

**Consultation:** ACCC plan of action

**Body:** Department of Environment, Climate and Communications

**Submitted by:** [REDACTED]

**Submitted to:** environmentpolicy@decc.gov.ie

**Date:** Sunday 17 April 2022

**Summary:** Re DECC's measures<sup>1</sup> in response to ACCC recommendations 4(b)i & 4(b)ii

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<sup>1</sup> Decision VII.8i Ireland Plan of Action Template  
<https://assets.gov.ie/219219/f60c6390-6832-446a-92b3-886887521d10.pdf>

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## Recommendation 4(b)i of ACCC

*In paragraph 4 (b) (i) of decision VII/8i, the Meeting of the Parties recommends that the Party concerned take: (b) The necessary legislative or regulatory measures to ensure that:*

*(i) Appeals under the Access to Information on the Environment Regulations to the Office of the Commissioner for Environmental Information or the courts, whether commenced by the applicant or any other person, are required to be decided in a timely manner, for instance by setting a specified deadline;*

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## Measure proposed by DECC

*Revise the current existing European Communities (Access to Information on the Environment) Regulations 2007 – 2018 to include a specified deadline within which the Office of the Commissioner for Environmental Information must respond.*

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## Comments

The proposed measure does not state what specified deadline OCEI must meet.

The proposed measure requires only that OCEI ‘respond’ to appeals within the specified time instead of ACCC’s recommendation that appeals ‘be decided’ by a specified deadline.

The proposed measure does not contain a remedy to delay in the courts as identified in the ACCC’s findings<sup>2</sup>. The continued absence of a remedy was noted and underlined by the report of the ACCC<sup>3</sup>, and later endorsed at the Meeting of the Parties<sup>4</sup>.

To note also,

- that OCEI has, for various reasons, returned appeals to public authorities for re-consideration. That option would not likely be seen as a ‘decision’ of CEI by the requester.
- that OCEI has submitted to DECC on the delaying effects of inadequate responses to AIE requests by public authorities (including DECC<sup>5</sup>), and has proposed changes<sup>6</sup> to make the obligations more explicit in the Regulations. However, OCEI has not proposed measures to dissuade the identified poor behaviour; the possibility of the drawing of ‘adverse inferences’ with unspecified consequences, as proposed by OCEI, is not reassuring.

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<sup>2</sup>Findings and recommendations with regard to communication ACCC/C/2016/141 concerning compliance by Ireland - paras 118, 134a, 135a [https://unece.org/fileadmin/DAM/env/pp/compliance/C2016-141\\_Ireland/Draft\\_Findings/C141\\_Ireland\\_findings\\_advance\\_version.pdf](https://unece.org/fileadmin/DAM/env/pp/compliance/C2016-141_Ireland/Draft_Findings/C141_Ireland_findings_advance_version.pdf)

<sup>3</sup>Report of the Compliance Committee on compliance by Ireland - Part II paras 24-26, “24. Not having been provided the draft text of any amendments yet, the Committee is not in a position to assess whether the proposed legislative amendments will meet the requirements of paragraph 134 of the Committee’s findings on communication ACCC/C/2016/141. However, it underlines that any legislative or regulatory measures taken to meet the requirements of paragraph 134 (a) must address appeals to both the OCEI and the courts. To ensure that appeals to the OCEI are decided in a timely manner would be an important first step but would not be in itself enough to fulfil the requirements of paragraph 134 (a).” [https://unece.org/sites/default/files/2021-08/ece.mp\\_pp\\_2021.52\\_ac.pdf](https://unece.org/sites/default/files/2021-08/ece.mp_pp_2021.52_ac.pdf)

<sup>4</sup>Decision VII/8i concerning compliance by Ireland with its obligations under the Convention - para 2a “2. Endorses the findings of the Committee with respect to communication ACCC/C/2016/141 that: (a) By failing to put in place measures to ensure that the Office of the Commissioner for Environmental Information and the courts decide appeals regarding environmental information requests in a timely manner, the Party concerned fails to comply with the requirement in article 9(4) of the Convention to ensure timely procedures for the review of environmental information requests;”

