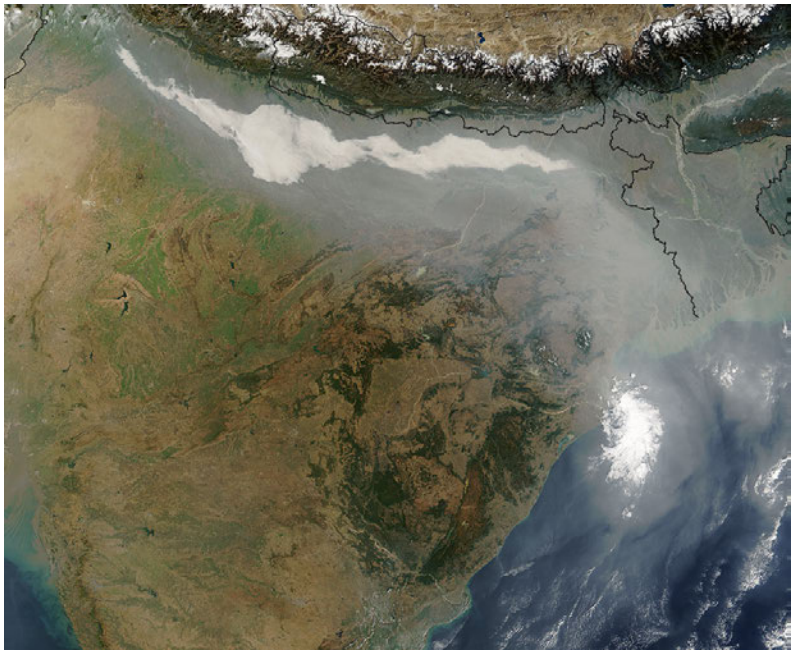

SUBMISSION TO THE APRIL 2021 PUBLIC CONSULTATION ON THE REVIEW OF THE ACCESS TO INFORMATION ON THE ENVIRONMENT (AIE) REGULATIONS 2007-2018

[redacted]

ABSTRACT

This document outlines the changes required to make the Access to Information on the Environment Regulations compliant with the Aarhus Convention

[redacted]

Contents

1. Introduction

The importance of the Aarhus Convention in assessing the AIE Regulations:

It is important to bear in mind that while the Access to Environmental Information Regulations primarily seek to implement the Access to Environmental Information Directive 2003/4/EC, this Directive is an EU implementation of the Aarhus Convention 1998, which Ireland is also a party to, and has fully ratified. Therefore, the Regulations the subject of this consultation must be read not only in light of the AIE Directive and CJEU case law, but also the Convention itself, as part of Ireland's obligation to implement the Convention as a party. A further layer of obligation to consider the Convention arises in relation to EU approval and implementation of the Convention since 2005. The Aarhus Convention is multilateral mixed agreement and therefore in Ireland's dualist legal system only has effect when implemented and in the manner implemented. But the case law of the CJEU on the implementation of Art 9(3) of the Convention[1] makes it clear that where the EU acts to implement the Convention, the application by a Member State of EU measures implementing the Convention must be done in light of the relevant provision of the Aarhus Convention itself. So in plain terms this means the Irish AIE Regulations absolutely can and should be measured against the Convention itself, and the interpretation of the Convention provided by the Aarhus Convention Compliance Committee.

Case 240/09 "Slovak Brown Bears" or "LZ No.1" , at para 51:

> "In those circumstances, the answer to the first and second questions referred is that Article 9(3) of the Aarhus Convention does not have direct effect in EU law. It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by EU law, in order to enable an environmental protection organisation, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law."

Ryall[2] points out that this "interpretative obligation" is similar to that that was already a part of Irish law, drawing on O'Domhnaill v Merrick [1984] IR 151, which\azsx at para stated that to avoid conflict in statutory interpretation, the domestic law should be interpreted in accordance with the well established principles of Irish law.

Summary of the main issues with AIE implementation in Ireland:

Poor first instance decision making by public bodies in relation to information requests, and poor practice in public participation design and implementation generally arise from lack of training/knowledge in the public bodies concerned, or a lack of clear guidelines/implementation of guidelines. Ongoing awareness raising/training among the staff of public authorities is urgently needed on a scale that would match that of efforts to promote data protection on the implementation of GDPR. Underfunding of the Office of the Commissioner for Environmental Information (OCEI) should be addressed immediately.

[1] LZ No.1
[2] A. Ryall, Beyond Aarhus Ratification: What Lies Ahead for Irish Environmental Law (2013),

The Access to Information Regulations 2014- 2018[3] as amended (AIE Regulations) create a comprehensive regime implementing Directive 2003/4/EC on Access to Information, and Article 4 & 5 of the Aarhus Convention. Information relating to the environment is very broad including "state of the environment" information like water quality levels, chemical use levels, plans or programs affecting the environment), environmental legislation reports, cost-benefit analysis, matters affecting human health and the food chain.

This regime is complemented by Freedom of Information[4] laws which mandate access to all information held by public bodies unless that information is somehow sensitive (for example for State Security or Commercial Sensitivity reasons).

The legislative process is not subject to these laws, and Cabinet discussions on these issues benefit from the legal principle of Cabinet Confidentiality.

However, the exceptions must be applied on a case by case basis according to the proportionality test (the restriction seeks to achieve a legitimate objective, and goes no further than is necessary to achieve that objective) and so some documents circulated by Cabinet are amenable to disclosure (see CLG v An Taoiseach [2018] IEHC 371 below).

The Aarhus Convention requires that public bodies gather environmental information and disseminate it. This provision is partly implied in the Access to Environmental Information Regulations, Section 5, but there does not appear to be any actual clear implementing provision for the Article 5 (Aarhus Convention) obligation on Public authorities to "possess and update environmental information which is relevant to their functions", and as consequence this provision is not well implemented.

