

Just Transition Greens Submission to AIE Regulations Public Consultation 2021



“1. What, in your opinion, are the positive benefits of the AIE Regulations?”

The Just Transition Greens welcome the opportunity to make a submission on this important issue. We believe that the AIE Regulations offer a wealth of benefits to the Irish environment and the Irish people. This review is a chance to highlight the fact that the members of the public and the public authorities are working together to protect our environment, and a chance to find a way to do that in as simple and effective a way as possible.

The environment cannot speak for itself. It follows that others must speak on its behalf if it is to be protected, which means that effective and timely access to information is vital.

The right of access to information is vital to ensure good governance (Ryall (2016)) and functioning democracy, principles of open and transparent governance. The AIE regulations also serve the important function of implementing Ireland’s obligations under EU and International Environmental Law (the AIE Directive and the Aarhus Convention UNECE 1998).

Environmental information is also of grave importance to humans and our own rights and interests. Humans are wholly intertwined with the natural world. Our natural home supports and sustains us, and any degradation of nature is a degradation of human interests and rights, such as the rights to life, to dignity, and to bodily integrity. It follows that in order to best vindicate and protect these rights, all the people in Ireland need to have access to any and all information on the environment.

The thinking behind our submissions is not only to make it easier to request information, but to also simply make information more freely available, with the view that the real aim of providing easy and timely access to environmental information is so that people can participate in decision-making. It’s not a question of the public in opposition to the public authorities, but of working together to help protect the natural and human environment. It also aims to contribute towards improving Ireland’s compliance with its EU and international law obligations. This submission also seeks to reflect the findings of the ACCC in case ACCC/C/2016/141 Ireland (ECE/MP.PP/C.1/2021/8) which was the key driver for this public consultation.

Public authorities, like libraries, are the stores of information which the public need in order to increase our awareness on environmental matters, and help shape our environmental decisions.

“2. Should any specific part of the Regulations be amended?”

- **Article 5**
- **Paragraph 5(1)(b)**
 - Delete the words "make all reasonable efforts to"

Rationale: Public authorities should be unconditionally obliged to hold information in accessible formats.

- **Paragraph 5(1)(d)**
 - Amend 5(1)(d) and add 5(1)(e) to read:
 - “(d) maintain registers or lists of the environmental information held by the authority, with archives open to the public when possible, with clear information as to where such information may be found, and shall ensure that such registers, lists and archives are publicly accessible on the internet, and
 - (e) designate an information officer(s) for such purposes, who will make environmental information publicly available and accessible, deal with information requests, and assist those who are seeking information or making information requests.”

Rationale:

- We need to change our mindset regarding the information held by public authorities. They need to see themselves as repositories of information we all need and be far more proactive in making that information available, thus reducing or removing the need for time-consuming information requests. The best way to address the need for timely and effective access to information, is for the information to be proactively disseminated by the public authorities. Article 3(2) of the Aarhus Convention says that "Each Party shall endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters."

- These registers and archives need not be expensive information management systems, but such a database of information, built up between and across public authorities, if well managed and kept accessible to the public, will in time form an important national resource.
- Public authorities will need to have an environmental information officer, if they are to deal with requests, which they must do. Their role is also to simply make the information accessible. The former final point of 5(1)(d) has now become redundant.
- **Sub-article 5(2)**
 - **Insert paragraphs 5(2)(e)-5(2)(h):**
 - “(e) Reports on the State of the Environment referred to in paragraph (3) below;
 - (f) authorisations with a significant impact on the environment and environmental agreements or a reference to the place where such information can be requested or found in the framework of Regulation 5;
 - (g) environmental impact studies and risk assessments concerning the environmental elements referred to in Regulation 3(1)(a) or a reference to the place where the information can be requested or found in the framework of Regulation 5.
 - (h) Public authorities shall take the necessary measures to ensure that national, and, where appropriate, regional or local reports on the state of the environment are published at regular intervals not exceeding four years; such reports shall include information on the quality of, and pressures on, the environment.”

Rationale: The above textual additions incorporate the full wording of the obligations of Art 7 of Directive 2003/4/EC, in order to promote more comprehensive active dissemination practices by public authorities.

