Opening statement of Right to Know - ACCC/C/2016/141 (Ireland)

Introduction

Chairman, curator, members of the committee, observers, colleagues and delegation from the Party concerned

I would like to begin by thanking the Committee for the invitation to come here this morning to the hearing in Right to Know's communication concerning Ireland's compliance with the Aarhus Convention.

I would also like to thank the Party concerned for engaging diligently in the procedure and for its response and observations which are important to enable to committee to be as fully informed as possible before it makes its conclusion.

The crux of the communicant's complaint is that it takes too long for the Irish Commissioner for Environmental Information (CEI) to review decisions of public authorities which are considered to be wrongly refused or otherwise not dealt with in accordance with the law.

We will keep this opening statement brief because the Communicant considers the data as presented in our original communication and in the update that we filed shortly before the hearing speaks for itself.

The median time for the CEI to make a decision is currently more than 10 months but taking into account that his decisions are not effective for a further 2 months, the median decision only becomes effective on average 12 months after an appeal is made.

This delay is compounded by the large number of disputes over whether the right of access to information applies at all, either because the entity to whom the request is made does not consider itself to be a public authority or it is denied that the request is for environmental information. As set out in its submissions and also in the CEI's procedures manual the position of the Party concerned is that it would be somehow inappropriate to require a request to be handled if it ultimately emerged that the requestor had no right of access in the first place.

In these cases, the practice is for the CEI to make a preliminary decision on jurisdiction and if it turns out that the requester has a right of access he or she must, in essence, begin the process again from the start by making a new request. In this way it is like a game of snakes and ladders … just as you reach the end of the game you land on the wrong square and have to slide all the way down a snake and resume your journey to your ultimate destination which is to exercise your right of access to information. The analogy can only go so far though, because in Ireland the game is played on a board where there are only snakes and **no** ladders for those requesting information.

If you appeal the CEI's decision to a court then the most you can hope for is that the Court will find that the CEI has not interpreted the law correctly and will order your case to be

remitted to the CEI who invariably will require a new decision from the public authority before making a second decision. In this way it can, and indeed has, taken many years for requesters to establish that they even have a right of access in the first place. For example this is what happened in the NAMA case where it took 5 years to discover that the requestor was in fact entitled to make his request. .

The Communicant says that these delays and inappropriate procedures constitute breaches of article 4(2), 4(7), 9(1), 9(4) and 3(1) of the Convention.

Outline of access to environmental information procedures in Ireland

It may be helpful for you the committee if I outline in brief, how article 4 and article 9(1) and 9(4) are implemented in Ireland in terms of access to environmental information.

Ireland has implemented these articles of the Convention in part through its obligations as a member state of the European Union by transposing directive 2003/4/EC by way of the European Communities (Access to Information on the Environment) Regulations 2007 (as amended).

These regulations provide a right of access within one month or exceptionally two months, and an internal review, which is a reconsideration by the public authority, which must be concluded in one month. An internal review decision may then be appealed to the CEI who conducts a further independent administrative review. The CEI has limited powers to affirm, vary or annul the public authority decision and if appropriate direct that environmental information be made available. The CEI also has powers to compel production of information from a public authority and may state a case to the High Court to clarify points of law.

In the Irish legal system, the CEI, as an administrative decision maker, can only exercise powers expressly granted to it but enjoys a wide discretion to adopt procedures that are consistent with the law.

In terms of the Courts, they have consistently refused to acknowledge jurisdiction to consider the merits of an access request, to review the relevant information and to order release. Again this narrow jurisdiction does not derive from a statutory source but from the Courts' own discretion to interpret its jurisdiction which it has read across from purely domestic law into access to environmental information procedure.

It is important to point out a couple of things about the CEI.

Firstly and most importantly there is no statutory time-frame, either mandatory or discretionary which the CEI is to observe. This is to be contrasted with the 4-month target for general domestic access to information reviews under Freedom of Information law (**FOI**).

