

Our Reference: FPL/113/03040  
Your Reference: ACCC/C/2023/198

7 May 2024

**By Email**

Ms Fiona Marshal  
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**Our clients: Right to Know CLG and Uplift – A People Power Company**

**RE: ACCC/C/2023/198 - Ireland**

A Cháirde

1. The Party Concerned issued its response to the communication on 17 October 2023. In light of this response our clients would like to provide a brief update to the Compliance Committee which we hope might be reviewed at the 83<sup>rd</sup> meeting.
2. First we would like to update the Compliance Committee to make them aware that the Planning and Development Act 2000 and the Planning and Development Regulations 2001 which were relied on by the Communicants are due to be replaced with new legislation very shortly. The Communicants feel that it would serve no purpose for it to issue a comprehensive response to the reply from the Party Concerned until this new legislation is in place.
3. However the Communicants respectfully submit that there are issues which the Compliance Committee might wish to consider at this stage so that further information may be sought from the Party Concerned in order to advance the Communication in the meantime.

**General Obligation to make information available**

4. The Party Concerned claims that it is not required to impose general obligations on public authorities to progressively make environmental information available, including on the internet via the AIE Regulations<sup>1</sup> or elsewhere. It says, in essence, that it complies with Article 5 of the Convention by imposing a general obligation on public authorities to maintain environmental information held by or for them in a manner that is readily reproducible and accessible by information technology or by electronic means, but the obligation to make information accessible

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<sup>1</sup> European Communities (Access to Information on the Environment) Regulations 2007 to 2014 (SI 133 of 2007)  
<https://revisedacts.lawreform.ie/eli/2007/si/133/revised/en/html>

and available on the internet is to be found in specific pieces of legislation, the Planning and Development Act 2000 being one such example. To that end the Party Concerned to the reference in section 1A of this Act to Directive 2003/4/EC.

5. While the communicants accept that, in principle, compliance with the Convention may be achieved in this way, it has doubts that Ireland has in fact given effect to this approach. These doubts are evidenced by three concrete examples of decisions in relation to activities which may have a significant effect on the environment for which there is no specific publication obligation.
6. For example, there is no legislative provision requiring publication of decisions to allow derogations from the prohibition on certain activities harmful to strictly protected flora and fauna under Articles 12 and 13 of the Habitats Directive<sup>2</sup>. These are clearly decisions within the scope of Articles 5(3)(d) and 6(1) of the Convention where there is no specific obligation of publication (see attached unofficial consolidation of Part 6 of the European Communities (Birds and Natural Habitats) Regulations 2011 at **Annex 1**).
7. As another example, there is no legislative provision for publication of decisions to allow derogations from the limits on manure spreading on land imposed by the Nitrates Directive<sup>3</sup>. These derogation decisions allow farmers to spread animal slurry on land in excess of limits imposed by EU law. These decisions clearly also come within the scope of Articles 5(2)(d) and 6(1)(b) of the Convention since the spreading of manure on land is one of the most significant causes of water pollution in Ireland. There is a finding of the High Court that confirms that these decisions are not published, *An Taisce v Minister for Agriculture Food and the Marine* [2024] IEHC 129<sup>4</sup>, where the Court observed (emphasis added):

*102. My decision on this issue is that the case must proceed on the basis that there is no system in Irish law or practice for the systematic publication of individual derogation decisions. The information published is general or aggregated. There are no means, still less numerous means, by which specific decision information can be readily obtained. Rather any interested party would be obliged to pursue express requests for environmental information under the AIE directive. **Surprisingly perhaps, the applicant hasn't challenged this lack of publication in the proceedings so the legality of the lack of a publication system as such will have to be considered in some other case at some other time. However, the fact of there being no such individual publication of decisions must be taken to be established and indeed not properly disputed**, for the purpose of any of the pleaded grounds to which that fact is relevant (if there are any such grounds - again a matter of substantive law to be considered further, not of pleading-type objection).*

8. As a third and final example, the Irish Department of Agriculture Food and the Marine does not publish negative screening decisions for forestry permits under the Habitats Directive. As the attached decision of the Commissioner for Environmental Information (**Annex 2**) shows, it actually considers requests for publication of these decisions to be manifestly unreasonable.

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<sup>2</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31992L0043>

<sup>3</sup> Council Directive of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources (91/676/EEC) <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1561542776070&uri=CELEX:01991L0676-20081211>

<sup>4</sup> [https://courts.ie/view/judgments/328a9b27-42e9-45e6-a41d-49029f9ba5d4/707bdc7e-46c3-48d5-b12b-68fe4f1dea40/2024\\_IEHC\\_129.pdf/pdf](https://courts.ie/view/judgments/328a9b27-42e9-45e6-a41d-49029f9ba5d4/707bdc7e-46c3-48d5-b12b-68fe4f1dea40/2024_IEHC_129.pdf/pdf)

9. Given that the Communicants have pointed to three examples of non-publication of environmental information which the Convention requires to be actively disseminated, specifically decisions permitting activities which may have a significant effect on the environment, it appears *prima facie*, that Ireland's claim that it ensures compliance with the obligations to make environmental information available via specific legislation is not true.
10. In light of this, the Communicants respectfully ask the Compliance Committee to request the Party Concerned, which is best place to compile the information, to provide a comprehensive list of legislation which it says shows compliance with the Article 5 obligation to ensure that environmental information is effectively available and is progressively made available on the internet.

