Environmental Pillar
working for a sustainable future

Environmental Pillar Submission

to the public consultation on

The amending 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)

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Note: While this submission has been prepared for the Environmental Pillar it may not reflect the views of all our members.

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Introduction

The Environmental Pillar welcomes the public consultation on the amending 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 regulations". We also very much welcome Ireland's commitment to amend the regulations in response to the findings of non-compliance against Ireland by the UNECE Aarhus Convention Compliance Committee, ACCC in communication ACCC/C/2-16/141. We understand from the Department's website page that the intention is to review regulations overall and we also therefore welcome this as an opportunity to both improve the implementation of the EU AIE Directive 2003/4/EC and the Information pillar of the Aarhus Convention. However, we cannot overemphasise the importance of addressing robustly and as the absolute urgent priority the ACCC's non-compliance issue.

This is because

1. The issues with access to justice in AIE requests either through the Office of the Commissioner for Environmental Information, OCEI, or before the Courts serve to fundamentally undermine the efficacy and credibility of the AIE regime in Ireland. Consequently they have a very serious detrimental effect on the rights of the public and eNGOs under the Aarhus convention and under EU law.
2. They additionally compromise the ability to engage meaningfully and effectively under the participation pillar, and potentially also impede those seeking to make determinations on pursuing access to justice.
3. The practical changes needed to comply with the characteristics of Article 9(4) of the convention which Ireland was found to be non-compliant with by the ACCC, have the potential to transform Ireland's implementation and resolve many basic issues with the system and regulations.
4. The Meeting of the Parties. MoP to the Aarhus Convention, is in October 2021. If Ireland moves swiftly there may still be an opportunity for Ireland to be able to agree and implement a solution to resolve the non-compliance in time, so while the non-compliance finding stands, it can then be considered as resolved at the MoP. This would be very significant. Ireland thus needs to be able to in the interim to meet the deadlines necessary for consideration of its proposals by the ACCC and the associated consultations, in a very tight timeframe. It is therefore disappointing that following a significant extension to Ireland to respond to the draft findings, the findings were adopted by the Committee on 9 Nov 2020, yet the public consultation on a review of the regulations was only opened 4 months later on 8 March, and ran over both the St Patricks national holiday and Easter and concludes on 16 April 2021.

Responding to the non-compliance issues in ACCC/C/2016

The Environmental Pillar wish to continue to emphasise the reliance of our sector on an effective implementation of the Convention's information pillar, and the AIE Directive.

We do welcome that some de minimis suggestions to the Department from the Environmental Law Officer of the IEN to assist the public with updating the consultation page to providing links to

information on the Aarhus Convention, on the compliance issue and the Directive and to the unofficial consolidation of the regulations were responded to.

Turning to the very specific issue then of the response needed in respect of communication ACCC/C/2016/141, it is disappointing that the consultation document did not set out for the wider public the nature of options under consideration in addressing the problem, so that their relative merits/demerits could be commented upon in consultation responses.

We therefore set out the considerations which we feel are relevant to the specification of the solution.

Purpose and Objective of the Convention & General Obligations

We first wish to highlight the fundamental purpose and objective of the convention as set out unequivocally in Art 1

"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."

More particularly, in the General Obligations provisions of Art 3 – paragraph 1 emphasises the interoperability and interdependence of the three pillars as follows: (emphasis added)

"1. Each Party shall take the necessary legislative, regulatory and other measures, including measures **to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions** in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention."

These two provisions we submit are material to the specification of the solution.

Findings of the ACCC

The ACCC found in respect of:

- The OCEI appeal mechanism that it did not comply with the essential characteristic of **timeliness** specified as one of the mandatory requirements under Art 9(4) for the reviews provided by the OCEI.
- The Courts review did not comply with the essential characteristic that its remedies be **effective and adequate** as two of the mandatory requirements under Article 9(4) of the Convention.

Stating in its findings that:

> "134. The Committee finds 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."

The nature of the solution required:

In respect of the timeliness issue for the OCEI review – we are conscious of the well-rehearsed observations on the difference in how a timeline is specified for Freedom of Information appeals in Irish legislation, whereas no such timelimit is specified for the OCEI's AIE appeals system. However the issue of "timeliness" is a very particular characteristic. It implies as was submitted in the observations on the communication, a relevancy and a context specific consideration and relevance, rather than a mere arbitrary time limit. This is all the more so when one considers the other characteristics for the review specified in Art 9(4) – that the remedies provided through the review be both "adequate" and "effective" , providing as it does:

" In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible"

In short for the outcome of the review to be adequate and effective – these also connote the need to achieve relevance and usefulness to the party seeking the review.