As the Communicant has pointed out in its communication, the CEI is on the record as stating that this target has in the past resulted in shared resources being used to prioritise

FOI requests at the expense of access to environmental information requests. This statement also shows that even aspirational targets are effective in ensuring timely reviews.

Second, while the CEI has published its procedures it must be noted that these are not statutory procedures, in other words the CEI is not bound to adopt these procedures, it is equally open to him to adopt procedures that are more streamlined and do not require multiple rounds of decision making, but he has not chosen to do this.

Deadlines in context

To put the CEI's decision making time in context it is helpful to set out some comparators from other environmental decision making and analogous access to information regimes. The examples referred to are statutory deadlines, some are mandatory and some may be extended for appropriate reasons but nevertheless represent an expectation as to how long decisions should take.

Planning and Development

Decision of local authority to grant planning permission	8 weeks (default grant if missed)
Appeals by An Bord Pleanála	18 weeks
Strategic Housing Developments An Bord Pleanála	16 weeks (mandatory)

Access to Information

Data Protection Subject Access request	1 month
Complaint to data protection commission	3 months
Access to environmental information Request	1 month (exceptionally 2 months)
Access to environmental information Internal review	1 month
FOI request	4 weeks (exceptionally 8 weeks)
FOI Internal review	3 weeks
Review by the Information Commissioner	4 months

Judicial review/Appeals (period in which appeal must be brought)

Default period	3 months

Planning and development cases	8 weeks
Proposed for strategic infrastructure cases	4 weeks
Access to environmental information	8 weeks
Freedom of information	4/8 weeks

In all of these procedures issues of law and fact and in the case of large development permits, significant volumes of information and complex laws around environmental assessment arise and fall to be considered. The CEI's decision time is an outlier when compared to these comparators.

Threshold decisions

Threshold decisions cause significant delays to resolving access to environmental information requests.

Threshold decisions are quite common within the Convention framework, in particular articles 6 and 7 - where screening for EIA, AA and SEA is built into the decision-making process. However in these situations threshold decisions i,e, whether or not public participation is required are generally integrated into the process. It would be bizarre to think that a developer would have to wait for more than a year (or possibly up to five years if there were appeals to the courts) to find out whether it had to follow EIA or AA procedures and at the end of that process be told that he would have to submit a new planning application to secure a permit for a development.

In that context it would be entirely unacceptable, but in the access to environmental information context this is exactly what happens.

The CEI points out that almost half of his decisions in 2017 concerned threshold issues. Similarly the majority of litigation to date has been concerned with these same issues. This indicates that there is a serious gap between the perception of members of the public and public authorities as to the scope of the right of access to environmental information.

Comments on Ireland's submission

The Communicant will just make some brief comments on Ireland's submission.

While the Communicant welcomes the measures described in Ireland's submission including resources and training, it feels that Ireland's justification is to too focussed on inputs rather than outputs. Compliance should be measured against the achievement of the objectives of the Convention rather than simply focussed on inputs. Without a mechanism to ensure that the inputs achieve the appropriate outcome then non-compliance may result, exactly as the Communicant shows in its analysis.

From the Communicant's point of view there seems to be very little focus, if not an absence entirely, in the CEI's procedures and in Ireland's submission, on the fact that the Convention provides for access to environmental information as a right. The Party concerned presents the CEI's task as somehow neutrally mediating or adjudicating a dispute between parties. This is not the full picture. First, one of the parties is a public authority which has significant obligations flowing from articles 4 and 5 to provide access to information and the other party is a member of the public who enjoys a fundamental right of access to information without having to advance any justification. This means that the starting point in every appeal is the very strong presumption that access must be granted and refusal is exceptional. The task of the reviewer in the appeal should be to apply this presumption and to only uphold a refusal if it believes the public authority has genuinely justified its refusal. If the refusal has not been justified the remedy must be an order directing the public authority to grant access to information. When an appeal is made to the CEI it has to be presumed that the public authority has assembled the relevant information and has made two reasoned decisions. It is very hard to see in this case why further lengthy rounds of submissions and consideration are necessary.

If points of law arise that are genuinely complex or novel, as Ireland asserts, the CEI has the benefit of stating a case to the High Court or making a preliminary reference to the CJEU yet has never done so.

