Communication to the Aarhus Convention's Compliance Committee by Right to Know concerning Access to Environmental Information (ACCC/C/2014/141)

OPENING COMMENTS ON BEHALF OF IRELAND

A. Background

1. The Communicant alleges non-compliance with the provisions of the Convention regarding access to environmental information on a number of grounds. It is worth noting, however, that a number of its complaints about the access to information mechanisms available in Ireland are either (i) mere assertions, not supported by evidence; or (ii) not related to any provision of the Convention. In any event, the allegations of non-compliance are denied by Ireland which considers that it has put in place an effective and robust system for ensuring that the public has access to environmental information and, moreover, that that system is working well.

2. The Communicant's complaints are summarised in its submission dated 9 October 2018 as follows:
    i. Public Authorities fail to make decisions within the time frames mandated by Articles 4(2) and 4(7) of the Convention;
    ii. Ireland has failed to provide an expeditious administrative review procedure contrary to Article 9(1) of the Convention;
    iii. Ireland has failed to provide a timely procedure for reviewing decisions before the Courts contrary to Article 9(4) of the Convention;
    iv. As a result of the foregoing, Ireland has failed to comply with its obligations pursuant to Article 3(1) of the Convention.

3. It is Ireland's position that there is simply no evidence to support the Communicant's contention that public authorities are "routinely" failing to make decisions at all, or that

they are deliberately making decisions on narrow grounds with a view to frustrating the objects of the Convention regarding access to environmental information. It is Ireland's view that the provisions are made most effective by promoting good decision-making and good practices at first instance. Ireland has legislated for strict timelines at first instance, as required by the Convention, and has put in place supports in terms of training, guidance and a platform for information sharing, the AIE Officers Network group to support and enhance decision-making by public authorities. It is submitted that the low percentage of appeals from decisions by public authorities reflects the robustness of the first instance decision-making.

4. The review procedure put in place, the appeal to the OCEI, is becoming more efficient with increasing resources being devoted to it. The average time for the determination of an appeal is now less than 8 months. Although this is longer than the time allowed for decisions by public authorities, it is inevitably the case that appeals to the OCEI will involve more complex and more contentious issues. The requirements of fair procedures necessitate that an appeal between (at least) two parties disputing a public authority's decision will, on average, take far longer than it took for the public authority to decide the disputed issue.

5. Recourse to the Court has rarely been required as evidenced by the limited cases which have been before the Courts. It is accepted that the Court processes has often been lengthy, but those few cases which have been referred to the Court for determination have typically involved complex or novel issues which go to the heart of the access to environmental information regime (e.g. what is a 'public authority'; what is 'environmental information') and will, it seems likely, inform future decision-making by public authorities and the OCEI.

6. Helpfully, the Communicant has further elaborated on its "principal complaint" at page 2 of its 9 October 2018 submission as follows:
    i. The OCEI takes too long to make decisions;
    ii. The review and appeal procedures are not expeditious or timely and the focus on "threshold jurisdictional issues" undermines their effectiveness;

iii. The Courts do not have jurisdiction to order the release of information, *i.e.* the remedy available for the Irish Courts is limited.

7. It is apparent, therefore, that the Communicant makes two complaints which are at the heart of its allegation of non-compliance with the Convention requirement to provide access to information. That is (i) that decision-makers decide cases based on threshold jurisdictional issues; and (ii) the Courts do not have the powers to direct the release of information.

8. Neither complaint is rooted in any particular allegation of non-compliance with a Convention obligation. The Communicant does not (and cannot) point to a provision of the Convention which requires signatories to require that all issues potentially arising from a request for information must be determined irrespective of whether the provisions of the Convention even apply. The Communicant's proposition boils down to the following: the obligations of the Convention must be met in substance even where it is determined that the Convention does not apply. To state the Communicant's position is to illustrate its fallacy.

9. Nor does the Communicant identify the source of an alleged requirement to provide that a review by the Courts must enable that Court to direct the release of environmental information. This, is, in effect a call for a merits-based review by the Courts *in addition to* the full right of appeal to the OCEI provided for by the Irish implementing Regulations. There is nothing in the Convention which requires two full review procedures in respect of a request for environmental information (which has already been the subject of an internal appeal procedure) and no reason at all to believe that it would lead to more timely determinations of disputed requests; in fact, the reverse is the likely to be the case.

