has provided a three-tier system of review under the AIE Regulations. Articles 11, 12 and 13 of the AIE Regulations establish the statutory framework providing access to justice relating to a request for access to environmental information under Article 9(1) of the Convention. Article 11 establishes the right to an internal review of a refusal under Article 7 to give access to Environmental Information, free of charge, and sets out the procedures under which this right may be exercised. An Applicant may make a request for an internal review not later than one month following the receipt of the decision of the public authority concerned. That review must be carried out by a person unconnected with the original decision maker whose ranking is the same as or higher than the original decision maker. That decision must be notified to the Applicant within one month from the receipt of the request for the internal review.
15. In an internal review, Article 11(5) states that the reference to a request refused in whole or in part includes the ground that the amount of the fee charged under article 15(1) is excessive. This therefore provides the first tier of internal review if an applicant is of the view that a fee charged by a public authority is not reasonable having regard to the Directive and is excessive.

“(5) In sub-article (1) and article 12(3)(a), the reference to a request refused in whole or in part includes a request that—

[...]

(c) has otherwise not been dealt with in accordance with Article 3, 4 or 5 of the Directive (including the ground that the amount of the fee charged under article 15(1) is excessive).” (Emphasis added)

16. Regulation 12 of the AIE Regulations establishes the Office of the Commissioner for Environmental Information (“the OCEI”) which is an independent office. In accordance with Article 12(3)(a) where the decision by a Public Authority has been affirmed in whole or in part under Article 11 or under 12(3)(b) a person other than the Applicant will be affected by the disclosure of the environmental

⁵ <https://assets.gov.ie/194000/5b01a967-9f6c-4a9a-bbd0-44bfb814562f.pdf> . See page 5 and 17 in respect of training events on the AIE Regulations.



information concerned, the Applicant or other person affected may appeal to the OCEI against the decision of the Public Authority concerned. An appeal must be initiated either not later than one month after the receipt of the decision under Article 11(3) or not later than one month from the time when the decision was required to be notified under Article 11(3). The OCEI has jurisdiction to extend the time for initiating an appeal where he is satisfied that in the circumstances of the particular case it is reasonable to do so. The general powers of the OCEI are set out in Article 12(5) to Article 12(10). Article 15(3) provides for a fee of €50 to appeal to the OCEI. In certain circumstances (e.g. medical card holders), a reduced fee of €15 applies. The fee may also be waived in certain circumstances, at the discretion of the Commissioner under Article 15(6). The fee charged on appeal to the OCEI is dealt with in further detail below.

17. As stated in Article 11(5)(c), the reference in Article 12(3)(a) to a request refused in whole or in part includes where it is alleged that a request has not been dealt with in accordance with Article 3, 4 or 5 of the Directive, including the ground that the amount of the fee charged under article 15(1) is excessive. Therefore, an appeal to the OCEI provides a second tier of review if an applicant is of the view that a fee charged is not reasonable having regard to the Directive and is excessive.
18. Article 13 provides that a party to an appeal to the OCEI or any other person affected by a decision of the OCEI may appeal to the High Court on a point of law from the decision. It is respectfully submitted that the framework established by the AIE Regulations is compliant with Article 9 of the Convention
19. In addition, there is a right to a review in respect of access to environmental information matters before a court in the form of Judicial Review before the High Court. An application for judicial review is a remedy available to parties in situations where any body or tribunal in Ireland with legal authority to determine rights or impose liabilities, and with a duty to act judicially, has acted in excess of legal authority or contrary to its duty. Judicial review is generally concerned not with the decision of a body or tribunal but with the decision making process.
20. It is submitted that the AIE Regulations establish a clear, transparent and consistent framework to implement the Convention.

Review and Proposed Reforms of the AIE Regulations

21. Ireland wishes to bring to the attention of the Compliance Committee that proposals to amend the AIE Regulations are underway. The AIE Regulations are currently under review by the DECC. A public consultation took place between 8



March 2021 and 6 April 2021⁶ and a total number of 33 submissions were received which are available on the public consultation webpage. Informed by the public consultation, the Regulations were reviewed and updated. On 14 November 2023, the DECC published online new draft AIE Regulations for public consultation on the proposed amendments to the AIE Regulations and to gather stakeholder feedback⁷. The closing date for submissions was on 8 January 2024. 30 submissions have been received which are currently under review. To raise public awareness, a press release⁸ was issued at the outset of the consultation process and a webpage was maintained on the gov.ie website throughout the process. A range of stakeholders were contacted directly and invited to participate in the consultation process. As the consultation process has not yet completed and the submissions are being considered, the final wording of the proposed amended Regulations is still under review.

III. Allegations of non-compliance relating to fees charged by public authorities.

22. In its Communication, the Communicant makes a number of allegations in respect of non-compliance with the Convention which relate to the fees charged by public authorities and make complaints in respect of the charging of indirect costs and that the fees charged are unreasonable or excessive. As outlined above, it is notable that the Communicant does not identify any specific situation in which it has actually been required to pay unreasonable or excessive fees in respect of a specific AIE request. The specific factual evidence is deficient in this regard.

23. Rather, the Communicant makes a generalised complaint of an alleged “systemic failure”. Ireland does not accept that there is a “systemic failure” in respect of compliance with the Convention as alleged. While the Communicant has carried out various “surveys” of Planning Authorities, there does not appear to have been any further engagement with individual Planning Authorities. It is also of note, as outlined above, that the survey is only in respect of 31 planning authorities where there exists 286 public authorities in the State.

⁶ <https://www.gov.ie/en/consultation/53b81-public-consultation-on-the-review-of-the-access-to-information-on-the-environment-aie-regulations-2007-2018/> - Public Consultation March – April 2021.

⁷ <https://www.gov.ie/en/consultation/ce756-public-consultation-on-proposed-amendments-to-the-access-to-information-on-the-environment-aie-regulations-2007-2018/> - Public Consultations 14 November 2023 – 8 January 2024

⁸ <https://www.gov.ie/en/press-release/aada6-access-to-information-on-the-environment-aie-regulations-2007-2018-published-for-public-consultation/>



The Right of Public Authorities to Charge Fees

24. As outlined above in section II, Article 15 of the AIE Regulations provides for the right of a public authority to charge a fee when it makes available environmental information in accordance with the Regulations. Article 15 transposes Article 5 of the Directive. To facilitate officials in public authorities in fulfilling their duties under the AIE Regulations, guidance on the Regulations has been published.⁹ The *Guidance for Public Authorities and others on implementation of the Regulations* of May 2013 (“the Guidelines”) provides guidance in respect of Fees in section 16.¹⁰

“16.1 Article 15 of the Regulations provides that public authorities may make a charge for supplying information but also provides that such charge may not exceed an amount which is considered reasonable having regard to the actual cost of supplying the information requested. It should be noted that public authorities may not charge for the actual making of a request for environmental information, for access to registers or lists of environmental information or for the examination in situ of such information.”