Taking a purposive approach in the same manner of the EU Court of Justice to what is therefore obligated in terms of timeliness requires a solution which interprets the obligation of timeliness which is consistent with the fundamental objective and purpose of the Directive.

In the context then for example of someone seeking to participate in some time delimited public consultation be it on some consent or permitting procedure, or some policy consultation the overall timeframes of the AIE process have to be considered – versus the timeframes of those other participation/consultation windows.

At present the regulations provide broadly in line with the AIE Directive the timelines for processing requests. However the upper limit of a month for responding to an AIE may be extended to 2 months, and thereafter a further upper limit of one month may be incurred for an internal review, before one can take the matter to the OCEI. Therefore even before the OCEI process commences, 3 months may have elapsed. Yet there are very few if any statutory consent processes which allow for such a window. This therefore has the potential to compromise the potential quality and effectiveness of informed participation in environmental decision-making across a whole range of sectors, planning, forestry, aquaculture, mining, water, waste etc. It also serves to potentially inhibit an actor considering the need to pursue Judicial Review with timelimits for JR being to all intents and purposes only 8 weeks pursuant to s.50(6) of the Planning and Development Act 2000,"PDA" notwithstanding what is generally acknowledged to be a challenging threshold to achieve any extension as it stands currently, based on the PDA and the jurisprudence of the Irish Courts. In other sectors timelimits for various types of appeals and JR vary – with an upper limit of 3 months. But clearly even before the OCEI appeal can even commence – the issue of timeliness is already an issue – putting in fairness the OCEI office in a challenging position.

It is notable that the clock stops in the planning system when a developer is required to provide further information. However there is no similar generosity typically exercised in the various consent systems when issues with access occur, and in general it is not even provided for. In fact in the context of Covid-19 pandemic new planning SI's* introduced allow the Local Authority miss a 5 day deadline to get planning files online – on the basis of a wide range of excuses, including volume. Yet even despite there being an acknowledgement of volume – there is no extension of timeline for participation. It is in this regard important to note that core elements of Art 6 of the Convention are actually overlapping with the information pillar in relation to provision of notifications and information on environmental decision-making.

Finally in conclusion on this point – our interpretation of what is necessitated is given further weight by the AIE Directive itself. In addressing the requirement under the convention for the Member States – the Directive in Article 3(2), requires the Public Authority to process a request "having regard to any timescale specified by the applicant". There is a serious omission in the Irish regulations which is to reflect this requirement in both Art 6 and 7 of the Regulations, but most particularly Art 7 which is directed at the public authority as "action on request".

Practical and constructive suggestions:

Therefore we hope the following would be seen as certain practical and constructive suggestions and we include the following:

1. Limit the need for requests in the first instance – they should be an exceptional requirement if there is progressive proactive dissemination of information in accordance with the AIE Directive in particular, and clearly Ireland in making any changes to the regulations needs to be mindful of the need to be compliant with both the AIE Directive and the Aarhus Convention.

   This has the added benefit of not only avoiding the challenging issue of timeliness in the OCEI review, but also reducing the burden on the OCEI and Public Authorities in processing requests.

2. Therefore, additionally the key requirement in the regulations and in complementary implementation measures – is to radically improve the obligation and mindset around proactive dissemination of information. This will required both legislation, training and oversight.
3. We highlight in that regard there is an enforcement obligation in Art 3(1) for which Ireland does not appear to have any solution for.
4. The training focus needs to extend to the wider public. It is acknowledged the Department has done initiatives on this in the past, and indeed supports IEN staff members but there is a need to engage together to do more in this space and to build on our collective experience and networks.
5. Information should be from the outset viewed as something which the public are likely to have an interest in, and with the bias intended and explicit in the Convention and the Directive on disclosure.
6. All public authorities should be identified and the list of bodies under their control which are subject to AIE under the Definition of Public Authorities in the Convention and Directive, should be rigorously maintained to avoid basic jurisdictional challenges and associated issues on whether a body is a body for the purposes of AIE.

