


Public consultation on the review of the European Communities (Access to Information on the Environment) Regulations 2007-2018

Submission by: 

Submission Date: **29th March, 2021**

Address: 

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1 CONTEXT OF THIS SUBMISSION

1.1 Purpose of this Consultation

Section 1 of the consultation document states that its purpose is to seek the views of the public on the review of the AIE Regulations 2007-2018, which transpose the AIE Directive, Directive 2003/4/EC, into Irish law.

Section 2 sets out that in 2020, Ireland committed to amending the AIE Regulations in response to findings of non-compliance by the Aarhus Convention Compliance Committee (ACCC). As the Regulations have been in place since 2007 and have been amended previously on three occasions, it is proposed to use this opportunity to review and consolidate the existing regulations.

It further proposes that the review will consider updating the Regulations to ensure continued compatibility with EU law.

This statement of purpose is disingenuous in that it fails to inform the reader that the fundamental compliance issue is with respect to the Aarhus Convention itself, and that the findings of non-compliance arise from a Communication to the Aarhus Convention Compliance Committee by the Right to Know in 2016.

1.2 Communication ACCC/C/2016/141 Ireland

The communicant alleged that the system for reviewing decisions to refuse access to environmental information by public authorities in the Party concerned is not fit for purpose in that:

- Applicants who take their requests to independent administrative appeal face years of delay and their requests effectively become neutralised.
- The delays mean that in almost every case requests are answered long after related decisions have been made thereby frustrating public participation and access-to-justice in environmental decision making.

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1.3 Compatibility with AIE Directive 2003/4/EC

The objectives of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information are:

- (a) 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 practical arrangements for, its exercise; and
- (b) to ensure that, as a matter of course, environmental information is progressively made available and disseminated to the public in order to achieve the widest possible systematic availability and dissemination to the.

Article 2 provides key definitions which include:

1.3.1 Definition of Environmental information

"Environmental information" shall mean any information in written, visual, aural, electronic or any other material form on:

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

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- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c).

1.3.2 Definition of Public Authority

2. "Public authority" shall mean:

- (a) government or other public administration, including public advisory bodies, at national, regional or local level;
- (b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; and
- (c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within (a) or (b). Member States may provide that this definition shall not include bodies or institutions when acting in a judicial or legislative capacity. If their constitutional provisions at the date of adoption of this Directive make no provision for a review procedure within the meaning of Article 6, Member States may exclude those bodies or institutions from that definition.

1.3.3 Definition of Information Held by a Public Authority

"Information held by a public authority" shall mean environmental information in its possession which has been produced or received by that authority.

1.3.4 Definition of Information Held for a Public Authority

"Information held for a public authority" shall mean environmental information which is physically held by a natural or legal person on behalf of a public authority.

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1.3.5 Definition of Applicant

"Applicant" shall mean any natural or legal person requesting environmental information.

1.3.6 Definition of Public

"Public" shall mean one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organisations or groups.

1.4 References to the AIE Directive and the AIE Regulations

The Commissioner for Environmental Information sets out the basis for the right of access to environmental information in the "Legislation" page of its web site, where it states that:

1. European law guarantees the right of public access to environmental information held by or for public authorities. It does this by means of European Directive 2003/4/EC on public access to environmental information. This Directive is commonly known as the 'AIE Directive'.
2. AIE Regulations; the following statutory instruments (S.I.s) give effect to the AIE Directive in Ireland. These are S.I. No. 133/2007, S.I. No. 662/2011, S.I. No. 615/2014 and S.I. No. 309/2018. Together, these are known as the European Communities (Access to Information on the Environment) (Amendment) Regulations 2007 to 2018 or "the AIE Regulations".
3. An unofficial consolidated version of the above instruments brings them together so that they can read as one. While this document comes with a disclaimer saying that it is not itself a legal document and it has no legal status, it is a very helpful document. Many people use it as their primary source of information on AIE law."