- **Sub-article 5(3)**
 - Delete and replace with:
 - “(3) In the event of a threat to human health or the environment, whether caused by human activities or due to natural causes, a public authority shall ensure that all relevant information held by or for it is, immediately and without delay,
 - (a) effectively disseminated to the general public, and

(b) directly communicated/delivered to any affected group or individual”

Rationale: Any risk to the environment or human health is a matter which ought to be published as a matter of urgency. The decision as to what information could enable the public likely to be affected to take measures to prevent or mitigate harm arising from the threat is one for the public concerned to make.

- **Insert Sub-article 5(6)**

The Commissioner for Environmental Information shall monitor and report on the training and work and the information officers of public authorities.

Rationale: information officers need to be properly informed on the definition of environmental information, and on the OCEI to monitor the work of information officers.

- **Article 6**

- **Paragraph 6(1)(a)**

- Delete the words "writing or electronic" and insert "any".

Rationale: The requirement that applications be in writing is exclusive. It risks undermining the information-rights of groups such as people with literacy problems and certain persons with disabilities. Áine Ryall notes that "a request may be made orally under the equivalent measures in England, Wales and Northern Ireland and in Scotland" (Ryall 2011, 53). Under Article 12 of the General Data Protection Regulation 2016/679, for example, information may be provided orally, provided that the identity of the data subject is proven by other means, when requested by the data subject.

- **Paragraph 6(1)(b)**

- Delete this provision.

Rationale: The burden should not be on the applicant to know the details of the AIE Regulations or FOI Act. If the information requested is not environmental information, and does not fall under

these Regulations, the person requesting can be informed of that at that moment. This requires that information officers to be properly informed on the definition of environmental information, and on the OCEI to monitor the work of information officers.

- **Paragraph 6(1)(c)**

- Delete and replace with "(c) state the name and any relevant contact details of the applicant,"

Rationale: Requiring an applicant to provide an address risks excluding various groups from accessing information. For example: homeless people, certain members of the Traveller community, asylum seekers, and students. Article 3(9) of the Aarhus Convention says that “the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality *or domicile...*” (italics added), while Article 1 cites “the right of *every person* of present and future generations to live in an environment adequate to his or her health and well-being...” (italics added)

- **Article 7**

- **Insert paragraph 7(1)(b):**

- “The public authority shall establish an online log to enable applicants to track the processing of requests for information.”

- **Insert paragraph 7(1)(c):**

- “The public authority shall acknowledge receipt of requests for information within 2 days of the receipt of the request, and inform applicants of the status of their request for information within 10 days of the receipt of the request.”

- **Paragraph 7(2)**

- Amend to:
- “(a) 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 14 days from the date on which such request is received by the public authority concerned. The public body shall

acknowledge receipt of the request immediately in writing, or within five days at the latest.

- (b) Only in exceptional circumstances, 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 period—
 - (i) give notice in writing to the applicant of the detailed 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.
- **Paragraph 7(6)(a)**
 - Amend to:
 - “Where sub-article (5) applies and the public authority concerned is aware that the information requested is held by another public authority, it shall as soon as possible, and within 5 days of receipt of the request —
 - (a) transfer the request to the other public authority and inform the applicant accordingly.
 - (b) This shall not extend the 14 day deadline for responding to the request, unless the receiving public authority requires to extend the time limit in the manner described in 7(2)(b) above.”
- **Sub-article 7(8):**
 - After “a manner” insert “or is unreasonable having regard to the volume or range of information sought”
 - After “such a request” insert “e.g. by providing information on the use of the public registers, lists and archives referred to in paragraph 5(1)(d), or informing the applicant of the place where such information can be examined and facilitating such examination.”
- **Insert sub-article 7(11)**

A public authority shall put in place systems to collate appropriate annual statistics, including the following:

- the number of requests for information received relating to access to information on the environment,
- the number of cases under which the information was either fully disclosed, partially disclosed or refused in full,
- the number of cases referred for internal review, and
- in cases where access to information was refused, the reasons for refusal or the exceptions under which it was refused.
- The above information shall be collated and forwarded to the Office of the Commissioner for Environmental Information on an annual basis.
- The information shall be publicly available

Rationale: These amendments would promote better administrative practices within public authorities. If there is a clear publicly-accessible register of information held, the need to transfer the request should be a rare occurrence. The collation of information on requests will help improve the operation of the access to environmental information. Aarhus Convention Compliance Committee communication ACCC/C/2004/3 (Ukraine) (§33) has suggested ways to deal with voluminous requests.