25. Section 16.2 of the Guidelines provides for a policy in favour of providing such information free of charge.

“16.2 In general, public authorities should adopt a policy in favour of providing information without charge but are entitled to charge for the supply of information. It would be reasonable to take account of the extent of the information being requested and the overall resources necessary to supply the environmental information in determining any charge that is made.”

26. This is given further clarity, having regard to the judgment of the Court of Justice of the European Union (“CJEU”) in [Case C-71/14 East Sussex](#), in Circular AIE/2/2017 AIE (Access to Information on the Environment) Search & Retrieval Fees which was circulated on 7 February 2017 to all public authorities in respect of fees and is now available on the DECC website.¹¹ The Circular referred to Article 15 of the AIE Regulations and to *Case C-71/14 East Sussex* and the finding that a charge for supplying environmental information may include the overheads attributable to the time spent by the staff of the public authority on

⁹ <https://www.gov.ie/en/organisation-information/1e52cb-access-to-information-on-the-environment-aie/#guidelines>

¹⁰ <https://www.gov.ie/pdf/?file=https://assets.gov.ie/76998/4d6c5e83-b377-493e-92c6-c76de9d2e0d8.pdf#page=null>

¹¹ <https://www.gov.ie/pdf/?file=https://assets.gov.ie/283396/b083f461-073b-45d6-b556-9c453aff7d98.pdf#page=null>



answering individual requests for information, properly taken into account in fixing the charge, provided that the total amount of the charge does not exceed a reasonable amount. The Circular amended section 16.4 of the Guidelines as follows.

“AIE Guidelines (May 2013)

The Guidance for Public Authorities and others on implementation of the Regulations which was published in May 2013 states under 16.4:

A "reasonable" charge may vary depending on the volume of information to be released but could, for example, include costs connected with compiling, copying, printing and posting of the information. The charge may only relate to the supply of information, and charges should not be made for:

- provision of general advice on the information that is available,*
- time expended on discussing a request,*
- determination of what information is discoverable or*
- search and retrieval costs for the information requested.*

In light of the CJEU ruling point 4 “search and retrieval costs for the information requested” will be discounted and replaced by the instruction of this circular AIE/2/2017.”

27. The Circular clarified that charges may include not only postal and photocopying costs, but also costs attributable to the time spent by staff on answering an individual request for information, which includes the time spent on searching for the information and putting it in the form required and emphasised that any such charge shall not exceed a reasonable amount. The Circular also advised that it is essential that each public authority must make available to a member of the public the schedule of fees that may apply to them on application of an Access to Information Request and that it is advisable to publish such information on the AIE section of each public authority’s website.

28. As outlined above, proposals to amend the AIE Regulations are underway. The draft AIE Regulations published in November 2023 propose to amend the article in respect of Guidelines issued by the Minister. However, the public consultation review has not yet been finalised as the submissions received are under review and the final wording of the draft AIE Regulations has not yet been confirmed. It is intended to update the Guidelines after the new amended AIE Regulations are published. Regulation 12 of the proposed draft AIE Regulations published in November 2023 as part of the public consultation process provides as follows.

“Guidelines

12. (1) The Minister shall publish guidelines in relation to the implementation and



operation of these Regulations by public authorities, not later than 12 months after the date of their coming into operation.

(2) The Minister shall review any guidelines published under paragraph (1) at regular intervals not exceeding 5 years.

(3) A public authority shall, in the performance of its functions under these Regulations, have regard to any guidelines published by the Minister under paragraph (1).

(4) In addition to the guidelines referred to in paragraph (1), the Minister shall ensure that an indicative list of public authorities is publicly available in electronic format on a website maintained by the Minister.

(5) Notice of the making of guidelines or a list under this Regulation shall be published in the Iris Oifigiúil.”

29. Further, Ireland relies on Case C-71/14 *East Sussex* in respect of the entitlement of public authorities to charge for indirect costs. The CJEU sets out the applicable principles as follows:

“39 By contrast, the costs of ‘supplying’ environmental information which may be charged under Article 5(2) of Directive 2003/4 encompass not only postal and photocopying costs but also the costs attributable to the time spent by the staff of the public authority concerned on answering an individual request for information, which includes the time spent on searching for the information and putting it in the form required. Such costs do not arise from the establishment and maintenance of registers and lists of environmental information held and facilities for the examination of that information. That conclusion is, moreover, supported by recital 18 in the preamble to the directive, which states that in principle charges may not exceed the ‘actual costs’ of producing the material in question.

40 In view of the use of the expression ‘actual costs’ in that recital, it must be concluded that overheads, properly taken into account, may in principle be included in the calculation of the charge provided for in Article 5(2) of Directive 2003/4. As the referring tribunal points out, the inclusion of overheads in the calculation of that charge corresponds to normal accounting principles. However, those costs can be included in the calculation of that charge only to the extent that they are attributable to a cost factor falling within the ‘supplying’ of environmental information.

41 As the time spent by the staff of the public authority concerned on answering individual requests for information falls within the ‘supplying’ of environmental information, as found in paragraph 39 above, the



proportion of overheads attributable to that time may also be included in the calculation of the charge provided for in Article 5(2) of Directive 2003/4. That is not the case, on the other hand, with the proportion of overheads attributable to the staff time spent on the establishment and maintenance of a database used by the public authority to answer requests for information.

42 *In the second place, as regards the second condition laid down in Article 5(2) of Directive 2003/4, namely that the total amount of the charge provided for in that provision must not exceed a reasonable amount, it follows from the Court's case-law on Article 5 of Directive 90/313, which remains of relevance for the application of Article 5(2) of Directive 2003/4, that any interpretation of the expression 'reasonable amount' that may have a deterrent effect on persons wishing to obtain information or that may restrict their right of access to information must be rejected (see, to that effect, judgment in Commission v Germany, C-217/97, EU:C:1999:395, paragraph 47).*

43 *In order to assess whether a charge made under Article 5(2) of Directive 2003/4 has a deterrent effect, account must be taken both of the economic situation of the person requesting the information and of the public interest in protection of the environment. That assessment cannot therefore relate solely to the person's economic situation, but must also be based on an objective analysis of the amount of the charge. To that extent, the charge must not exceed the financial capacity of the person concerned, nor in any event appear objectively unreasonable."*

30. It is noted in this regard that the Communicant accepts, as a matter of EU law, the lawfulness of the charging of indirect costs for supplying environmental information (as stated at paragraph 92 of the Communication).