A link to the unofficial consolidated version is provided by the Commissioner for Environmental Information, and it is this document that I have used as my source of information on the AIE Regulations.

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1.5 Aarhus Convention

The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) was adopted at the Ministerial Conference in Aarhus, Denmark, on 25th June 1998 acknowledging that ***we owe an obligation to future generations and establishing that sustainable development can be achieved only through the involvement of all stakeholders.***

The Convention is an agreement about government accountability, transparency and responsiveness in the area of environmental protection, focusing on interactions between the public and public authorities in a democratic context and underpinning public participation and buy-in.

This is why it is so important to fulfil the spirit of the convention if public participation and buy-in on our shared environmental future is to be realised.

Article 1: OBJECTIVE

"In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention."

The objective of the convention makes it crystal clear that what is at stake is the ***right of every person of present and future generations to live in an environment adequate to his or her health and well-being.***

The onus is firmly placed on each Party (i.e. governments, including the Government of Ireland) to guarantee the rights afforded by the three mutually supporting pillars of the convention, namely:

- Access to Information on the Environment
- Public Participation in Decision Making on Environmental Matters
- Access to Justice in Environmental Matters

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2 QUESTIONS POSED BY DECC

2.1 Positive Benefits of the AIE Regulations

The spirit and the ethos of the Aarhus Convention is at the core of this question, where its stated purpose is to underpin public participation and buy-in to environmental protection by focusing on government accountability, transparency and responsiveness in interactions between the public and public authorities in a democratic context.

I have briefly expounded of the spirit of the AIE Directive, the AIE Regulations and the Aarhus Convention in the previous section. This is not intended to be an extraneous preamble that can be ignored, but rather to make the point that we all share the environment together, as the current Covid-19 pandemic has shown us so forcefully.

There is no Planet B. The environment that nurtures each of us is all we have, and it is incumbent on all of us to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being as set out in Article 1 of the Aarhus Convention.

The Regulations purport to transpose the principles Aarhus Convention into Irish Law. But the convention is bigger than just a set of rules; implicit in it is the spirit in which the rules are followed. In common parlance, this is often referred to as a "culture" of implementation.

It is apparent that to date, the culture of implementation in many cases is adversarial. Them versus us. Winners and losers (and who wants to be the loser?). There is no environmental future for Ireland as a nation if the implementation of the AIE Regulations continues to foster an adversarial interaction with the public.

If this continues to prevail, we will not be bequeathing a viable environment to our children and grandchildren. We must work together, messy and frustrating as that may be, to take account of all democratically held viewpoints and positions.

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2.2 Specific Parts of the AIE Regulations that should be Amended

2.2.1 Article 3 - Interpretation

There is no definition of what constitutes "the public" as provided in Article 2 of Directive 2003/4/EC para. 6. as: "*Public' shall mean one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organisations or groups.*"

Article 3.(1) defines a "public authority" as including (vii) a company under the Companies Acts, in which **all the shares** are held—

- (I) by or on behalf of a Minister of the Government,
- (II) by directors appointed by a Minister of the Government,
- (III) by a board or other body within the meaning of paragraph (vi), or
- (IV) by a company to which subparagraph (I) or (II) applies, having public administrative functions and responsibilities, and possessing environmental information;

The term "all the shares" negates the intention of this definition, as it is only necessary to have a controlling interest in the shares to exercise beneficial ownership and this regulation should be amended to give effect to this.

2.2.2 Article 4 - Scope

Article 4.(1) provides that "These Regulations apply to environmental information other than, subject to sub-article (2), information that, under any statutory provision apart from these Regulations, is required to be made available to **the public**, whether for inspection or otherwise." There is no definition in Article 3 of "the public".

2.2.3 Article 5 - A public authority shall-

Article 5.(1) provides that "A public authority shall- (a) inform **the public** of their rights under these Regulations and provide information and guidance on the exercise of those rights." There is no definition in Article 3 of "the public".

