



**Response by Energia to the Department of
the Environment, Climate and
Communications**

***Consultation on the Review of the Access to
Information on the Environment (AIE) Regulations
2007-2018***

16th April 2021

1 Introduction

- 1.1** The Department of the Environment, Climate and Communications (the “Department”) published a request for submissions on the review of European Communities (Access to Information on the Environment) Regulations 2007 - 2018 (the “AIE Regulations”) on 8 March 2021. We understand that the purpose is to respond to findings of the Aarhus Convention Compliance Committee (“ACCC”) and to review and consolidate the Regulations, ensuring continued compatibility with EU law.
- 1.2** Energia makes the following specific observations and recommendations in response to this request.
- 1.3** Energia is of the view that part (b) of the definition of “Public Authority” under Article 3 of the Regulations should be reviewed and the Department should provide guidance on how this definition should be interpreted by reference to the Directive 2003/4/EC (the “Directive”) and the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the “Aarhus Convention”).

2 Definition of “Public Authority” under the AIE Regulations – Article 3

2.1 A public authority is defined by Article 3(1) of the AIE Regulations as:

- (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 paragraph (a) or (b),

And includes:

- (i) A Minister of the Government
- (ii) The Commissioners of Public Works in Ireland
- (iii) A local authority for the purposes of the Local Government Act, 2001 (No. 37 of 2001)
- (iv) A harbour authority within the meaning of the Harbours Act 1946 (No. 9 of 1946)

- (v) The Health Service Executive established under the Health Act 2004 (No. 42 of 2004)
- (vi) A board or other body (but not including a company under the Companies Acts) established under statute,
- (vii) A company under the Companies Act, 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 sub paragraph (I) or (II) applies, having public administrative functions and responsibilities, and possessing environmental information.

2.2 Apart from the non-exhaustive list of bodies listed at (i) – (vii), the definition of public authority in the AIE Regulations reflects the definition contained in Article 2(2) of the Directive identically.

2.3 The Directive, and by extension the AIE Regulations, are framed so that the obligation to release environmental information is only placed on those bodies which come within the three specific categories identified in Article 3 and therefore this definition and how it is interpreted is of critical importance to the whole AIE regime.

2.4 On any interpretation, the definition of a “Public Authority” is aimed at encapsulating bodies which comprise the State and those which are engaged in the provision of either public administrative functions or public services. This means that the definition expressly requires a public element to the functions of the body in question, and this is the common factor across the three categories of the definition. In that sense, the definition as framed in the AIE Regulations (a definition which mirrors the definition in the Directive and the Aarhus Convention) does not extend to bodies which do not exercise any type of public role and care must therefore be taken not to extend the scope of the AIE Regulations beyond that which was intended by the Directive. This issue is particularly pertinent to part (b) of the definition.

3 Part (b) of the definition of “Public Authority” and the interpretation of “public administrative functions”

- 3.1** As set out above, part (b) of the definition provides, that a “public authority” is:
“(b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment.”
- 3.2** Limb (b) identically replicates Article 2(2)(b) of the Directive which in turn replicates Article 2(2)(b) of the Aarhus Convention.
- 3.3** The test which has been developed through case law for determining whether a body falls within the definition of “Public Authority” is found in the CJEU’s decision in *Fish Legal*¹.
- 3.4** In that decision the CJEU found that Article 2(2)(b) captured entities which are entrusted under law with the performance of “*services of public interest*” and which are, for that purpose, “*vested with special powers beyond those which result from the normal rules applicable in relations governed by private law*”. Paragraph 52 of that judgment states:
“52 The second category of public authorities, defined in Article 2(2)(b)² of Directive 2003/4, concerns administrative authorities defined in functional terms, namely entities, be they legal persons governed by public law or by private law, which are entrusted, under the legal regime which is applicable to them, with the performance of services of public interest, inter alia in the environmental field, and which are, for this purpose, vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.”
- 3.5** Therefore, under the test in *Fish Legal*, for a body to be deemed a “Public Authority” within category (b) it must be:
- (a) A legal person governed by public law or private law;
 - (b) Entrusted with the performance of services of public interest, inter alia in the environmental field; and
 - (c) Vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.
- 3.6** This test has been followed by the Information Commissioner and by the Irish Courts and most recently was relied on by the Irish High Court in the case of *Right to Know CLG v Commissioner for Environmental Information &*

¹ Case C-279/12 (19 December 2013).