AIE Requests received and charges levied in Ireland

31. It is not accepted that there is a "systemic" issue of non-compliance in Ireland in respect of the charging of fees for access to environmental information. On an annual basis, the DECC collects data from each Department of Government and Local Authority in respect of the number of requests made to them under the AIE Regulations. Each Department of Government is also responsible for obtaining the relevant data from public authorities within its remit in order to furnish that to the DECC. Statistics for national AIE requests received by all public authorities



are published on the DECC section on Gov.ie website¹². Each public authority has been advised that it should, in turn, publish its AIE statistics on its website. The DECC publishes an AIE disclosure log indicating a summary of the AIE requests received by the Department and the reply.¹³

32. The table below gives an indication of the number of AIE requests received by public authorities between 2013 and 2022 and an indication as to how they have been dealt with. It is submitted that the statistics illustrate that public awareness of the AIE regime has increased in recent years. The fees charged by public authorities have clearly not been a deterrent in respect of the making of AIE requests.

Year	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Total AIE Requests	374	608	658	670	606	640	912	858	1651	4555

33. An examination of these statistics indicates that public authorities are mindful of the applicable guidance that public authorities should adopt a policy in favour of providing information without charge, with only 2 out of the 286 public authorities surveyed having charged any fees during 2022. In relation to the fees charged, the amount charged in 2022 came to a total of just €780 across 11 requests, notwithstanding that there were 4,555 requests across all public authorities in the State. The total amount of AIE fees actually received by all public authorities in 2022 was just €160. It is also of note that in the 31 planning authorities surveyed by the Communicant not one of those planning authorities had charged a fee in 2022. Further, most public authorities do in fact waive the charges for supplying environmental information.

34. It is also important to note that the majority of requests for information are in electronic format. It is rare for a request to be in hardcopy form. Although full statistics for 2023 are not yet available, by way of example, across 49 public authorities, 1581 AIE requests were received in 2023. 1379 of those requests requested for the information in E-format, 154 were unspecified format requests and 17 were hardcopy requests. Thus, 97% of requests are E-format or unspecified and 3% are hard copy/other. Only one of those public authorities charged a fee of €315 (search and retrieval €20 per hour for 5 hours and 5400

¹² <https://www.gov.ie/en/collection/257c4-national-aie-statistics/>

¹³ <https://www.gov.ie/en/publication/7a9cb-aie-disclosure-log/>



sheets) which fee was not received. The full set of figures and public authorities who provided data is contained in Appendix 2.

35. The fact that most of the public authorities have not charged any fees in respect of AIE requests demonstrates that there is adherence to section 16.2 of the *Guidance for Public Authorities and others on implementation of the Regulations of May 2013*¹⁴ which provides for a policy in favour of providing information free of charge and provides guidance to public authorities that a charge may not exceed an amount which is considered reasonable having regard to the actual cost of supplying the information requested. It is submitted that the statistics in Ireland demonstrate that there is a presumption that information is provided free of charge in accordance with the principles outlined in the decision of *Moldova in Communication ACCC/C/2017/147*¹⁵ at paragraph 86.
36. It is evident that, having regard to the very modest charges levied in Ireland and the fact that the number of AIE requests has increased more than 12-fold in the past decade (from 374 in 2013, to 4,555 in 2022), no deterrent effect exists.

Complaints in respect of An Bord Pleanála

37. The Communicant complains that Ireland is in breach of the Convention, alleging that it permits 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. A complaint is also made that Ireland permits 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).
38. At paragraph 45 of the Communication, the Communicant refers to an earlier Communication ACCC/C/2023/198 which 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. Ireland relies on the Response to that Communication filed on 17 October 2023¹⁶ which is set out at Appendix 3.

¹⁴ <https://www.gov.ie/pdf/?file=https://assets.gov.ie/76998/4d6c5e83-b377-493e-92c6-c76de9d2e0d8.pdf#page=null>

¹⁵ [Moldova ACCC/C/2017/147](https://www.unece.org/sites/default/files/2023-11/frPartyC198_17.10.2023.pdf)

¹⁶ https://unece.org/sites/default/files/2023-11/frPartyC198_17.10.2023.pdf



39. As outlined in that Response, Article 5 of the AIE Regulations places certain general obligations on public authorities, including planning authorities and the Board. Article 5 states:

“5 (1) A public authority shall:-

- (a) inform the public of their rights under these Regulations and provide information and guidance on the exercise of those rights,*
- (b) make all reasonable efforts to maintain environmental information held by or for it in a manner that is readily reproducible and accessible by information technology or by other electronic means,*
- (c) ensure that environmental information compiled by or for it, is up to date, accurate and comparable,*
- (d) maintain registers or lists of the environmental information held by the authority and designate an information officer for such purposes or provide an information point to give clear indications of where such information can be found.*

(2) The environmental information specified in sub article 5(1)(b) shall include at least:

- (a) the texts of international treaties, conventions or agreements and legislation pertaining to them,*
- (b) policies, plans and programmes,*
- (c) progress reports on the implementation of items specified in sub articles (a) and (b), where these have been prepared by the public authority or are available in electronic form, and*
- (d) data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment, where such information is directly relevant to the function of that public authority and is environmental information within the meaning of Article 3.*

(3) In the event of an imminent threat to human health or the environment, whether caused by human activities or due to natural causes, a public authority shall ensure that all information held by or for it, which could enable the public likely to be affected to take measures to prevent or mitigate harm, is disseminated immediately and without delay.

(4) Exceptions in articles 7, 8 and 9 may apply in relation to the duties imposed by this article.

(5) Public authorities may satisfy the requirements of this article by creating links to internet sites where the information may be found.

40. In particular, Article 5(1)(b) of the AIE Regulations places an obligation on a public authority to “make all reasonable efforts to maintain environmental information held by or for it in a manner that is readily reproducible and accessible by information technology or by other electronic means”. Article 5(2) identifies



some of the documentation to which this obligation relates. However, it should be noted that the list contained in Article 5(2) is not an exhaustive list of that which comes within the scope of Article 5(1)(b).