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2.2.4 Article 7 - Action on a request

Article 7.(2) (a) provides that "A public authority shall make a decision on a request and, where appropriate, make the information available to the applicant as soon as possible and, at the latest, but subject to paragraph (b) and subarticle (10), not later than one month from the date on which such request is received by the public authority concerned" and,

Article 7.(2) (b) provides that "Where a public authority is unable, because of the volume or complexity of the environmental information requested, to make a decision within one month from the date on which such request is received, it shall, as soon as possible and at the latest, before the expiry of that month -

- (i) give notice in writing to the applicant of the reasons why it is not possible to do so, and
 - (ii) specify the date, not later than 2 months from the date on which the request was received, by which the response shall be made,
- and make a decision on the request and, where appropriate, make the information available to the applicant by the specified date."

This article is totally unsatisfactory because by their definition, requests for information on environmental issues frequently arise from issues which are subject themselves to time limitation, such as the period within which this consultation process will accept submissions or within which planning submissions can be made on Environmental Impact Assessment Reports or Natura Impact Statements.

It certainly does not take a month to ascertain whether requested environmental information can be provided within the time frame, and in view of the fact that all information nowadays is either held electronically, or can be scanned to be held electronically, there is unlikely to be an onerous burden of paper records review associated with an AIE request.

It is not only desirable, but essential, that a requestor of environmental information be informed within 3 working days, by electronic means, whether the requested information is available or not, and where it is available, the link to a cloud location from whence it can be downloaded.

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Article 7.(3) (a) provides that "Where a request has been made to a public authority for access to environmental information in a particular form or manner, access shall be given in that form or manner unless -

- (i) the information is already available to **the public** in another form or manner that is easily accessible, or
- (ii) access in another form or manner would be reasonable."

The issue of a particular form or manner is a recipe for delay and unreasonable cost to the public authority. It is reasonable to offer the requested information as a prompt download, with the proviso that information in any other format will incur delays. Furthermore, as noted in 2.2.2 and 2.2.3, there is no definition in Article 3 of what constitutes "the public".

2.2.5 Article 8 - Grounds that, subject to article 10, mandate a refusal

There is evidence in the outcomes of appeals to the Commissioner for Environmental Information that some public authorities, not least the Department of the Environment, Climate and Communications and its predecessors, take an exceedingly narrow interpretation of "Confidentiality", with the result that requests are routinely refused access, leading to the very delays that gave rise to the findings of Communication ACCC/C/2016/141.

Article 8.(a)(iv) provides that "A public authority shall not make available environmental information in accordance with article 7 where disclosure of the information would adversely affect, without prejudice to paragraph (b), the confidentiality of the proceedings of public authorities, where such confidentiality is otherwise protected by law (including the Freedom of Information Acts 1997 and 2003 with respect to exempt records within the meaning of those Acts)."

In Case CEI/15/0032, Damien McCallig v. The Department of Communications, Climate Action and Environment, the Commissioner considered an appeal against a refusal by the Department to disclose requested information on the basis of Article 8.(a)(iv).

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The substance of the case was that the appellant, Damien McCallig, submitted a request for environmental information in a bullet-pointed list to the Department on 26th August 2015. The information requested was:

1. Modelling, analysis and related reports, carried out on Ireland's land area and the power generating potential from wind energy projects on those areas. In particular I am seeking access to the outcomes of the modelling under various setback and turbine height scenarios (for the State, as a whole, and by local authority area if available);
2. Information relating to the minimum turbine size and setback distances required to meet Ireland's renewable energy targets; and
3. Information relating to minimum turbine size and setback distances required to provide for, what the department would consider, commercially feasible wind energy development in Ireland.

On 21st September 2015, the Department informed the appellant that it held 7 records within the scope of the request and refused access to all of this information. The appellant requested an internal review on 17th October 2015 and the Department affirmed its original decision on 11th November 2015.