7. To assist this Public Authorities should keep clear registers of their functions and also the environmental information which they hold and develop programmes and responsibilities to ensure this is increasingly proactively disseminated, and that information relating to environmental decisions be it applications and associated materials, assessment and decisions in particular are all readily and freely available. In that regard we highlight the material and deeply problematic inconsistency with the charges implemented in Forestry pursuant to SI 417/2020. While these appear to endeavour to stand outside the AIE regime – there is still a potential need to invoke AIE also. Compare this with the wide access the public has in planning and in every other consent regime – and it is clear this hardly can be compatible with the requirement for **consistency** in Article 3(1).
8. Such lists on what environmental information is for a public authority should be developed following public consultation, and should be capable of review and expansion by the Commissioner for Environmental Information.
9. The above (7) will also serve to assist public authorities identify clearly and consistently what information they hold which is environmental information, and limit the argument and appeals associated with the interpretation of the definition of environmental information.
10. Therefore there is a need as part of this response to transform the sectoral approaches and issues, and recent tendencies to retrench on provision of information as we have seen with the regressive modification of Art 21(3) of SI 191 /2017 for Forestry licencing decisions.
11. Equally Public Authorities such as An Bord Pleanála, should maintain their own files online obviating the delay and necessity to request them.
12. Applications which go straight to An Bord Pleanála, such as Strategic Infrastructure Developments and Strategic Housing should all be available on the Board's own website. The current practice of this being available through the Developer is problematic as the timeframes over which the information is or is not available vary hugely and may ultimately become unavailable.
13. Complementary requirements enabling Public Authorities comply would include ensuring applications are received electronically. Equally so with observations, or at least facilitated limiting the amount of scanning required by Public Authorities to maintain files.
14. Ultimately however the Department will need to consider to what extent the timeframes for participation and review need to be revisited to accommodate the timeframes needed by Public Authorities to comply with requests. We submit that is entirely consistent with the obligation in Article 3(1) that: "Each Party shall take the necessary legislative, regulatory and other measures, including measures **to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions** in this Convention …" As notwithstanding the upperlimit timeframes specified for AIE requests, the overall configuration of Ireland's environmental decision-making needs to be seen against the all important purpose and objective of the Convention, and indeed the fundamental general obligation of Article 3(1) on the compatibility between the Pillars.
15. It will therefore not be sufficient we submit to meet the standard of timeliness to merely specify an arbitrary timelimit, as is the case in the FOI provisions of 4 months.
16. To further limit the issue then with matters which do go to appeal the OCEI's remit should be extended so they can initiate own initiative investigations, and assess proactively the compliance of all public authorities with the regime and conduct consultations in order to make recommendations to drive further improvements at a legislative and complementary measures basis. We submit this is entirely consistent with the standard of obligation in Article 3(1) of the Convention which obliges a party to take "the necessary legislative measures" . In order to determine what is necessary this clearly connotes a requirement to

evaluate what is and is not working in the manner envisaged by the Convention and Directive, that being national law relating to the environment also.

17. Finally, in respect of eliminating issues which may precipitate delays in the processing of requests and/or appeals – the OCEI should establish and administer a complaints system. This is to ensure issues compromising access to information do not go undetected. It is understandably off-putting that if someone has been frustrated in accessing information in time to support their requirement for whatever reason – then having to pay €50 to bring the matter to an appeal and engage in an appeal process, may not be pursued. Thus many issues may never come to light and the opportunity to resolve them and ensure others are not similarly impacted not realised.
    Therefore someone should be able to simply detail a complaint which the OCEI then has a remit to investigate and address.
18. Further in relation to complaints the Ombudsman should be able to deal with complaints against the OCEI, but the current practice of the same person holding the three roles of Ombudsman, Commissioner for Information for FOI and Commissions for Environmental Information for AIE – is clearly not functional or at least not optically optimal.
19. Any provision which could be interpreted as putting a limit on the discretion and remit of the Courts on providing an adequate and effective remedy should be removed
20. Provisions emphasising the need for both the OCEI and Courts providing an adequate and effective remedy would be welcome. In particular this will require that Art 12 of the regulations be revisited to put more specific obligation on the OCEI to determine a request fully when considering a request which may be appealed on the basis of the authority not being a public authority or it not being environmental information or some exemption unlawfully applied, and to determine the request fully and order the release of information within appropriate specified periods and powers to achieve that, and as appropriate then similarly for the Courts.
21. The OCEI's office clearly needs to be resourced to accommodate its expanded remit, and to process appeals in a timely way, and equally the Courts.
22. The OCEI should be subject to providing detailed granular report on the performance of the overall information pillar including the performance of PA on requests. It is not sufficient for example to report on the amount of requests dealt within a month. These reports should be done quarterly to drive improvement, the enforcement obligation in Art 3(1) of the Convention, and should be available to the public, and should have a consultation dimension at least on an annual basis.
23. The OCEI should be subject to appear before Joint Oireachtas Committees.

