Department of the Environment, Climate and Communications ("DECC")

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

Submission of Coillte CGA

Introduction

Coillte welcomes this opportunity to make submissions to the DECC in relation to the review of the Access to Information on the Environment (AIE) Regulations 2007-2018 (S.I. No. 133 of 2007; S.I. No. 662 of 2011; S.I. No. 615 of 2014; S.I. 309 of 2018) (the "**AIE Regulations**").

Coillte notes that, in 2020, Ireland committed to amending the AIE Regulations in response to findings of non-compliance by the Aarhus Convention Compliance Committee (ACCC).

Coillte also notes and welcomes the fact that it is proposed to use this opportunity to review and consolidate the existing regulations.

Below, we set out our consultation submissions, in the form of answers to Consultation Questions 2 and 3.

Confidentiality Note

We note that the DECC intends to publish the contents of all submissions received, and will redact personal data prior to publication.

We confirm that this consultation response does not contain any personal, commercially-sensitive or confidential information.

Responses to Consultation Questions

Q.1 – n/a

Q.2

***Should any specific part of the Regulations be amended? If yes, please provide details of the suggested amendment and why you consider such an amendment to be necessary. Please note you must include the article of the AIE Regulations to which you are referring*.**

Details of Suggested Amendments to the existing AIE Regulations

Article 3 – Interpretation

Proposed amendment to Article 3:

Insert a definition of "month" to read:

'"month" means a period of 20 working days, and in determining such a period, a Saturday or a public holiday (within the meaning of the Organisation of Working Time Act 1997) shall be disregarded.'

The Environmental Information Regulations in the UK have, to date, used a period of 20 working days to constitute the "month" referred to in the Directive, and this would be desirable in the Irish

AIE Regulations also, as the calendar month can cause difficulties time-wise, particularly where public holidays fall within a period in which a request is being processed.

Article 4 – Scope

Article 5 - A public authority shall-

Article 6 - Request for environmental information

Article 7 - Action on a request

Proposed amendment to Article 7(3)(b):

Amend Article 7(3)(b) to read:

"(b) Where a public authority decides to make available environmental information other than in the form or manner specified in the request, the reason ~~therefore~~ therefor shall be given by the public authority in writing."

The **purpose** of this is to correct an existing typographical error.

Amend Articles 7(5) and 7(6) and add a new sub-article (7):

"(5) Where a request is made to a public authority and all or any of the information requested is not held by or for the authority concerned, that authority shall inform the applicant as soon as possible, and in any event, and at the latest, when notifying the applicant of its consequent decision under this sub-article wholly or partially to refuse his or her request, that the information concerned is not held by or for it.

(6) Where sub-article (5) applies and the public authority concerned is aware that all or any of the information requested is held by another public authority, it shall as soon as possible, and without prejudice to the applicant's right to apply under Article 11(1) for an internal review of the whole or partial refusal under sub-article (5) —

> *(a) transfer a copy of the request to the other public authority and inform the applicant accordingly, or*
>
> *(b) inform the applicant of the public authority to whom it believes the request should be directed."*

(7) Where an applicant gives his or her consent to the complete or partial transfer of his or her request to another public authority (the "transferee public authority") and agrees wholly or partially to withdraw his or her request from the first public authority accordingly, the request will be deemed to have been withdrawn to that extent from the first public authority and made to the transferee public authority upon the transfer of the request, or part of the request, as the case may be.

The **purpose** of these amendments is to:

1. clarify confusion as to whether a transfer of all or some of a request is also a refusal of the request to that extent, and a refusal that can be the subject of an internal review application; and

2. to allow a requester, if desired, to agree with the public authority that the transfer of all or part of his or her request is also intended to be a withdrawal by him or her of his or her request to that extent, such that he or she will not seek an internal review of any refusal that would otherwise be deemed to have occurred, and such that he or she would then take up the request with the transferee public body.

Insert a new sub-article after the current Article 7(8) to read:

"(XX) Where the applicant has made a more specific request following the invitation of the public authority to do so, the applicant's request shall be deemed to have been received on the date that the more specific request is made."

The **purpose** of this amendment is to make it clear that the one-month, or as the case may be, two-month period within which to decide on a request do not start to run until a more specific request is received.

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

Proposed amendment to Article 8(a)(iv):

> *"8. A public authority shall not make available environmental information in accordance with article 7 where disclosure of the information—*
>
> *(a) would adversely affect—*
>
> *…*
>
> *(iv) 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~~ Act 2014, ~~with respect to~~ through its exemption of certain ~~exempt~~ records ~~within the meaning of those Acts~~ from disclosure);*

The **purpose** of this amendment is to seek to make it clearer that the exemption provisions in the FOI Act that are designed to protect the confidentiality of the proceedings of public authorities can be relied on in the AIE context by all public authorities, and not merely those public authorities that are also FOI bodies under the FOI Act. The amendment seeks to convey the idea that it is the exemption provisions of the FOI Act, rather than whether a public authority is an FOI body under that Act, that should be the focus when interpreting and applying Article 8(a)(iv) so as to 'import' the same exemption circumstances from the FOI legislation into the AIE legislation and allow public authorities to apply these, irrespective of whether any public authority concerned is, or is not, also an FOI body.