41. The instant Communication contains no explanation of the basis upon which it is suggested that the broad nature of the obligation contended for by the Communicant (i.e. that a public authority is required to publish all environmental information held by it on a website or electronic means) arises from the Convention. There is no textual analysis of the Convention nor are there any decisions of the Committee cited in support of the proposition. The Communicant has not referred to any decision to say that public authorities are required to publish every piece of environmental information held by them on a website or a general requirement to disseminate all environmental information on the internet.

42. Article 5(3) of the Convention provides that:

“3. Each Party shall ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunications networks. Information accessible in this form should include:

(a) Reports on the state of the environment, as referred to in paragraph 4 below;

(b) Texts of legislation on or relating to the environment;

(c) As appropriate, policies, plans and programmes on or relating to the environment, and environmental agreements; and

(d) Other information, to the extent that the availability of such information in this form would facilitate the application of national law implementing this Convention, provided that such information is already available in electronic form.”

43. Ireland denies that there is any failure to comply with that Article 5(3) of the Convention. Article 5(1)(b) of the AIE Regulations places an obligation on public authorities to make all reasonable efforts to maintain environmental information held by or for them in a manner that is readily reproducible and accessible by information technology or by other electronic means. That is a general obligation placed on public authorities which sits in parallel with other, specific obligations which arise in different contexts such as under planning legislation in particular. It is evident from the language used in Article 5 of the AIE Regulations that the obligation which it places on public authorities correlates with that which arises from Article 5 of the Convention. The obligation arising from Article 5 of the Convention is to ensure that environmental information becomes progressively available in electronic databases which are easily accessible to the public through telecommunications networks. That obligation is discharged (i) by the imposition, through Article 5(1)(b) of the AIE Regulations, of a general obligation



to make all reasonable efforts to maintain environmental information held by or for it in a manner that is readily reproducible and accessible by information technology or by other electronic means and (ii) by reference to other, more specific statutory obligations to publish certain environmental information online.

44. As outlined above, public authorities are entitled to charge for the provision of environmental information as permitted under the Convention and in accordance with the AIE Regulations and the Guidance circulated. Further, planning authorities are permitted to charge for access to documentation under planning legislation. Sections 38(4) and 146(6) of the Planning and Development Act 2000 states that copies of documents under those sections shall be available for purchase *“on payment of a specified fee not exceeding the reasonable cost of making such a copy”*. There is no requirement under the Convention that such information has to be provided free of charge. Ireland refers to the Response to Communication ACCC/C/2023/198 outlining the efforts being made to update the ePlanningPortal to make more files electronically available on the internet and to convert hardcopy files to electronic format.
45. Article 6(6) of the Convention merely requires the public authority to give *access for examination* free of charge without prejudice to the provisions of Article 4 of the Convention and provides as follows:

“6. Each Party shall require the competent public authorities to give the public concerned access for examination, upon request where so required under national law, free of charge and as soon as it becomes available, to all information relevant to the decision-making referred to in this article that is available at the time of the public participation procedure, without prejudice to the right of Parties to refuse to disclose certain information in accordance with article 4, paragraphs 3 and 4. The relevant information shall include at least, and without prejudice to the provisions of article 4.”

46. The Committee is also referred to the statistics in respect of AIE requests as outlined at paragraph 34 above. These demonstrate that most AIE requests are provided in E-format. It is rare for any charge to be imposed in respect of furnishing environmental information whether by way of electronic access or otherwise. Therefore, it is not accepted that there has been non-compliance with Articles 4(8), 5(3) or 6(6) as alleged.

Availability of Internal Review and Appeal to the OCEI for Unreasonable or Excessive Fees



47. Section 15.2 of the *Guidance for Public Authorities and others on implementation of the Regulations* of May 2013 refers to internal reviews under Article 11 and appeals to the OCEI under Article 12 of the Regulations. It makes it clear that internal reviews and appeals can be made where the applicant considers that the fee to be charged is excessive or unreasonable. The OCEI is granted jurisdiction to consider factual and legal appeals from any decisions to refuse a request for environmental information including on the ground that the fee to be charged is excessive. Ireland has provided a three-tier system of review which assists in ensuring that in each case charges levied meet the requirements of Article 4(8) of the Convention.
48. In this regard, the Communicant's allegations on the prohibitively expensive or excessive costs remain hypothetical, since the Communicant has not established any case where costs were indeed prohibitively expensive and they do not identify any specific situation in which it has been required to pay unreasonable or excessive fees in respect of a specific AIE request. The Communicant does not give any example as to where it has complained to or raised an issue with a public authority in respect of an allegation of non compliance with the Convention having regard to fees charged or the information in respect of fees published or made available to applicants. The Communicant does not give any example as to where it has utilised the Article 11 process, which is free of charge, or any further appeal to the OCEI pursuant to Article 12 in a specific situation where it considers that the fee charged was excessive or unreasonable. It is therefore submitted that the allegations in respect of costs have not been sufficiently substantiated.
49. The OCEI publishes its Annual Reports online¹⁷. As can be seen from OCEI Annual Report 2021¹⁸ (at page 89) two appeals dealt with by the OCEI in respect of the reasonableness of fees imposed in respect of an AIE request are referred to. In those appeals¹⁹ the OCEI concluded that the fees charged were not reasonable in light of EU case law and that the publications scheme on the website did not comply with the requirements under Article 15(2) of the AIE Regulations. The Report states as follows:

“Reasonableness of fees

The OCEI issued a composite decision in two appeals, OCE-105379-F8L2B9 and OCE-106896-D5T5W5, brought by the same individual about two decisions of the Department of Agriculture, Food and the

¹⁷ <https://www.ocei.ie/en/organisation-information/4821e-annual-reports/>

¹⁸ <https://www.ocei.ie/pdf/?file=https://assets.ocei.ie/media/266278/bcde05e2-f0c8-4239-b6f0-823dcda23c80.pdf#page=null>

¹⁹ *OCEI Appeal decision of 1 October 2021 OCE-105379-F8L2B9* <https://ocei.ie/en/ombudsman-decision/1c507-mr-x-and-department-of-agriculture-food-and-the-marine/>



Marine. These appeals relate to the reasonableness of fees levied for search and retrieval of environmental information on foot of two requests that he had made. Article 15(1)(a) of the AIE Regulations provides that a public authority may charge a fee when it makes available environmental information, provided that such fee shall be reasonable having regard to the AIE Directive. This provision implements Article 5(2) of the AIE Directive, which provides that public authorities may make a charge for supplying any environmental information but such charge shall not exceed a reasonable amount. The Aarhus Guide reinforces this message that fees for access to information must be affordable.