The Commissioner examined the 7 relevant records in the light of the AIE request and found that the information which they contain relates to part 1 of the request. All of the records were held when the AIE request was made and the records contain the inputs and outputs of various hypothetical modelling scenarios. He was satisfied that these records constituted all of the records, within the scope of the request, which were held by or for the Department when the AIE request was made.

The Department maintained that it was "still in the deliberative process" and the modelling records were being used to inform the decision-making process. It said that this was a very technical area and engagement between the two Departments was ongoing and maintained that refusal on the ground of article 8(a)(iv) was justified since disclosure of the information would adversely affect the confidentiality of its proceedings, which, it argued, is protected by section 29 of the Freedom of Information (FOI) Act 2014.

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The Commissioner reported that the Department also maintained that refusal on this ground was justified following the application of a public interest test. It said that it had "weighed the public interest served by disclosure against the interest served by refusal", but it did not specify all of the public interests which it had identified.

The Commissioner found that the Department's refusal to provide access to the withheld information was not justified by reference to article 8(a)(iv) and accordingly varied the Department's decision to reflect the above findings, requiring the Department to provide the appellant with access to the withheld information according to the provisions of 12(5)(c).

2.2.6 Article 9 - Discretionary grounds for refusal of information

Article 9.(1)(c) provides that "A public authority may refuse to make available environmental information where disclosure of the information requested would adversely affect - commercial or industrial confidentiality, where such confidentiality is provided for in national or Community law to protect a legitimate economic interest."

In Case CEI/14/0016, Sandra Cusack v. EirGrid plc, the Commissioner considered an appeal against a refusal by EirGrid to disclose requested information on the basis of Article 9.(1)(c).

The substance of the case was that the appellant, Sandra Cusack, submitted a request for environmental information to EirGrid on 9th July 2014, quoting from EirGrid's Stage 1 Report for the Grid Link Project which said that "it is EirGrid's policy that for technical and operational reasons underground cables shall not be installed at intermediate points along an overhead line".

The request for information was "In light of the foregoing, I would like to receive a copy of any reports completed for or by EirGrid which were prepared to support the technological solution proposed and routing for the Grid Link project in the Stage 1 report, such reports to include financial cost benefit analysis of possible solutions assessed where they exist."

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EirGrid provided the costings for all the overhead options, but redacted the financial details of the underground option. The appellant asked for an internal review, which was rejected by EirGrid. The appellant then appealed this refusal to provide the costings on the underground option to the Commissioner for Environmental Information.

EirGrid argued that its decision was justified by article 9(1)(c) because the redacted information concerned the cost of High Voltage Direct Current underground cable provided by a single cable manufacturing company based in Switzerland.

The position of EirGrid was that disclosure of the information would amount to a breach of commercial confidentiality where such confidentiality is provided for in national or Community law to protect a legitimate economic interest. EirGrid submitted that the supplier's confidential costings "would be evident" from the information.

In support of this argument, EirGrid relied on the European Communities (Internal Market in Electricity) Regulations, 2000 (Statutory Instrument Number 445 of 2000). These regulations impose a statutory obligation on EirGrid, as Transmission System Operator, to preserve the confidentiality of commercially sensitive information.

"Commercially sensitive information" is defined in S.I. No. 445 of 2000 as "any matter the disclosure of which would materially prejudice the interests of any person" and Regulation 12 of S.I. No. 445 of 2000 (as amended by S.I. No. 60 of 2005) provides:

- (1) The Transmission System Operator shall preserve the confidentiality of commercially sensitive information obtained by it in the discharge of its functions under these Regulations and the Electricity Regulation Act of 1999 (No. 23 of 1999) unless required to disclose such information in accordance with law.
- (2) The Transmission System Operator shall prevent information about its own activities which may be commercially advantageous being disclosed in a discriminatory manner.
- (3) A person who contravenes paragraph (1) or (2) shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding €3,000.