The final point to make is that there doesn't seem to be an awareness from Ireland or the CEI as to what duties are imposed by article 9(1) and 9(4) in terms of making expeditious and timely decisions. Ireland offers no view as to what it considers to be a reasonable time in which the CEI should make a final decision.

While the CEI has detailed procedures, and this is to be welcomed, the time limits for action provided in these procedures are rarely observed and public authorities are usually given far longer to produce information or to justify their decisions than they would have at first instance where the entire search and decision making process is intended to be completed in no more than one month.

What is the underlying problem?

While we can talk about resources and fair procedures, we must first look at the fundamental principle grounding access to environmental information. In the Communicant's view, the underlying problem is that the Party concerned has not given effect to the principle that members of the public may access environmental information as a right. In fact the Irish High Court has put this at a higher level, calling it a fundamental right to access environmental information. But from the Communicant's point of view, this concept has not flowed through into the administrative appeal or judicial review process.

Second, the Party Concerned has not given express statutory expression to the requirement that reviews should be expeditious and timely and that remedies should be adequate and effective. As we can see, CEI appeal and judicial review timescales are entirely incompatible

with timeframes set down for other environmental decision making and proceed in parallel without any real reference to underlying environmental decision making.

Finally, there is simply no coherence between access to environmental information and public participation in environmental decision making, there is no possibility in Ireland to resolve a dispute concerning access to information while maintaining the possibility of public participation or access to a judicial remedy to challenge a decision that falls within the scope of articles 9(2) or 9(3).

Possible solutions;

The Communicant has come to Geneva to seek solutions and is somewhat disappointed that none have been proposed by the Party concerned.

It notes that new guidelines are in development and that there is now an AIE Officer's network but regrets that it has not been invited to participate in the development and implementation of these measures. It would be preferable if Ireland embraced the concept of public participation in the ongoing development of the right of access to environmental information.

The Communicant welcomes the proposed reform of the access to environmental information regulations and looks forward to participating in the upcoming public consultation and it is hoped that the non-compliance identified in this communication will be rectified in that process. It is noted however this appears unlikely in the context of the Party concerned's response to the issues raised in this communication. So we would urge the Committee to be cautious about assuming that.

The primary solution is that Ireland must impose statutory time frames on the CEI to avoid long delays in decision making. These time frames must reflect the letter and spirit of article 9(1) and 9(4) to ensure that decisions are expeditious and timely and consistent with the right to public participation, and to ensure they do not act as a barrier to accessing justice either.

To avoid frequent disputes over the status of public authorities, lists of public authorities should be generated, particularly of private or semi private entities that come within categories (b) and (c) of the definition so that those entities and the public are aware in advance as to which entities or categories of entities are public bodies.

The Party concerned needs to propose constructive steps to remove and minimise the reasons for delay including but not limited to: measures to reduce disputes concerning the classification of environmental information and to understand why there is such a gap between members of the public and public authorities in terms of the breadth of the definition. This is particularly concerning given consistent Irish, European and UK case law that points to a broad right of access consistent with the purpose and objectives of the Convention and the access to environmental information Directive

Procedures need to be established so that threshold jurisdictional issues can be decided quickly and within a single procedure, it should only be in exceptional circumstances that there are multiple rounds of decision making. More and better use of the CJEU and the High Court by the CEI should be encouraged to resolve novel legal issues as soon as they arise. It therefore should be possible to address all issues within a single procedure (as is clearly intended by the convention) so that disputes over access to information, at least at CEI level, are resolved in a matter of weeks rather than as is the case now in procedures that take many months and often several years.

Improved dissemination of information reducing the need to pursue what should be an increasingly exceptional step of requesting information also needs to be addressed. Adequate resourcing and complete transposition are also essential, as are more effective monitoring of the performance of Public Authorities on a regular basis not just annual - so that problem areas and issues can be proactively resolved.

This concludes the Communicant's opening statement and it looks forward to discussing the issues raised during the remainder of the hearing.