In these cases, we concluded that the fees charged by the Department were not 'reasonable' in light of EU case law on the meaning of that term. We also found that because the fees themselves were not reasonable, the publication scheme on the Department's website did not comply with the requirements under article 15(2) of the AIE Regulations.

These cases highlight the importance of interpreting the AIE Regulations with reference to the AIE Directive, as opposed to applying a domestic interpretation. Reasonableness and affordability are relative terms, which require consideration of the context in which the request is made, and the circumstances of the requester, and not the context of, or burden placed upon, the public authority carrying out the search and retrieval work. This is a considerable distinction from the basis for the fees structure that public bodies have in place under the FOI Act, with which most public authorities may be more familiar. It is therefore crucial that public authorities take account of the provisions of the AIE Regulations and the AIE Directive when making a decision on the charging of fees for processing an AIE request."

50. The OCEI has also considered appeals relating to whether the fees charged by a public authority were reasonable or excessive and whether there was compliance with Article 15 of the Regulations in Appeals OCE-110723-R2S7B8²⁰, CEI/18/0038²¹ and CEI/11/0007.²² These provide examples of the review mechanism available to any applicant where an applicant is of the view that a fee charged is unreasonable or excessive or where an applicant is of the view that the fee information made available is not in compliance with article 15(2)

²⁰ OCEI Appeal decision of 16 December 2022 OCE-110723-R2S7B8 - <https://ocei.ie/en/ombudsman-decision/16aff-ms-m-and-department-of-agriculture-food-and-the-marine/>

²¹ OCEI Appeal decision of 13 March 2019 CEI/18/0038 - <https://ocei.ie/en/ombudsman-decision/1864f-lar-mckenna-offaly-county-council-the-council/>

²² OCEI Appeal decision of 20 February 2013 CEI/11/0007 - <https://ocei.ie/en/ombudsman-decision/e5262-mr-pat-swords-and-the-department-of-environment-community-and-local-government/>



of the Regulations. This demonstrates that the internal review procedure and the mechanism to appeal to the OCEI allows for the consideration of an actual case by case review where the facts of a case and all of the factors on the basis of which the amount of the charge is calculated can be assessed in the context in which the request is made, to determine whether any charge imposed is reasonable or in compliance with the Regulations and Convention.

51. The OCEI has the power to annul the decision of a public authority to impose a charge and can direct the refund of any fee imposed. This provides an effective and sufficient means of redress. As outlined above, the Communicant has not utilised either the internal review procedure or an appeal to the OCEI in respect of a complaint of unreasonable or excessive fees. Having regard to the statistics above outlining the number of AIE requests received and the number of cases where a fee has in fact been charged, demonstrating that most public authorities have not imposed any fee for an AIE request, it is submitted that there has been no “systemic” failure by Ireland as alleged. It is therefore not accepted that it was not possible to utilise this review mechanism or to exhaust domestic remedies as alleged in section VI of the Communication and in particular paragraph 93 thereof. It is denied that there has been non-compliance with Articles 1, 3(1), 4(8), 5(3), 6(6) and 9(4) of the Convention as alleged.
52. The Communicant has carried out a “survey” of the costs published by various planning authorities and has sought to carry out a comparison of the fees published on the various websites but has not identified any obligation for each public authority to match each others charges. The Communicant has not identified a specific case where it has been charged in excess of the fee information made available. The “survey” conducted by the Communicant and on which it relies has little or no evidential value and does not demonstrate any absence of compliance with the Convention. However, it is evident from the responses that the planning authorities (only 31 of which were surveyed) were generally aware of the obligations placed on them by the AIE Regulations. The vast majority of planning authorities have confirmed that information in respect of fees is available on their websites. Accordingly, the evidence relied upon does not demonstrate “systemic” non compliance.
53. Accordingly, it is not possible for the Committee to determine or reach a conclusion that there has been a systemic failure and non compliance with the Convention in respect of the survey results with no factual context within which to consider whether a fee imposed is reasonable or excessive.
54. In the decision of *Moldova ACCC/C/2017/147* the Committee was in a position to consider specific circumstances of a charge imposed on the Communicants and consider whether the charge was reasonable. In the rare circumstances where



a charge is actually imposed by a public authority, or if it is alleged that a public authority has not made the applicable fee information available to an applicant, Ireland has provided a three-tier review mechanism for an applicant to ensure compliance by a public authority with the Regulations and the Convention.

55. Without prejudice to the foregoing, even if an erroneous decision is made by a public authority in respect of charging excessive fees or a failure by a public authority to publish or make the fee information available, this should not automatically lead to a finding of non compliance by the Committee given that there are effective review procedures in place. By way of a general principle, in response to this communication, Ireland relies on the decision of the Committee in [European Community ACCC/C/2007/21](#) (Appendix 4):

“The Committee considers it important to point out the aforementioned deficiencies on the handling of information requests in order to clarify the obligations under the Convention with regard to environmental information and thereby contribute to better implementation of its provisions. However, it does not consider that in every instance where a public authorities of a Party to the Convention makes an erroneous decision when implementing the requirements of Article 4, this should lead the Committee to adopt a finding of noncompliance by the Party, provided that there are adequate review procedures. The review procedures that each party is required to establish in accordance with Article 9, paragraph 1, are intended to correct any such failures in the processing of information requests at domestic level, and as a general rule, it is only when the Party has failed to do so within a reasonable period of time that the Committee would consider reaching a finding of non-compliance in such a case. Decisions on such a question need to be made on a case-by-case basis. In the present case, the requested information was provided, albeit with some delay, and thus the matter was resolved even before there was any recourse to the review procedures available to the communicant”. [Emphasis added]

56. As outlined above, proposals to amend the AIE Regulations are underway. It is intended to update the Guidelines after the new amended AIE Regulations are published. However, it is accepted that no Circular or guidance has been issued since 2017. Therefore, pending the finalisation of the revised Regulations, the DECC is willing to issue a further Circular to public authorities to remind them of their obligations under Article 4(8) of the Convention to the effect that any charge for supplying information shall not exceed a reasonable amount and that they are required to make available a schedule of charges which may be levied and also indicating the circumstances in which they may be levied or waived and when the supply of information is conditional on the advance payment of such a charge.