B. Non-Compliance with Articles 4(2) and 4(7) of the Convention

10. Articles 4(2) and 4(7) of the Convention require that public authorities make decisions on requests for access to environmental information within at most one month, save in complex cases when, for stated reasons, two months may be allowed. These requirements

are mirrored in Articles 7(2) and 7(4) of the European Communities (Access to Information on the Environment) Regulations 2007 – 2018 ("the AIE Regulations"). The Communicant can thus have no complaint that, as a matter of law, Ireland does not comply with its Convention obligations.

11. Its complaint must be, therefore, that as a matter of fact, we are not compliant. However, there is no evidence to support such a contention. As the latest figures illustrate, only about 5% of requests in 2017 were not determined within the very strict time limits imposed by the Regulations (and Convention).

12. Insofar as the Communicant contends that public authorities are "routinely" not deciding cases at all, it is submitted that this is belied by the statistical evidence available. Insofar as the Communicant appears to suggest that public authorities are deliberately deciding cases on narrow grounds in order to frustrate the objects of the Convention, there is simply no basis or evidence for such a claim. Taking 2017 as an example (as the last full year for which there is data), approximately two thirds of requests are granted or partially granted. This clearly evidences detailed engagement by public authorities with requests made. And though the number of appeals to the OCEI has risen in the last two years, those appeals still represent a small fraction of the total number of requests for information received by public authorities.

13. Having regard to the training and support offered to public authorities and the lack of evidence put forward by the Communicant to support a contention that public authorities are not discharging their obligations consistent with Ireland's Convention obligations, it is submitted that there is no basis for a finding of non-compliance with Articles 4(2) and 4(7).

14. It is worth addressing a related issue at this point. It is suggested that a delay in dealing with requests for environmental information pursuant to the Regulations is in some way interfering with or undermining public participation in environmental decision making. There is simply no basis for such a claim, which is unsupported by evidence and is made without reference to any specific instance. The argument, insofar as it is advanced, seems to be based on the false proposition that it is *only* through requests for access for

information pursuant to the AIE Regulations that the public concerned can get access to relevant information. Nothing could be further from the truth and environmental decision-making in Ireland is the subject of extensive public participation in Ireland in the course of which the documentation relied on and produced by decision-makers is made available to and routinely interrogated by the public.

15. Moreover, even where there is a dispute as to whether a request for environmental information should be granted, that does not mean that the information requested is necessarily unavailable. As is apparent from the written submissions, the Communicant herein is pursuing a High Court case in relation to information held by the Department of Transport with which it has already been provided.

C. Non-compliance with Article 9(1)

16. The Communicant's complaint regarding non-compliance with Article 9(1) is not that a review procedure hasn't been provided as required but that the review is not sufficiently expeditious. It also makes the complaint that the decisions of the body established to conduct such reviews are habitually based on threshold jurisdictional grounds.

17. Since the Communicant doesn't (and couldn't) complain that Ireland has failed to put in place a review procedure as required by Article 9(1), its complaint is again not a complaint that, as a matter of law, Ireland hasn't complied with its Convention obligations, but rather that, as a matter of fact, it has failed so to do. Insofar as the complaint is made about decisions being based on threshold jurisdictional grounds, the Communicant does not identify any Convention obligation on which it relies and doesn't, therefore, identify any legal basis for its complaint.

18. The time taken to deal with the appeals received by the OCEI speaks for itself. The average time taken continues to fall year on year and, having regard to the total number of requests received pursuant to the Freedom of Information Act and the AIE Regulations (for both of which the same office is responsible), it is submitted that a proportionate amount of resources are applied to dealing with requests for environmental information. It is submitted that the fact that the proportion of decided cases which are the subject of

an appeal is rising but the time taken to deal with appeals is on average decreasing is evidence of a system which is operating effectively. The Communicant draws a false equivalence between determinations of requests by public authorities and by the OCEI, but it is clear that, although each are addressing the same or similar issues, public authorities and the OCEI necessarily have to engage in very different processes in order to resolve those issues.