As regards Article 7(2), Ireland has one of the longest periods in the EU for responding to AIE Requests. Many EU countries provide for two weeks e.g. Portugal (EU Commission (2012)). AIE Requests are recognised as time sensitive, supporting as they do the right to participate in environmental decision making processes. Effective public participation is contingent on timely access to the information relevant to the decision making process. The Directive permits better access than the minimum conditions established therein and both the Directive and the Convention establish that the request should be complied with “as soon as possible”. The complaint before the ACCC in Case 141 raised issues of the practice of public bodies to treat the two months as the actual deadline, and although the ACCC did not address this as it was not fully established in that case, this is a common complaint from NGOs (e.g. FIE (2012)). It would be likely to lead to

improved practice if the initial response period was shortened and if it was more difficult for public bodies to extend the time period to the maximum allowed by the Directive.

- **Article 8**

- Change the title of the article to “Grounds that, subject to article 10, allow for a refusal.”
- Delete the words "shall not make" and insert the words, "subject to article 10, may refuse to make"

Rationale: As Ryall notes, this regulation is more restrictive than the AIE Directive requires and should be relaxed to ensure wider access to information. Mandatory grounds for refusal are not permissible under the Directive 2003/4/EC. (Ryall 2011, 53)

- **Article 9**

- Change title of the article to “Other grounds on which a request for environmental information may be refused”

- **Paragraph 9(2)(a)**

- After “information sought” insert “taking into account article 7(8)”

- **Insert paragraph 9(2)(e)**

- “Where a request is refused on the basis that it concerns material in the course of completion, the public authority shall state the name of the authority preparing the material and the estimated time needed for completion.”

- **Insert paragraph 9(2)(f)**

- “Where a request is refused on the basis that it concerns material in the course of completion, the public authority shall inform the applicant when such information becomes available”

Rationale: This would ensure effective access to information.

- **Article 12**

- **Delete sub-article 12(2)** and renumber other sub-articles appropriately.
- **Insert sub-article 12(6)** and renumber other sub-articles appropriately:

- (a) “A decision under subsection (5) shall be made as soon as may be and, insofar as practicable, not later than 4 months after the receipt by the Commissioner of the application for the review concerned.
- (b) The Commissioner for Environmental Information shall, in the performance of her or his functions under this article, have regard to any timescale specified by the applicant.
- (c) An appeal may be prioritized if the person submitting the appeal can show that the information is required for a specific process in which she/he wishes to participate.”

Rationale (sub-art. 12(2) deletion): Freedom of Information and Access to Information on the Environment are disparate schemes, and the Aarhus Convention Compliance Committee stated that “the disparity between the two schemes means that, by definition, the person who exercises the two functions is under pressure to give priority to appeals lodged under the FOI Act” (ACCC/C/2016/141 §108). This is having a detrimental effect on the timely resolution of AIE appeals.

Rationale (sub-art. 12(6) insertion): The aim of these regulations providing access to environmental information is that people be able to participate in decision-making. The Aarhus Convention Compliance Committee states that “the average time taken by the OCEI in 2018 and 2019 to publish decisions on appeals (279 and 249 days, respectively) far exceeds the deadlines set for public participation in decision-making procedures or commencing court proceedings.” (§105) They also note that “this figure is only an average, so a significant proportion of the appeals decided by the OCEI take longer.” (§106) The Committee also states that, the “OCEI carries out a full review of the facts and the law, but that cannot justify systemic delays that prevent members of the public from exercising their rights under the Convention to participate in decision-making or seek access to justice regarding the environment.” (§106)

A four-month period is still far outside the timelines for many of the deadlines set for public participation in decision-making procedures, either within the initial planning processes or within judicial review procedures, but brings AIE Appeals within the timeframe of FOI requests in S22(3) of the FOI Act 2014. As the Aarhus Convention Compliance Committee states also, “It is difficult

to see why, if it was feasible for the Party concerned to establish a clear deadline for FOI appeals, there should not also be one set for appeals under the AIE Regulations.” (ACCC/C/2016/141 §108)

- **Article 13**

- **Sub-article 13(4)**

- After “may, where appropriate,” substitute with:
- “... issue directions for the adequate and effective resolution of its order, and specify the period within which effect shall be given to its order.”