IV. Fees for Appeals to the OCEI

57. As outlined above, Ireland has provided for a three-tier review mechanism with the internal review under Article 11 of the Regulations being a procedure that is free of charge. Regulation 12 of the AIE Regulations establishes the OCEI which is an independent office and an independent administrative appeals body, consistent with Article 6(1) of Directive 2003/4/EC which provides that:

“Member States shall ensure that any applicant who considers that his request for information has been ignored, wrongfully refused (whether in full or in part), inadequately answered or otherwise not dealt with in accordance with the provisions of Articles 3, 4 or 5, has access to a procedure in which the acts or omissions of the public authority concerned can be reconsidered by that or another public authority or reviewed administratively by an independent and impartial body established by law. Any such procedure shall be expeditious and either free of charge or inexpensive.”

58. The Communicant complains that the fee for an appeal to the OCEI is prohibitively expensive and alleges a breach of Article 9 of the Convention. Article 15(3) of the AIE Regulations provides for a fee of €50 to appeal to the OCEI. In certain circumstances (e.g. medical card holders), a reduced fee of €15 applies. The fee may also be waived in certain circumstances, at the discretion of the Commissioner under Articles 15(5) and 15(6) of the AIE Regulations. The Commissioner considers requests to waive the appeal fee on a case by case basis. It is the practice of the OCEI to refund the appeal fee where an appeal is deemed to be withdrawn where a public authority makes the information available.

“15. [...]

(3) Subject to sub-article (4), a fee of €50 shall be charged for making an appeal to the Commissioner under article 12.

(4) In respect of an appeal pursuant to article 12 by—

(a) a holder of a medical card,

(b) a dependant of a holder of a medical card, or

(c) a person referred to in article 12(3)(b),

the fee charged shall be €15.

(5) The Commissioner may deem an appeal to be withdrawn if the public authority makes the requested information available, in whole or in part, prior to a formal decision of the Commissioner under article 12(5). In such circumstances, the Commissioner may waive or refund all or part of the appeal fee.



(6) *In respect of an appeal pursuant to article 12 on a decision pursuant to article 10(7), the Commissioner may waive all or part of the appeal fee.*
(7) *Where an appeal pursuant to article 12 is withdrawn by an appellant, the Commissioner may waive all or part of the appeal fee.”*

59. It is not accepted that the appeal fee to the OCEI is prohibitively expensive and the Committee’s attention is brought to the history of the appeal fee to the OCEI. In SI. No 133 of 2007²³ the appeal fee under Article 12(3) was €150 and the reduced fee under Article 12(4) was €50 and this remained the applicable fee under S.I. No. 662/2011²⁴. Ireland reviewed the applicable appeal fee and there was a subsequent amendment to the AIE Regulations and a reduction of the applicable fee in SI No. 615/2014²⁵ to €50 and the reduced fee of €15 under Article 12(4). As set out in the explanatory note of SI No. 615/2014 the purpose of the amendment and the reduction in the fee was to ensure that the review procedure of an appeal to the OCEI is not prohibitively expensive. It is not accepted that Ireland has not adopted measures to ensure that administrative appeals to the OCEI are not prohibitively expensive. This reduction in the appeal fee has resulted in a significant increase in the number of appeals to the OCEI, as can be seen in the statistics and tables outlined below.

60. The OCEI publishes statistics and reports on appeals received and issues Annual Reports.²⁶ The tables below give an indication of the number of new appeals received by the OCEI in respect of AIE requests between 2013 and 2022. The majority of AIE requests received by public authorities are granted. In 2021, 147 appeals were received by the OCEI representing a 220% increase on the previous year and a 130% increase from 2019, a year in which the OCEI received a record number of appeals²⁷. In 2022, appeals were received by the OCEI representing 151% more appeals in 2022 compared to 2021, which was itself a record year for appeals dealt with by the OCEI.²⁸ The OCEI has described it as an “*exponential increase in case numbers experienced by the OCEI in recent*

²³ <https://www.irishstatutebook.ie/eli/2007/si/133/made/en/print> - S.I. No. 133/2007 - European Communities (Access to Information on the Environment) Regulations 2007

²⁴ <https://www.irishstatutebook.ie/eli/2011/si/662/made/en/print> - S.I. No. 662/2011 - European Communities (Access to Information on the Environment) (Amendment) Regulations 2011

²⁵ <https://www.irishstatutebook.ie/eli/2014/si/615/made/en/print#:~:text=The%20principal%20purpose%20of%20these,28%20January%202003%20on%20public> - S.I. No. 615/2014 - European Communities (Access to Information on the Environment) (Amendment) Regulations 2014.

²⁶ <https://ocei.ie/en/organisation-information/4821e-annual-reports/?referrer=http://www.ocei.ie/en/publication/a3986-annual-reports/>

²⁷ OCEI Annual Report 2021 page 75 - <https://ocei.ie/pdf/?file=https://assets.ocei.ie/media/266278/bcde05e2-f0c8-4239-b6f0-823dcda23c80.pdf#page=null>

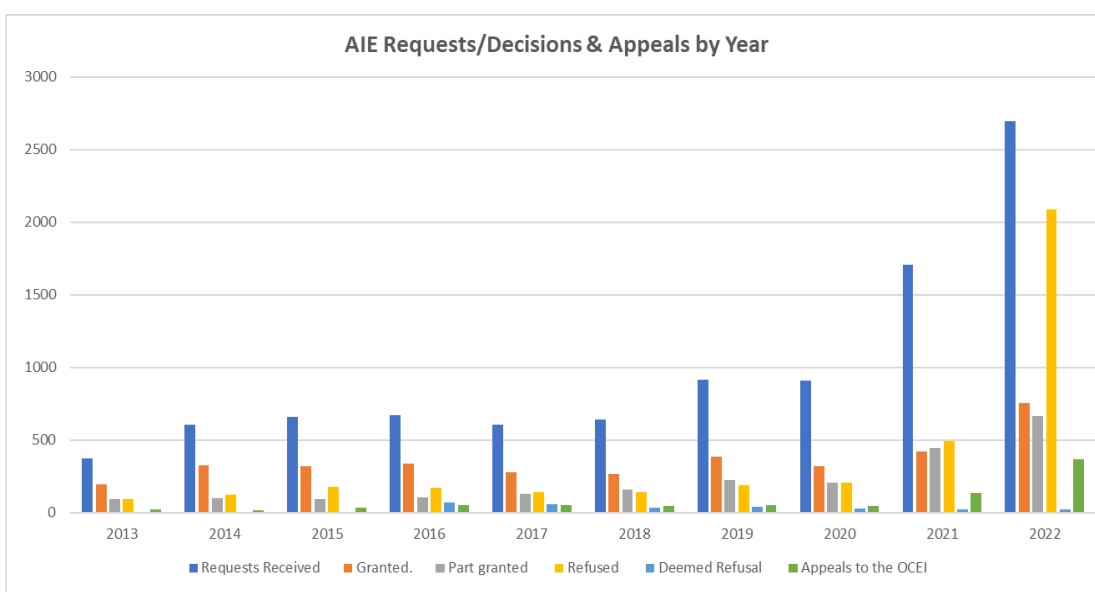
²⁸ OCEI Annual Report 2022 page 2 - <https://ocei.ie/pdf/?file=https://assets.ocei.ie/media/266276/4b27831c-1fb3-4cf8-9f20-374c42edd4a1.pdf#page=null>



years”. This substantial increase is reflective of an increase in requests to public authorities under the AIE Regulations across all sectors.