Wider Comments on the Regulations:

There are some brief further more general comments we would like to make in the context of the review of the regulations.

a) Clearly Ireland needs to implement both the Aarhus Convention and the AIE Directive, and has been obliged to have transposed and implemented by 14 February 2004 the AIE Directive. However there are many matters specified in the AIE Directive which are discretionary including in respect of reasons for refusal. Therefore the extent to which such matters can be lawfully specified by Statutory Instrument under the European Communities Act 1976 arises. This is clearly particularly relevant for Art 8 and 9 of the Regulations but not limited to these.
b) Regarding Art 7 of the Regulations: – actions on request should include an acknowledgement within 48 working hours, with contact and log details against which the progress on the request can be tracked.
c) Regarding Art7(8) of the Regulations: in the event a request needs to be clarified or refined – the obligation on the Public Authority to engage with the applicant should be much sooner. As it stands a full month could elapse before the need to clarify the request is made know delaying the whole process where this could have been avoided.
d) Regarding Art 8-10 of the Regulations: In any lawful reformulation of exemptions – the overarching obligation to consider the requirement to weigh the public interest in considering the merits of disclosure and the requirement in respect of disclosing information on emissions on the environment should be front loaded in the structure and formulation of reasons potentially lawfully permitting a refusal. While Art 8 of the Regulations admittedly does say "subject to" Article 10, as currently structured Art 9 could be read in isolation and mislead an authority. However in both instance leaving these overarching obligations to the end risks reinforcing any pre-disposition to non-disclosure. Further there are no "mandatory" reasons for refusal under either the convention or directive – and any reformulation should be re-worded
e) Regarding Art 8 of the regulations – these provisions need to be clarified and maintained so they can be read as whole without the public have to stitch together disparate pieces of legislation in respect of any lawful exemptions on confidentiality grounds in the interests of all concerned. The reference to the FOI Act should be removed - FOI is a transparency law not a confidentiality law - this reference is confusing and leads to FOI exceptions being "read in" to AIE.
f) Regarding 9(2) of the Regulations: The term "Manifestly Unreasonable" in (a) needs to be interpreted and guidance provided to avoid arbitrary and/or subjective application. Regarding material in the course of completion – there needs to be some qualification on this to avoid the potential of information being effectively inaccessible as it remains uncompleted, and also to clarify that once completed – drafts are accessible.
g) Regarding Article 10 – the obligation to separate out that information which can be provided from that which can be lawfully withheld as provided within Article 4(4) of the Directive needs to be specified in the Irish provisions, with clarity that this includes within records also.
h) Regarding Article 3(2) of the regulations: The exemptions to the definition of public authorities in Art 3(2) of the AIE Regulations introduced in SI 309/2018 to exempt :
    - the President, the Office of the Secretary General to the President, the Council of State, any Commission for the time being lawfully exercising the powers and

performing the duties of the President we submit appear unlawful given Ireland did not make any relevant declaration when ratifying the Convention.

i) Re Article 3 on the definition of "public authority" in indent (vii) the considerations seem overly narrow compared to what is required by the convention and directive in respect of bodies under the control. As phrased all shares need to be held by the specified bodies in subparagraphs (1-IV) however – clearly control may be exercised in many different ways and by wheels within wheels of organisational structures. This therefore needs to be revisited and widened.

j) Art 5 (3)and (4) of the regulations: The absolute requirements of the Convention and the Directive in respect of disclosures relating to emissions into the environment are arguably compromised by the formulation in Art 5 (3)and (4) – which provides:

> "(3) In the event of an imminent threat to human health or the environment, whether caused by human activities or due to natural causes, a public authority shall ensure that all information held by or for it, which could enable the public likely to be affected to take measures to prevent or mitigate harm, is disseminated immediately and without delay.
> (4) Exceptions in articles 7, 8 and 9 may apply in relation to the duties imposed by this article."