<sup>5</sup><https://www.ocei.ie/decisions/ken-foxe-right-to-know-cl/OCEI-Decision-OCE-101846-L2D7P1.pdf> (29/06/2021) paras 5 & 6

<sup>6</sup><https://www.gov.ie/pdf/136947/?page=null>

- that the median decision time of the last twenty decisions<sup>7</sup> was 490 days, and of the last ten decisions; 705 days.
- that ACCC has written that timeliness and effectiveness under Article 9.4 of the Convention is considered “in a systemic manner”<sup>8</sup> and proposes to evaluate progress in 2023 and 2024.
- that at the time of writing DECC has not published draft legislation, regulations, or guidelines.

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<sup>7</sup> Decision reference numbers: OCE-98828-R4K6M9, OCE-93399-G8R1J0, OCE-93470-B9V8X6, OCE-107723-Z8B0J8, OCE-93472-R5M8V0, OCE-93408-H1B3M9, OCE-93473-B1N5L7, OCE-93405-C8C1J5, OCE-93415-Y0N1P2, OCE-113791-R0T6G2, OCE-108782-X6N0D1, OCE-102190-N4X6Y3, OCE-93401-X4C2M5, OCE-105379-F8L2B9-OCE-106896-D5T5W5, OCE-98781-F2M6F5, OCE-93418-X2F2P8, OCE-93418-X2F2P8, OCE-104048-N2R9G9, OCE-93469-W3X0R6, OCE-97782-D6J1J0

<sup>8</sup>Findings and recommendations with regard to communication ACCC/C/2016/141 concerning compliance by Ireland - para 99  
[https://unece.org/fileadmin/DAM/env/pp/compliance/C2016-141\\_Ireland/Draft\\_Findings/C141\\_Ireland\\_findings\\_advance\\_version.pdf](https://unece.org/fileadmin/DAM/env/pp/compliance/C2016-141_Ireland/Draft_Findings/C141_Ireland_findings_advance_version.pdf)

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## Recommendation 4(b)ii of ACCC Meeting of the Parties

*In paragraph 4 (b) (ii) of decision VII/8i, the Meeting of the Parties recommends that the Party concerned take:*

*(b) The necessary legislative or regulatory measures to ensure that:*

*(ii) There are mandatory directions in place to ensure that, should a court rule that a public authority or an information request falls within the scope of the Access to Information on the Environment Regulations, the underlying information request is thereafter resolved in an adequate and effective manner;*

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## Measure proposed by DECC

*Revise the current existing European Communities (Access to Information on the Environment) Regulations 2007 – 2018 to include a requirement that pursuant to Article 13 of the AIE Regulations public authorities shall comply with any order of the court requiring the requested information to be issued to the person making the request.*

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## Comments

To note OCEI's continuing practice of halting its consideration of multiple exemptions once it has found one that is both exempt and not overridden by the public interest test.

In cases where not all exemptions have been considered it is doubtful a court would overturn OCEI's decision and order the release of information. In those circumstances remittal to OCEI seems more likely and so the proposed measure, of itself, would not provide for an effective resolution.

The measure should require as a preliminary that both threshold issues and all raised exemptions have been put to the requester<sup>9</sup>, and any interested party, and have been decided upon by OCEI<sup>10</sup>. A court, if asked, would then be in a position to resolve the request.

As already noted ACCC has written that it views timeliness and effectiveness "in a systemic manner."

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<sup>9</sup> The CEI proposals to amend A.12.4 and A.12.6  
<https://www.gov.ie/pdf/?file=https://assets.gov.ie/136947/04d180fc-809c-47bd-a590-c2b355bc5f0d.pdf#page=null>

<sup>10</sup> cf. Case number: CEI/13/0005

"I approached this review by considering two questions:

Question 1: Do the withheld records contain environmental information?

Question 2: If they do, was refusal justified? .....

Conclusion for question 1

I find that the withheld records do not contain environmental information in the meaning of the Regulations.

As that is my finding, it is not necessary for me to consider questions 2."