### **Replacement of the Planning and Development Act 2000**

11. The Party Concerned pointed out that the section 1A of the Planning and Development Act 2000 makes specific reference to Directive 2003/4/EC in support of the claim that this legislation forms part of the measures adopted by Ireland to comply with Article 5 of the Convention.
12. As pointed out above, draft legislation to replace the Planning and Development Act 2000 is currently in the final stages in the Irish Oireachtas (Parliament) and is anticipated to be adopted by the end of July 2024.
13. Strikingly the current draft of the bill does not make express reference to Directive 2003/4/EC and the only reference to the Convention is in the section providing for access to justice (see [https://courts.ie/view/judgments/328a9b27-42e9-45e6-a41d-49029f9ba5d4/707bdc7e-46c3-48d5-b12b-68fe4f1dea40/2024\\_IEHC\\_129.pdf/pdf](https://courts.ie/view/judgments/328a9b27-42e9-45e6-a41d-49029f9ba5d4/707bdc7e-46c3-48d5-b12b-68fe4f1dea40/2024_IEHC_129.pdf/pdf)).
14. The Communicants were criticised by the Party Concerned in its reply for not engaging with the Irish authorities in advance of making the communication. However, we can inform the Compliance Committee that the issues around the format and timing of publishing environmental information on planning applications were raised by representatives of the Irish Environmental Network during pre-legislative scrutiny in the Irish Parliament at a hearing on 28 February 2023<sup>5</sup>. The Irish authorities are well aware of the Communicants' concerns, particularly in relation to the revision of Irish planning legislation.
15. The Communicants also observe that despite repeated requests from environmental NGOs, the Irish authorities have refused to publish any analysis or advice identifying how the Planning and Development Bill 2023 complies with the Aarhus Convention.
16. In light of this we respectfully ask the Compliance Committee to request the Party Concerned to provide an update following the enactment of the Planning and Development Bill 2023 and implementing regulations setting out how this new legislation complies with the provisions of the Convention that are relevant to this communications.

### **Amendment to Forestry Appeals procedure**

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<sup>5</sup> Transcript available here <https://www.kildarestreet.com/committees/?id=2023-02-28a.468>

17. Finally we would like to draw the Committee's attention to a recent amendment to the regulations<sup>6</sup> which provide for administrative appeals against permits in the forestry sector. The effect of the amendment is to modify the time limit for taking an appeal to ensure that time limits start on the date of publication of the decision if it is later than the date of the decision and also that the time limits are counted in working days as opposed to calendar days.
18. These issues (i.e. time limits running before information is made available and time limits measured in calendar days) are also issues in this communication. It appears that for reasons that are not readily ascertainable, the Party Concerned felt that it had to regularise the procedure for forestry appeals to remove the anomaly where time was running against a member of the public who had no notice of a decision and time was unfairly counted over weekends and public holidays therefore shortening the effective time available to a member of the public to exercise their rights.
19. We respectfully ask the Compliance Committee to invite Ireland to comment on this amendment and the reason for it in light of this Communication where it denies that such an approach is required.

### **Summary**

20. In light of the above the Communicants respectfully ask the Committee to ask the Party Concerned to:
  - a. Provide a comprehensive list of specific measures which it has adopted to comply with the provisions of Article 5 requiring environmental information to be effectively made available including on the internet.
  - b. Once the Planning and Development Bill 2023 is enacted and the implementing regulations published to provide a summary of how the new legislation complies with the provisions of the Convention at issue in this Communication.
  - c. To explain the rationale for the adoption of the Agriculture Appeals Act 2001 (Regulations) 2023 in light of the issues raised in this communication about time limits which include periods where the public does not have access to the relevant information and which include non-working days.

Yours faithfully



**FP LOGUE LLP**

Cc: Party Concerned, Observers

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<sup>6</sup> Annex 3

List of Annexes

<b>No</b>	<b>Description</b>	<b>Paragraph</b>
1	Part 6 of the European Communities (Birds and Natural Habitats) Regulations 2011 (unofficial consolidation)	6
2	Decision of the Commissioner for Environmental Information in Mr X and Department of Agriculture Food and the Marine OCE-127116-B6P2P5 (26 April 2024)	8
3	Agriculture Appeals Act 2001 (Section 14A) Regulations 2023	17