Given para (4) follows immediately on (3) it serves to puncture the absolute clarity of obligation signalled in (3), and notwithstanding Art 10(1) which arises several pages later in the regulations.

k) Re Article 6(1)a of the regulations: The requirement to provide a request in writing in Art 6(1)(a) of the regulation is also discriminatory in respect of those who may have learning difficulties or other challenges making a written formulation difficult. We would urge the Department to consider the wider obligation to assist the public in the making of requests in this context also under the Directive Article 5(a) for example.

l) Re Article 6(1)c of the regulations: The requirement to specify an address in Art 6(1) cin respect of is discriminatory against Homeless persons, and does not appear compatible with the non-discriminatory provisions of Art 3(9) of the Convention or those who may feel vulnerable about such a disclosure.

m) Re Article 6(1)(b) of the regulations: the rights and obligations in respect of access to environmental information far transcend those of the Freedom of Information regime, consequent on their underpinning not just by the AIE Directive, the Convention but also the EU Charter of fundamental rights, Article 47 in particular, and to some extent the EU Treaties. There is therefore a concern on the extent to which we observe and hear of requests being directed to the FOI regime where the public and our eNGO colleagues will encounter a less favourable regime and less protection than under the Aarhus and EU law backed AIE provisions. In this regard we find the obligation here in Article 6(1)b of the regulations on the public to specify their request is an AIE request is problematic. It puts an unfair onus on the public to understand the differences and to specify the regime. More importantly there is no lawful basis for this requirement in the convention or under the Directive. The extent to which there is misdirection needs to be objectively and systematically assessed and monitored on a ongoing basis so that the public can confidently rely on the advice from authorities on the processing of their requests for information.

n) Re Article 11(1) and 12(4)(a)(i) of the Regulations: – the applicant may be the recipient of voluminous information and complex reasons in the decision – and should be afforded a

longer period to seek internal review and also appeal to the OCEI, however they have just a month. This can be further compromised and unclear if the decision is posted as the regulations say from "receipt" of the decision. They applicant may need to scrutinise the information and seek advice, and certainly in the context of eNGOs they may need to review the materials with colleagues which can be further compromised if it is not provided in electronic format as we typically request it. Not only will this provide for fairness, it will potentially also avoid and reduce the risk of internal reviews and appeals being generated simply out of an abundance of caution. It is noted that the OCEI has discretion to extend the deadline but we are aware of instances where this has not been extended. To assist the public it would be helpful if the decisions were to specify the date and if similar allowances to the freezing of time over Christmas etc were applied. The OCEI could maintain a calendar calculator similar to that provided on An Bord Pleanála's website which is a very helpful facility.

o) Re Art 15(3) of the Regulations: The fee and waiver system for the OCEI appeals needs to be revisited. The considerations for what might be prohibitively expensive are too narrow and do not permit case specific evaluation as is what is needed under Article 9(4). Further, removal of an appeal fee for eNGOs would be consistent with the special status they are afforded under the convention and would reduce the potential burden and disincentive to pursue appeals which either individually or cumulatively speaking may be a burden particularly for smaller and local eNGOs.
p) Re Art 15(1) of the regulations – there should be no fees for search and retrieval time, and no copying fees associated with provision of information in electronic format. The public should not be discriminated and disadvantaged and discouraged because PA's have not maintained the information in a way which makes it easy to retrieve and access. Nor should there be charges associated with time to execute redactions.
q) Re 13(3) The provisions on cost protection for those pursuing JR in relation to AIE requests are specified under the Environment and Miscellaneous Provisions Act, 2011. "EMPA" A member of the public considering the cost implications could easily be misled on the costs situation in considering what is detailed in 13(3) and infer that the conventional cost rules apply. Further, the EMPA provisions have not been corrected to eliminate the environmental damage test which was highlighted as being non-compliant by the CJEU in the NEPPC case – c-470/16 judgement. These are matters which could serve to misdirect the public in considering what was possible for them to pursue and the barriers they would need to overcome.

The Court of Justice in case c-378/17[1] *Minister for Justice and Equality and Commissioner of the Garda Síochána* has clarified the obligation on public authorities to disapply provisions of national law in breach of EU law stating in para 50:

> " It follows from the principle of primacy of EU law, as interpreted by the Court in the case-law referred to in paragraphs 35 to 38 of the present judgment, that bodies called upon, within the exercise of their respective powers, to apply EU law are obliged to adopt all the measures necessary to ensure that EU law is fully effective, disapplying if need be any national provisions or national case-law that are contrary to EU law. This means that those bodies, in order to ensure that EU law is fully effective, must neither request nor await the

[1] Judgement of the Court 4 Dec 2018, case c-378/17, EU:C:2018:979, para 50.

prior setting aside of such a provision or such case-law by legislative or other constitutional means"

Nonetheless it remains nonetheless obviously important to ensure everything is done to bring the Irish provisions on AIE under the Directive into compliance, and indeed in compliance with our obligations under the Convention through our EU membership and also as a fully ratified party in our own right, and to assist all concerned in so doing.

In conclusion, we thank the Department for its consideration of our comments.