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EirGrid also argued that the public interest would not be served by disclosure, as the disclosure would harm the commercial position of the cable manufacturer, which would in turn threaten the future provision of such information to EirGrid, and this would not be in the public interest as it would prevent EirGrid from carrying out function in Ireland.

EirGrid further argued that as an Expert Panel had been appointed to conduct an independent review of overhead line versus underground cabling options for the transmission of electricity, the public interest in disclosure of the information did not outweigh the interest served by protecting commercial confidentiality.

The appellant's response to these arguments was that the disclosure of the figures would not compromise the costings of the cable manufacturer as any figures supplied by the cable manufacturer were buried within aggregated costings in the subject records. The only way that members of the public could consider the merits and demerits of underground versus overhead options was to have full access to these figures.

The Commissioner made the following findings:

"I find the withheld financial information to be environmental information within the meaning of paragraph (e) of the definition set out in article 3(1) of the AIE Regulations. In reaching this conclusion, I distinguish this case from the case of Andrew Duncan and the Sustainable Energy Authority of Ireland (reference number CEI/13/0005).

In that case I was unable to establish that information in an economic 'viability study' had been 'used within the framework of' a measure likely to affect elements of the environment because I could not identify the adoption of any associated measure of the required type.

In contrast, I would characterise the Grid-Link project (as it was prior to the emergence of the Regional Option) as a firm plan (i.e. a measure) likely to affect elements of the environment (by virtue of requiring significant works to be carried out in the physical landscape), albeit that it included stages dealing with the economic and technical evaluation of available options."

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The Commissioner's decision rejected EirGrid's claim that it might be criminally or civilly liable for releasing confidential information:

"I find that EirGrid's refusal to disclose the withheld information was not justified under article 9(1)(c) because some of the withheld information was not supplied by the third-party whose interests were said to be at risk, and the remainder was aggregated information which did not disclose sensitive commercial or industrial information."

2.2.7 Article 12 - Appeal to Commissioner for Environmental Information

Article 12.(5) provides that "Following receipt of an appeal under this article, the Commissioner shall -

- (a) review the decision of the public authority,
- (b) affirm, vary or annul the decision concerned, specifying the reasons for his or her decision, and
- (c) where appropriate, require the public authority to make available environmental information to the applicant,

in accordance with these Regulations."

The basis of Communication ACCC/C/2016/141 that led (after 4 years) to the findings was that the system for reviewing decisions to refuse access to environmental information by public authorities in the Party concerned is not fit for purpose, in that applicants who take their requests to independent administrative appeal face years of delay and their requests effectively become neutralised and that the delays mean that in almost every case requests are answered long after related decisions have been made thereby frustrating public participation and access-to-justice in environmental decision making.

Time is of the essence as I have shown in this submission. Decisions delayed are justice denied.

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2.3 Other Comments on the AIE Regulations

The Department of the Environment, Climate and Communications does not have an outstanding track record on establishing harmonious working relations with the Irish public. For example, the proposed revision of the Guidelines on Wind Energy Development has been in abeyance for the past 8 years without resolution since the "Targeted Revision" was published for public consultation in December 2013.

The reason for the current public consultation is the finding by Communication ACCC/C/2016/141 that:

- (a) By failing to put in place measures to ensure that the OCEI 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;
- (b) By maintaining a system whereby courts may rule that information requests fall within the scope of the AIE Regulations without issuing any directions for their adequate and effective resolution thereafter, the Party concerned fails to comply with the requirement in article 9 (4) of the Convention to ensure adequate and effective remedies for the review of environmental information requests.

Despite the clear shortcomings set out in the communication from Right to Know, the time line shows that the Department contested the allegations for 4 years rather than taking steps to address them.

I conclude by reiterating that we all share the environment together, and there is no Planet B. The environment that nurtures each of us is all we have, and it is incumbent on all of us to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being as set out in Article 1 of the Aarhus Convention.

Whether the civil servants in the Department charged with this public consultation are able to raise their game in the spirit of the Aarhus Convention remains to be seen.