

Access to Environmental Information: International and European Community Law Standards

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This talk considered the complex network of laws regulating the right of access to environmental information and the interaction between the different sources of legal authority, including the Aarhus Convention, EC law (notably Directive 2003/4/EC) and national law. The position in Ireland was examined, noting that, as ever, the vigour of national implementing measures - and of local remedies in particular - determine whether or not the enhanced right of access succeeds in practice.

The terms of the Aarhus Convention, which Ireland alone of the EU states has not ratified, were considered, noting the role of the Compliance Committee which exists to police implementation of the Convention. One striking feature of the Aarhus review procedure, is the right of members of the public to make a 'communication' to the Compliance Committee. The Committee's reports are available, setting out its findings and recommendations on compliance by individual Parties. In cases of non-compliance, Parties are normally required to report to the Compliance Committee within a specified timeframe on the measures taken and the results achieved to implement the Committee's recommendations before the Committee then determines what recommendations, if any, to make to the Meeting of the Parties.

The terms of Directive 2003/4/EC were then reviewed. This directive purports to give effect to the Aarhus information obligations in EC law, taking the form of a framework directive which sets out the basic principles governing the right of access and leaves the details of local implementation to be settled at national level. The objectives of the directive are articulated in unequivocal terms in Article 1. First, to 'guarantee' the right of access to environmental information held by or for public authorities and to set out the basic terms and conditions of, and the practical arrangements for, the exercise of this right. Second, to ensure, 'as a matter of course', that environmental information 'is progressively made available and disseminated' with a view to achieving 'the widest possible systematic availability and dissemination of such information to the public.'

The limited ECJ case-law was also examined. Cases include: Case C-321/96 *Mecklenburg* [1998] ECR I-3809 (concept of 'information relating to the environment' is broad; narrow approach to exception for 'preliminary investigation proceedings'); Case C-217/97 *Commission v Germany* [1999] ECR I-5087 (strict approach to Member State's discretion to levy charges for supply of information); Case C-316/01 *Glawischnig* [2003] ECR I-5995 (concept of 'information relating to the environment is broad', but there are limits); Case C- 233/00 *Commission v France* [2003] ECR I-6625 (Community legislature intended scope of concept of 'information relating to the environment', and of the directive generally, to be wide; exceptions to the right of access must be interpreted strictly; reasons for an implied refusal must be provided); Case C-186/04 *Housieaux*

[2005] ECR I-3299 (two-month time limit is mandatory; significance of duty to give reasons for decisions in terms of effective judicial protection for EC law rights). The pending case *Flachglas Torgau GmbH v Germany* (C-204/09), raises questions of the scope of the definition of 'public authority' and the scope and meaning of the exception in Article 4(2)(a) concerning confidentiality of the proceedings of public authorities

The talk then considered the implementation of the directive in Ireland by means of the European Communities (Access to Information on the Environment) Regulations 2007 (SI No 133 of 2007; 'the AIE regulations'). These regulations include the establishment of a new office of Commissioner for Environmental Information (CEI) whose main function is to determine AIE disputes (see <http://www.ocei.gov.ie/en/>); the role of CEI is assigned to the person holding the office of Information Commissioner under the Freedom of Information legislation. The AIE regulations fill a gap in previous provisions by providing for a two-tier system of review: (1) internal review and (2) appeal to the CEI, with an appeal to the High Court on a point of law from a decision of the CEI.

A person seeking access to environmental information is free to choose whether to pursue the information via AIE or the more general Freedom of Information Act 1997, as amended by the Freedom of Information (Amendment) Act 2003 (hereafter 'FOI'), which provides for a general right of access to information held by specified public bodies. The core differences between the two access regimes need to be considered carefully: a request under AIE is free, but an 'up-front' fee applies under FOI in the case of non-personal information; AIE and FOI provide different grounds on which access may be refused; there is a fee for internal review under FOI but not under AIE; each regime provides for a different appeal mechanism; and AIE applies to a wider range of bodies.

It was noted that on a number of points the Irish regulations are at odds with Directive 2003/4/EC. These include insisting that the request for information be made in writing, a more restrictive provision on the release of emissions data (currently under consideration by the High Court), and a distinction between mandatory and discretionary grounds for refusal. Also contentious is the fee of €150 (€50 for some individuals, but not NGOs) to make an appeal to the CEI, especially so in the light of the Aarhus Convention's requirement that review procedures should be 'fair, equitable, timely and not prohibitively expensive'.

The fairly low volume of requests under the AIE regulations were considered, noting the long time taken for appeals to the CEI to be determined. The four appeal decisions to date (published at <http://www.ocei.gov.ie/en/DecisionsoftheCommissioner/>) provide a good indication of the most contentious issues arising in practice so far: the circumstances in which a public authority may levy a charge for supplying information; what is meant by a 'reasonable' charge and whether the cost of retrieving information can be included; the scope of the concept of 'environmental information' and whether this included information on a judicial review related to a planning application; whether a request for access to information concerning Cabinet discussions on Ireland's greenhouse gas emissions can be refused; and the definition of 'public authority' in the context of requests to the Courts Service.

The following conclusions were drawn:

1. The EC directive and Irish regulations have strengthened the right of access to environmental information in Ireland. There is a strong presumption in favour of disclosure; as the CEI put it in her Annual Report 2008, ‘the expectation, very clearly, is that access requests will be granted.’
2. The CEI provides a valuable and accessible remedy in the context of AIE, but the appeal fee and timeframes for decision-making remain problematic. NGOs have also expressed disappointment where public authorities ‘settle’ an appeal with the result that no binding decision is issued by the CEI on the point(s) at issue.
3. The CEI has adopted a robust and purposive approach to the AIE regulations.
4. A substantial body of case law interpreting difficult provisions of the AIE regulations is beginning to emerge.
5. Low levels of awareness of Directive 2003/4/EC and the AIE regulations among public authorities and the public persist. In her Annual Reports for 2007 and 2008, the CEI has highlighted the duty of public authorities to ‘actively seek to create public interest in, and knowledge of, environmental matters’.
6. The CEI’s observations in her 2007 Annual Report provide a cogent critique of the current, minimalist AIE regime. She recommended that an external body should be given responsibility to promote AIE within public authorities and to monitor compliance.
7. The number of appeals to the CEI so far has been low. She has mentioned two points as possible reasons for the low level of appeals, the discouragement presented by the appeal fee and the lack of awareness among the public of their rights under AIE.
8. The CEI has drawn attention to the importance of training for public authorities and a public awareness campaign.

Dr Ryall’s paper ended:

“To conclude, if the AIE regime set down in Directive 2003/4/EC is to take root in Ireland, then adequate resources and training must be provided to public authorities. Otherwise, public authorities will find it difficult, if not impossible, to respond to AIE applications effectively. More significantly, lack of resources will stifle the development of the proactive role envisaged for public authorities under the directive. A high-profile public awareness campaign is the only mechanism by which members of the public will be alerted to their rights under AIE and to the remedies available where the right of access is delayed or denied. As things stand, the overall impact of the AIE regulations to date has been disappointing.”