² In identical terms to Article 3(1)(b) of the AIE Regulations.

Raheenleagh Power DAC.³ In that case, Mr Justice Owens held that the respondent company, Raheenleagh Power DAC, a fully private company limited by shares with a licence to generate electricity under the Electricity Regulation Act 1999, was both entrusted with the performance of services in the public interest and had been, for that purpose, vested with special powers, even though those powers were subject to prior authorisation by the Commission of Regulation of Utilities (the “CRU”).

3.7 You can expect that AIE requests will be made of any private entity with a licence to generate electricity under the Electricity Regulation Act 1999, despite the fact that the entity may operate in a fully private and competitive market and lacks the public element which the definition of “Public Authority” under the Directive and the Aarhus Convention seeks to capture. This possibility, it is submitted, is not one which was intended by the Directive or the Aarhus Convention.

3.8 The concepts of “services of public interest” and “special powers”, which are determinative factors as to whether an entity falls within the definition of part (b) of the definition of “Public Authority” are not referred to at all in the Directive, the AIE Regulations, the Aarhus Convention, the guidance provided by the Minister for the Environment, Community and Local Government (as he then was) on implementation of the Regulations (the “Ministerial Guidelines”) or the Aarhus Convention: An Implementation Guide (June 2014 edition) (the “Aarhus Guide”).

3.9 These arose for the first time in the CJEU decision in *Fish Legal*. The bodies considered in *Fish Legal* are very different from fully private licensed power generators. The primary difference being that each of the bodies in *Fish Legal* is authorised to monopolise the supply of water and/or sewerage services in a given area in England and Wales. Whereas entities authorised to generate power under the Electricity Regulation Act 1999, generate electricity alongside other authorised entities and sell that electricity to suppliers on a competitive market. In addition, the bodies considered in *Fish Legal* are obliged by statute to carry out certain functions. Whereas authorised electricity generators are not subject to statutory duties of a similar nature nor are they obliged to provide electricity to any particular persons or premises. The obligatory functions entrusted to the bodies considered in *Fish Legal* include:

- a) To develop and maintain an efficient and economical system of water supply in its area;
- b) To ensure that all arrangements have been made to provide supplies of water to premises in their area and to persons who demand them;
- c) To make arrangements for the maintenance, improvements and extension of the water mains and other pipes;

³ [2021] IEHC 46.

- d) To provide, improve and extend a system of public sewers and to cleanse and maintain those sewers and to ensure that the area is and continues to be effectually drained.⁴

3.10 In addition, we note that the Aarhus Guide at p.43 describes a “public administrative function” as “*a function normally performed by governmental authorities, as determined according to national law.*” The Guide also notes that this “*may differ from country to country.*” This makes clear that whether a function can properly be described as being “public administrative” in nature is to be determined by reference to whether that function can properly be described as normally performed by governmental authorities in Ireland, pursuant to the law of Ireland (including EU law).

4 Suggested Amendments

4.1 Energia has two main suggestions: additional wording for part (b) of the definition of “Public Authority” in the AIE Regulations; and guidance on how to interpret this provision in light of the clear requirement for a public element to the body based on the Directive and the Aarhus Convention.

4.2 Energia suggests the following additional wording to part (b) of the definition of “Public Authority” to make it more in line with the wording of the Directive, the Aarhus Convention and the test in *Fish Legal* (the additional text is underlined for ease of reference):

“(b) any natural or legal person performing and entrusted with public administrative functions normally performed by governmental authorities as determined under national law, including specific duties, activities or services in relation to the environment.”

4.3 We also suggest guidance be provided by the Department on the proper interpretation of part (b) of the definition of “Public Authority” and in particular the phrase, “*public administrative functions*”. Such guidelines would provide much welcome precision to the definition of “Public Authority” and in particular part (b) of that definition and would allow bodies and requesters to understand more fully if it falls within the definition and is therefore subject to the AIE Regulations.

4.4 As currently framed and without further guidance, part (b) of the definition of “Public Authority” has the ability to be too far reaching, extending the scope of the AIE Regulations beyond that necessitated by the Directive and the Aarhus Convention.

⁴ Paragraph 14 of *Fish Legal* and section G of the decision of the Upper Tribunal (*Fish Legal v. Information Commissioner* [2015] UKUT 52), in particular paragraphs 74 and 75.