- **Insert sub-article 13(5)**

- “Pursuant to an order made by the High Court, Court of Appeal, or Supreme Court under this article, the Commissioner for Environmental Information shall issue directions for the adequate and effective resolution of that order.”

Rationale: The Aarhus Convention Compliance Committee states that:

“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.” (§133)

- **Article 14**

- **Insert Sub-article 14(3)**

- “The minister shall create and maintain a list of all public authorities subject to these Regulations.”

Rationale: Article 3(5)(b) of the Directive 2003/4/EC requires lists of public authorities to be maintained. This would reduce the number of refusals on “threshold issues” such as whether a body is a public authority or not. This list or register could be maintained by the Department of Environment or the OCEI. The creation of a mandatory registration requirement for any body that fits the criteria (analogous to the lobbying registration requirement) would alleviate the administrative burden on the relevant body tasked with maintenance of such a list or register.

- **Article 15**

- **Sub-article 15(3)**

- Substitute with: “Subject to sub-article (4), a fee of €25 shall be charged for making an appeal to the Commissioner under article 12.”

Rationale: a charge of €50 inhibits many from appealing a decision. The OCEI should be as widely accessible as possible. In contrast to the Irish position, no equivalent appeal fee has been payable under the regulations transposing Directive 2003/4/EC in England, Wales and Northern Ireland or in Scotland.

- **Insert paragraph 15(5):**

- In respect of eligible public interest non-governmental organisations, there shall be no fee charged.

- **Insert sub-article 15(8):**

- The minister may make regulations with respect to the Office of the Commissioner for Environmental Information to provide for any or all of the following:
- requirements which a public interest non-governmental organisation referred to in section 15(5) shall satisfy in order to be eligible under sub-article 15(5), being:
- (i) in relation to its membership,
- (ii) in relation to its aims or objectives being otherwise than for profit,
- (iii) in relation to the possession of a specified legal personality and the possession of a constitution or rules,
- (iv) in relation to its aims or objectives.

Rationale: Non-governmental organisations often must make multiple environmental-information requests, toward work that is to the benefit of all of society. The fee for an appeal, whatever the merits of the initial refusal, has a chilling effect on that work. This provision should include incorporated bodies as well as ad-hoc community groups. This provision should include all environmental NGOs and health NGOs as well as organisations working with or on behalf of disadvantaged and/or marginalised groups. This provision should not be restricted to bodies or organisations the aims or objectives of which relate to the promotion of environmental protection, because environmental information can be important to people and organisations for reasons beyond the only environmental protection per se.

“3. Any other comments on the existing AIE Regulations and their implementation of the AIE Directive 2003/4/EC?”

A significant problem remains with regard to timely access to the courts, which we have not been able to address within the ambit of these suggested amendments. The Aarhus Compliance Committee commented that in no sense can the review procedures before the Irish courts be considered timely (ACCC/C/2016/141 §116). As was pointed out by one of the participants in that hearing, the delay in reaching the courts is of particular concern for those seeking to participate in time-limited consultation processes or when deciding whether to apply for judicial review of decisions, acts or omissions within the time limit imposed for that (ACCC/C/2016/141 §81).

Finally, we submit that future public consultations should aim to improve upon this one. Greater efforts to engage with the general public and civil society organisations are required. In particular, efforts ought to be made to inform and consult with communities and groups who are most affected, and most likely to be affected, by environmental issues.

Sources

- Aarhus Convention Compliance Committee. “Findings and Recommendations with regard to compliance by Ukraine with the obligations under the Aarhus Convention in the case of Bystre deep-water navigation canal construction (submission ACCC/S/2004/01 by Romania and communication ACCC/C/2004/03 by Ecopravo-Lviv (Ukraine))” ECE/MP.PP/C.1/2005/2/Add.3 14 March 2005. Adopted by the Aarhus Convention’s Compliance Committee on 18 February 2005
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- Michael Ewing, Alison Hough and Magnus Amajirionwu (2011) “[Assessing Access To Information, Participation, and Justice in Environmental Decision Making in Ireland](#)”, EPA Strive Series No. 86.
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