19. As appears from the submissions, the OCEI and the State continue to work to improve the efficiency of decision-making at this stage of the process and a full review of the AIE Regulations is due to commence in 2019. It is submitted that the Communicant has not made out a case for a finding of non-compliance by reason of any delays in the OCEI.

20. Still less is there a basis for complaint regarding public authorities or the OCEI deciding cases on threshold jurisdictional issues. The Communicant deploys that criticism as if to suggest that a determination on such grounds is a determination on a 'technicality'. The opposite is, in fact, the case. The questions of whether the party of whom a request is made is a public authority or whether the information requested is environmental information are fundamental to the entire process. If one or other are found not to apply, then the Convention and the AIE Regulations have no application. The information at issue may be sought under other regimes, but neither the Convention or the Regulations can be said to impose any entitlement to it, or to impose any obligation on the party requested to provide it. It is difficult to understand the lawful basis upon which the Communicant could contend that a body which had made a decision that the AIE Regulations (or Convention) did not apply to them or to the information requested could nonetheless be required to treat the request as if the Convention or Regulations did apply. Such an interpretation would be to remove any restriction on the scope of the Convention and Regulations.

21. The Communicant relies on the decision of Mac Eochaidh J in *NAMA v Commissioner for Environmental Information* [2013] IEHC 2166 as supporting a general proposition that bodies of whom requests for environmental information are made should determine the request in substance notwithstanding that they may dispute the request on 'jurisdictional

grounds'. However, the Court in that case did no more than decide that a public authority *having been found by the High Court to be such* should be required to process a request for environmental information as if it were a public authority even where it intended to appeal that finding to the Supreme Court. This is precisely the approach adopted by the OCEI. Where a body is found by the OCEI to have wrongfully refused to deal with a request on the basis that it was not a public authority or that it was not environmental information, the OCEI requires that body to then deal with that request.

22. Insofar as the Communicant argues that remittal back to the original body to determine the appeal might lead to delay, it is submitted (i) that it is appropriate that the relevant public authority be the one who makes the decision on the information requested and, for instance, the applicability of any exceptions; (ii) that the strict timelines for the public authority to make a decision on any such remitted matter means that any delay caused if the matter had to be referred back to the OCEI would be relatively slight; and (iii) there is no evidence that matters which are remitted back to public authorities to determine in accordance with the OCEI's decision on appeal are routinely the subject of further appeals.

D. Non-compliance with Article 9(4)

23. The Communicant's complaint about the review procedure available before the High Court is that it is slow and too limited. The Communicant does not point to any requirement of the Convention which requires that a full right of appeal to the Courts from a decision of independent administrative body be made available. It is submitted that the regime created in Ireland with the availability of an appeal on a point of law only is consistent with the requirements of Article 9 of the Convention.

24. Insofar as it is alleged that the cases before the Courts are dealt with too slowly, it cannot be denied that most have taken longer than desirable to be finally disposed of by the Courts. However, as is clear from the individual analysis of the cases which have been appealed to the Court, most have involved substantial issues of law or novel or complex points of legal interpretation. The *NAMA* case, referred to above was sufficiently complex that only an intervening decision of the CJEU (between the High Court case and the Supreme Court appeal) prevented a reference to the CJEU. Others have required the

Courts to engage in an analysis of what is "environmental information" and have and are being pursued in order to determine questions of principle which will assist public authorities and the OCEI in the future.

25. Insofar as complaints are made regarding delays in the Court of Appeal, there is, in fact, nothing in the Convention which necessitates that a 'requester' be afforded an appeal from an unsuccessful Court review, and, as the *NAMA* decision shows, where a requester is successful, an appeal does not necessarily operate as a stay on the decision of the High Court.

26. Having regard to the very small number of cases in which appeals from decisions of the OCEI have been taken, it is submitted that there is no evidence of systemic failure such as to warrant a finding of non-compliance.

E. Conclusion

27. In all the circumstances, it is submitted that the Communication does not provide a basis for a finding of non-compliance by the party concerned with its Convention obligations.

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