Article 9 -Discretionary grounds for refusal of information

Proposed amendments to Article 9:

Amend Article 9(2)(a) to read:

"(2) A public authority may refuse to make environmental information available where the request—

(a) is manifestly unreasonable ~~having regard to the volume or range of information sought,"~~

The **purpose** of this amendment is to remove the restriction on what is "manifestly unreasonable" in the current AIE Regulations. The removal of the conditioning wording is in line with the provisions of the Directive, which also simply refers to the request being "manifestly unreasonable", without qualifying that expression with any prescriptive wording as to what will qualify as rendering a request unreasonable in that sense. Note that the request will still have to be *manifestly* unreasonable, and that application of this exception will still be subject to the public interest test. Also, the concept of what is manifestly unreasonable is well-charted in this area, and it would include matters such as volume and/or range of information sought, disproportionate burden and/or cost on the public authority, and vexatiousness of request.

Article 10 - Incidental provisions relation to refusal of information

Proposed amendment to Article 10:

Amend Article 10(6) to read:

"(6) Where a request is refused pursuant to article 9(2)(c) because it concerns material in the course of completion, the public authority shall inform the applicant of the name of the authority preparing the material (including, as the case may be, the public authority itself) and the estimated time needed for completion."

Article 11 - Internal review of refusal

Article 12 - Appeal to Commissioner for Environmental Information

Proposed amendments to Article 12:

Insert new sub-articles as follows:

(XX) Where an appeal is initiated under this article, the Commissioner may at any time endeavour to effect a settlement between the parties concerned of the matter concerned and may for that purpose, in his or her discretion, suspend (whether to allow for mediation, or otherwise), for such period as may be agreed with the parties concerned and, if appropriate, discontinue, the appeal concerned.

(YY) In relation to an appeal under this article, the public authority, the applicant and any other person who is notified by the Commissioner of the appeal may make submissions (as the Commissioner may determine, in writing or orally or in such other form as may be determined) to the Commissioner, in relation to any matter relevant to the appeal, and the Commissioner shall take any such submissions into account for the purposes of the appeal.

(ZZ) Subject to the provisions of these Regulations, the procedure for conducting an appeal under this article shall be such as the Commissioner considers appropriate in all the circumstances of the case, and, without prejudice to the foregoing, shall be as informal as is consistent with the due performance of the functions of the Commissioner.

The **purpose** of these amendments is to give greater flexibility to the Commissioner in the conduct of appeals. This would allow for a mediation-type process, for other formal or informal procedures to be followed towards either a settlement or a binding decision of the Commissioner. It would also allow for the Commissioner hearing orally from the parties, who might orally make submissions or attend before the Commissioner, rather than, or in addition to, conducting the usual formal written procedure.

These proposals could significantly speed up the review process and facilitate a greater understanding by all parties of the decision arrived at, and the reasons for the decision, as well as of the request and the true satisfaction of same. The current reliance on written submissions only can make the external appeal process exceedingly lengthy for all concerned, and can on occasion be very resource-demanding.

Amend sub-article (7) to read:

"A public authority shall comply with a decision of the Commissioner under subarticle (5) within 3 weeks after its receipt, save where the public authority wishes to initiate an appeal against the decision pursuant to Article 13, and, where such an appeal is initiated, the public authority may, as

appropriate, comply with the decision once the appeal is finally determined, or withdrawn, as the case may be."

The **purpose** of this amendment is to make it clear that there should be no obligation to comply with a decision of the Commissioner within 3 weeks if a public authority is considering an appeal, and, if it then initiates an appeal within the 2-month period provided for in Article 13(2). The obligation to comply only crystallises once no appeal is brought, or any appeal brought is finally determined, or withdrawn.

Article 13 -Appeal to high court on a point of Law

Article 14 –Guidelines

Proposed amendment to Article 14:

Amend Article 14(1) to read:

"14. (1) The Minister may publish guidelines in relation to the implementation of these

Regulations by public authorities, and shall review and update such guidelines not later than 3 years after their publication and subsequently not later than each third year thereafter."

The **purpose** of this amendment is to require the reasonably regular updating of the ministerial guidelines. This is highly desirable given the complexity of the Regulations, and their interpretation and application in light of ever-developing case law at CJEU, national court and domestic court level, as well as taking account of developments arising from the decisions and practices of the Commissioner for Environmental Information. It is also reasonable to require regular updating of the guidelines because, under Article 14(2), public authorities are mandated, in the performance of their functions under the Regulations, to have regard to the guidelines published by the Minister, and it is therefore necessary and appropriate that those guidelines be up-to-date and fit for purpose.