61. These tables illustrate that the appeal fee charged by the OCEI has not been a deterrent in respect of the making of an appeal to the OCEI and does not represent any impediment to persons wishing to appeal an AIE decision to the OCEI. The table below demonstrates and increasing number of appeals.²⁹

Year	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Total New Appeals Received	19	18	31	52	52	48	64	46	147	369



		2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Requests Received		374	608	658	670	606	640	912	910	1706	2694
Granted.		192	325	322	338	276	265	385	322	418	755
Part granted		90	97	94	104	128	157	225	207	443	662
Refused		91	124	174	170	141	141	191	208	494	2086
Deemed Refusal		0	0	0	72	55	35	40	25	23	20
Appeals to the OCEI		19	18	34	52	52	48	50	44	136	369

62. In 2022, approximately 8% of appeals received by the OCEI were from NGOs. In 2023, approximately 15% of appeals received were from NGOs. This does not

²⁹ <https://www.gov.ie/en/collection/257c4-national-aie-statistics/>



include cases where the named appellant may be a private individual, but they may be acting for or on behalf of an NGO.

63. With regard to the fee now applicable for appeals to the OCEI – €50 or €15 in certain circumstances, it is submitted that this this is a modest charge that represents a very small proportion of the cost to taxpayers of the OCEI appeals process and it is not accepted that the fee is prohibitively expensive.
64. Article 9 of the Convention provides that the review procedure of reconsideration by the public authority or review by an independent and impartial body “is free of charge or inexpensive” and article 9(4) indicates that such procedures should not be “prohibitively expensive”. There is no requirement for the whole review procedure system to be provided free of charge. There is an entitlement to impose a fee at either the internal review stage and/or at the stage of an appeal to the OCEI. Neither the Convention nor the Directive gives guidance in respect of any criteria to assess when determining whether the cost is or is not prohibitively expensive.
65. Having regard to earlier decisions of the Committee, it is submitted that, when assessing the costs related to review procedures, the Committee is required to consider the cost of the review procedure “as a whole and in a systemic manner”³⁰ as stated in *United Kingdom ACCC/C/2008/33; ECE/MP.PP/C.1/2010/6/Add.3*. The Committee is also referred to the judgment of the CJEU in Case C-530/11 *Commission v United Kingdom*³¹ where the CJEU stated that, where appropriate, costs already incurred at earlier levels in the same dispute can be considered. Therefore, in the assessment by the Committee it is relevant to take into account the review procedure as a whole and the fact that the first stage of internal review available to any applicant is free of charge.
66. Ireland notes the general approach of the Committee in examining complaints relating to Article 9 of the Convention, as set out in *Bulgaria ACCC/C/2011/58*.³² The Committee looks at the legal framework in general and at the different stages of the tiered decision making.

“52. When evaluating the compliance of the Party concerned with article 9 of the Convention in each of these areas, the Committee pays attention to the general picture on access to justice, in the light of the purpose also reflected in the preamble of the Convention, that “effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced”

³⁰ [United Kingdom ACCC/C/2008/33; ECE/MP.PP/C.1/2010/6/Add.3](#), at paras 128 and 136.

³¹ [Case C-530/11 Commission v United Kingdom EU:C:2014:67](#) para 49.

³² [Bulgaria ACCC/C/2011/58](#) at para 58.



(Convention, preambular para. 18; cf. also findings on communication ACCC/C/2006/18 concerning Denmark (ECE/MP.PP/2008/5/Add.4), para. 30). Therefore, in assessing whether the Convention's requirement for effective access to justice is met by the Party concerned, the Committee looks at the legal framework in general and the different possibilities for access to justice, available to members of the public, including organizations, in different stages of the decision-making ("tiered" decision-making)."

67. Ireland refers the Committee to its decision of *Denmark ACCC/C/2011/57; ECE/MP.PP/C.1/2012/7, 16 July 2012*³³ where the Committee was considering whether a fee regime to NEAB, an independent and impartial body, was prohibitively expensive. A fee of DKK 500 (approximately €67) was charged for private persons and a fee of DKK 3,000 (approximately €400) was charged for others, such as enterprises, NGOs and public authorities, making appeals.³⁴ The Committee considered (at paragraph 44) that while the requirement for fair procedures applies equally to all persons, a criterion that distinguishes between individuals and legal persons, like the differentiated fee regime under consideration in that case was not in itself necessarily unfair. The Committee considered the approach in *ACCC/C/2008/33 (United Kingdom)* to be appropriate to consider the system in a whole and systemic manner. The Communicant argued that the increased fees for NGOs would result in a decrease in the number of environmental appeals filed by NGOs and the Explanatory Note to the bill introducing the new fees regime explicitly stated "*the number of appeals submitted by organizations and enterprises is expected to decrease*". The Committee found that the new fees system was intended to, and was likely to, result in a decrease of the number of appeals filed against environmental decisions by NGOs³⁵.
68. Therefore, the Committee found that the fee of DKK 3,000 (approximately €400) for NGOs to appeal to NEAB was in breach of the requirement in Article 9(4) and was prohibitively expensive.
69. Self-evidently, the charge of €50 for an appeal to the OCEI is considerably less than the DKK 3,000 (€400) considered by the Committee and is less than the fee of DKK 500 (approximately €67) charged for private persons in Denmark.

³³ [Denmark ACCC/C/2011/57; ECE/MP.PP/C.1/2012/7](#), 16 July 2012,

³⁴ [Denmark ACCC/C/2011/57; ECE/MP.PP/C.1/2012/7](#), 16 July 2012, para 18.

³⁵ [Denmark ACCC/C/2011/57; ECE/MP.PP/C.1/2012/7](#), 16 July 2012, para. 50



70. Further, the appeal fee to the OCEI is also in line with or less than the fee for other administrative appeals. For example the fee payable for an Air Pollution Appeal to the EPA is €60.³⁶
71. In its decision in Belgium ACCC/C/2014/111³⁷ the Committee considered whether, taking account of the claimant's financial situation, the total amount of costs would prevent the claimant from invoking the review procedure.

“74. When assessing if the costs of procedures under article 9 of the Convention are prohibitively expensive in a specific case, the Committee first evaluates whether, taking into account the financial situation of the applicants, the total amount of costs would prevent them from challenging decisions, acts and omissions which fall under the Convention. With respect to environmental NGOs, the Committee held in its findings on communication ACCC/C/2011/57 (Denmark), that the financial capacity of any particular NGO to meet the cost of access to justice may depend on a number of factors, including the amount of the membership fee, the number of members and the amount of resources allocated for access to justice activities in comparison with other activities. The Committee note that these criteria should be duly considered by the courts in specific cases under article 9 of the Convention.”

72. Accordingly, the charge of €50 is not prohibitively expensive as alleged for either private persons or NGOs and cannot be said to be objectively unreasonable. Legal representation is also not required before the OCEI and therefore there are no additional legal costs for an appeal to the OCEI. The reduction in the fee in Ireland to €50 was to ensure that access to the OCEI is not prohibitively expensive and this has resulted in an increase in the number of appeals including appeals brought both by private persons and by NGO's. The Communicant has therefore not established that the cost of €50 has prevented the Communicant or others from pursuing an appeal to the OCEI.³⁸
73. Neither Article 9 of the Convention nor Article 6 of the Directive requires the putting in place of an option for a reduced fee or a facility for the waiver or reduction of fees. Instead, it is provided that the procedure be “free of charge or inexpensive” and “not prohibitively expensive”.
74. The Committee in its *Denmark* decision determined that a criterion that distinguishes between individuals and legal persons, like the differentiated fee

³⁶<https://www.epa.ie/publications/licensing--permitting/air/guide-to-fees-payable-to-the-epa-for-air-pollution-appeals.php>. See also appeal fees for aquaculture licensing appeals (<https://www.irishstatutebook.ie/eli/2021/si/771/made/en/print>). See also planning appeals to An Bord Pleanála (<https://www.pleanala.ie/en-ie/fees/fees-appeals>).

³⁷ [Belgium ACCC/C/2014/111](https://www.irishstatutebook.ie/eli/2014/c/111/made/en/print)

³⁸ [Case C-260/11 R \(Edwards\) v Environment Agency EU:C:2013:221](https://eur-lex.europa.eu/eli/c/2013/221/oj) para 35.



regime under consideration, was not in itself necessarily unfair. Denmark argued that a union of persons (such as an NGO) is normally in a better financial position than a private person and consideration was given to the financial situation of the Communicant. The Committee noted (at paragraph 25) that for NGOs, their income usually derives from membership fees and donation.

75. It is submitted that the €50 is a modest default fee that applies equally to both private persons and for NGOs and is not prohibitively expensive and represents a very small proportion of the cost to taxpayers of the OCEI appeals process. Applying a small fee also assists in preventing frivolous or vexatious appeals. The fee does not act as a barrier to justice which can be seen in the increase in the number of appeals to the OCEI since the reduction of the appeal fee.
76. The Communicant complains that Ireland has not introduced a legal aid scheme or assistance to assist with the paying of the appeal fee. No legal representation is required for an appeal before the OCEI and there exists no mechanism to award legal costs as against an unsuccessful appellant in an appeal before the OCEI. The OCEI is unaware of any requests for assistance with legal representation for an appeal before the OCEI. The modest fee reduces any financial barriers to access to justice and the Communicant has not established that the fee is prohibitively expensive and there is no need to establish an additional mechanism to further reduce these modest fees for the OCEI. It is respectfully submitted that the framework established by the AIE Regulations is compliant with Article 9 of the Convention.
77. In addition, Ireland relies upon the recent judgment of the Court of Appeal in *Friends of the Irish Environment v Legal Aid Board* [2023] IECA 19³⁹ in which Murray J (giving the judgment of the court) gave extensive consideration to the scope and effect of Article 9(5) of the Convention in the context of an argument advanced by the applicant that it had an entitlement to Civil Legal Aid. He concluded that Article 9(5) does not mandate the introduction of legal aid (See paragraphs 90 to 103).⁴⁰
78. As outlined above at paragraph 21 proposals to amend the AIE Regulations are underway. The draft AIE Regulations published in November 2023 propose to maintain the modest appeal fee of €50 and include a provision providing for the discretion to require the public authority to refund the appeal fee following a successful appeal to the OCEI where appropriate. However, the public consultation review has not yet been finalised and the final wording of the draft

³⁹ *Friends of the Irish Environment v Legal Aid Board* [2023] IECA 19 - https://www.courts.ie/view/judgments/5025c382-b26b-4d92-91ab-f3d36abfa76c/ac79b7db-6f38-46e7-b8ff-1e8faf303dfc/2023_IECA_19.pdf/pdf - See paragraphs 90 – 103.

⁴⁰ *Friends of the Irish Environment v Legal Aid Board* [2023] IECA 19. See paragraphs 98-99.



AIE Regulations has not yet been confirmed. Regulation 10(6) of the proposed draft AIE Regulations provides as follows.

“Appeal to Commissioner for Environmental Information

10

[...]

(6) Where the Commissioner has varied or annulled a decision of a public authority in accordance with paragraph (5)(b), the Commissioner may require the public authority to refund the appeal fee to the applicant where appropriate.”⁴¹

V. Conclusion

79. For the reasons set out above, it is submitted that the Communication does not disclose any non-compliance with the Convention, including Articles 1, 3(1), 4(8), 5(3), 6(6) and 9(4) thereof as alleged. There is no evidential basis for the allegation made and it has not been established that the Communicant – or the public more generally - have been unable to access any particular information by reason of fees or costs imposed to access environmental information or that they have been prohibited from making an appeal to the OCEI having regard to the appeal cost.

80. In all the circumstances Ireland respectfully requests that the Communication as referenced above is dismissed.

81. Please do not hesitate to contact the undersigned if you require any further information.

Yours sincerely

Elaine Kennedy

National Focal Point – Aarhus Conventions

⁴¹ <https://www.gov.ie/pdf/?file=https://assets.gov.ie/276559/c3a77cd8-7a90-4344-9cba-b9dc2dc1030c.pdf#page=null>