Article 15- Fees

Proposed amendments to Article 15:

Amend Articles 15(1)(a) and (2) to read:

"(1)(a) A public authority may ~~charge a fee~~ levy a charge when it ~~makes available~~ supplies environmental information in accordance with these Regulations (including when it makes such information available following an appeal to the Commissioner under article 12), provided that such ~~fee~~ charge shall be reasonable having regard to the provisions of the Directive concerning the levying of charges and the reasonableness thereof."

"(2) Where a public authority levies charges ~~a fee pursuant to sub-article (1)~~, for supplying any environmental information, it shall make available to the public a ~~list~~ schedule of ~~fees charged~~ such charges, information on how they are calculated and the circumstances under which they may be levied or waived, including whether, and if so in what circumstances, payment may be required in advance of the supply of any information concerned."

The **purpose** of the amendments is to align the provisions better with the provisions of the Directive, and also to provide for the seeking of advance payments in appropriate cases, before supplying any environmental information to an applicant.

Recital (18) of the Directive contemplates that "advance payment" can be required in certain circumstances, albeit such "should be limited". Advance payment is therefore lawful as a requirement, and providing for it will allow public authorities, for example, to require advance

payment where, say, the cost of supplying the information exceeds a certain threshold over which it would be reasonable to expect payment in advance of supply.

The cost of compiling, copying, printing and posting information can be significant.

[Note: "Fee" should be the word used to describe the charge for making a request or an application, whereas "charge" should be the word used to describe the charge for making available information. This is the language used in the Directive. This would be consistent also with the language-usage in the Freedom of Information Act 2014, which distinguishes in this way between "fees" and "charges". All references in the existing AIE Regulations should therefore be amended according to whether the reference is to a fee or a charge, properly speaking.]

Q.3

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

Clearly, the updated regulations will have to ensure that they are compatible with EU law and with Ireland and the EU's obligations under the Aarhus Convention (the "**Convention**").

However, as a general matter, Coillte would wish within that constraint to ensure that the updated regulations were as clear and precise and user-friendly as possible for both public authorities and members of the public to interpret and apply.

In that regard, from the public authority perspective, Coillte would request that the DECC consider whether there were any provisions or procedures that could be included, or amended, so as to make the Regulations less burdensome for public authorities to interpret and apply.

This would include amending and optimising the provisions already included in the existing regulations as well as providing for any further or other matters that could lessen or mitigate the burden on public authorities. Such would be capable of being implemented where the further or other matters were either contemplated by Directive 2003/4 (the "**Directive**") but not included in the existing regulations, or where the matters were not *expressly* contemplated, but would nevertheless not be *incompatible* with the Directive or the Convention.

We have included some suggested provisions in this regard under Q.2 above.

Further, we would ask that the DECC consider if there was any appropriate way of clarifying at the relevant EU and/or international level whether the High Court's recent decision in *Right to Know CLG v Commissioner for Environmental Information & Raheenlagh Power DAC* reflects the intended current scope, or possibly the intended future scope, of the concept of a "public authority" within the meaning of the Directive and the Convention.

In that regard, on one view, it could be said that the spirit and purpose of the definition was to bring within the ambit of the Directive and Convention (and our domestic Regulations) any body or authority of a substantively public nature, regardless of whether its form was that of a private and/or commercial entity governed, or governed largely, by private law, or of a purely public body governed by public law.

The flavour of the definitions in paragraphs (b) and (c) of the definition of *"public authority"* seem to bear this out:

> *"(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)"

The idea seems to be to capture whatever legal person, in whatever form or guise, has been tasked by the State with performing public administrative functions including specific duties, activities or services in relation to the environment (a "public body"), or any person having public responsibilities or functions, or providing public services, relating to the environment under the control of a public body.

In broad terms, it could be said that the intention was for the concept of a "public authority" to cover a body that performed functions or services in relation to the environment on behalf of the State, in whatever way, rather than to cover a private and commercial body that was regulated by the State in the carrying out of its commercial activity, and/or able to access certain powers to enable it to do so.

A purely private company which happens to require regulatory authorisation or licensing to pursue its private commercial aims, providing services to the public (rather than public services or having public functions in relation to the environment), and which can apply for certain powers to be exercised in order for it to carry out its licensed/authorised activity, would not seem happily to fall within the spirit of the definition, or to be recognisable as the kind of authority addressed by the machinery of the Directive and Convention. In that regard also, it would seem that, given the highly-regulated nature of such companies, the Directive and the Convention envisaged that any environmental information that would serve to foster and promote the aims and purposes of these instruments would be held by the public bodies performing the regulatory, authorisation and licensing functions, and would be accessible by the public in their hands.

In any event, the decision in the *Raheenlagh* case represents the law of Ireland, and must be respected. Nevertheless, it would be of interest if the DECC could ascertain at EU and/or international level whether it also chimes with the policy and intendment of the Directive and the Convention as understood at those levels, and, even if it does, whether any consideration is being given to rowing back on this as a matter of future policy at EU and international level.