2. What, in your opinion, are the positive benefits of the AIE Regulations?

It is clear that access to information is an important part of open and transparent governance, and is such is fundamental to good governance and the rule of law. Additionally, access to information rights are designed to support access to public participation. An uninformed public will not be able to participate in environmental decision-making processes effectively. This feeds in to improved decision making, in that informed participation improves the quality of environmental decision making. Better first instance decision making reduces the need for appeals and judicial review, enhancing administrative efficiency of decision-making bodies like planning tribunals. Access to information is therefore a foundation stone of good administrative decision making also.

Because of the importance of access to information in public participation, timeliness of responses is of fundamental importance. The information is no use if received when the process is completed. This is emphasised by the ACCC in Case 141 at para 104:

> "104. In its findings on communication ACCC/C/2013/93 (Norway), the Committee pointed out that: "time is an essential factor in many access to information requests, for instance

[3] European Communities (Access to Information on the Environment Regulations) 2007 to 2018. (S.I No. 133 of 2007, S.I. No. 662 of 2011, S.I. No. 615 of 2014, S.I. 309 of 2018). Unofficial Consolidation available here: https://www.dccae.gov.ie/documents/Unofficial%20Consolidation%20AIE%20Regs%202011-2018.pdf

[4] Freedom of Information Act 2014 as amended (Number 30 of 2014). http://revisedacts.lawreform.ie/eli/2014/act/30/revised/en/html .

> because the information may have been requested to facilitate public participation in an ongoing decision-making procedure”.”

For this reason it is vital that the issues relating to timeliness are addressed as referenced below.

Bell et al. (2017, p. 308)cite the link between access to information and achievement of sustainable development goals, in that greater access to information on the environment can result in changed behaviours as people become more aware of the impact of their actions on the environment, and can act as an incentive to more environmental behaviour by corporations and other bodies, as there is an awareness they are being judged on their environmentally friendliness. They also highlight how access to information enables the monitoring of the effectiveness of regulations, and improves the enforcement of environmental law.

These rationales are not merely theoretical, and there is empirical evidence that enhanced access to information changes behaviour and improves environmental indicators at a population level (Geller & Jeffords, 2018).

3. Should any specific part of the Regulations be amended?

Time limits and timeliness of responses

Time limits are longer in Ireland (one month extendable to two months for complex requests) than in many EU countries, and should be reduced to between 10 – 14 days (Institute of European Environmental Policy, 2019, p. 38) (EU Commission, 2012).

Also, the situation reported by NGOs that public authorities usually treat the outer limit of two months as the actual deadline should be addressed through amendments to the legislation that make it clear that extension is only to be availed of in exceptional circumstances. This should also be addressed through training provided regularly by the Department of Environment to public authorities.

It is difficult to address this issue when no statistics are available, and instead reliance is placed on the anecdotal reports of NGOs and timelines in cases which come before the Court. There are statistics available for Government Department response times to AIE requests and these do indicate good practice in terms of keeping to the time limit of one month. However, it is impossible to assess the situation in the absence of more comprehensive data.

Therefore, it is recommended that the legislation be amended to include an obligation that all public bodies submit to a central database annual reports on the requests, the response times, and the reasons for any exceedances of time limits.

Good Practice

Article 11 of the AIE Regulations do not create an obligation on the public authority, on first instance refusal, to inform the applicant of their right to appeal. Art 11(1) should be remedied accordingly.

The issue of threshold jurisdictional refusals highlighted by the applicant in Case 141 (but not subject to positive determination by the ACCC) should be investigated and if substantiated, should be dealt with by guidance, training, and possibly penalties for repeat offenders. Consideration should be given to clarifying the grounds to prevent this in the future.

Time Limits for the OCEI

A core finding by the ACCC in Case 141 was that the OCEI has no obligation to comply with the processing time limit of 1 month, and unlike the Information Commissioner, and there is no upper time limit beyond which they cannot extend the deadline for considering appeals (paras. 103 -110). The Committee found that there were frequently excessive delays in processing complaints to the OCEI. This has also been highlighted by academic commentary, e.g. by Ryall, where the deleterious effect of this upon the AIE regime is criticised. The Environmental Pillar in its submissions[5] on the issue in Case 141 highlighted that it was such as to undermine the credibility of the whole regime.
It is recommended that the regulations be amended to reflect an obligation similar to that available under the Freedom of Information legislation e.g. the requirement under section 22 (3) of the FOI Act to rule on appeals "as soon as may be and, insofar as practicable, not later than four months after the receipt by the Commissioner of the application for the review concerned."

Dissemination

A 2019 EU level study by the IEEP indicated that Ireland performs weakly when assessed on access to environmental information and transparency. It highlighted deficiencies in many respects in the dissemination of environmental information for example chemicals information (Institute of European Environmental Policy, 2019, p. 33). It also highlighted that Ireland was one of the few countries that did not provide online EIA information in a manner that complied with best practice on accessibility for those with disabilities for example allowing customisation of text (Institute of European Environmental Policy, 2019, p. 55), or allowing text to be read aloud, as well as comprehensive alt-text description of images.

The IEEP report also criticised Irelands provision of EIA information as not meeting best practice (pg. 34) because data was incomplete or hard to access. It highlighted the need for greater digitisation of environmental information in general, and a complementary need for enhanced broadband access because of the reliance on internet-based dissemination (pg. 120).

One area where there is no implementation of the AIE Directive is that of lists of public authorities required by Art 3(5)(b). This should be remedied, as it would enhance the clarity and efficiency of the regime if it was clear what bodies were subject to the regulations. This could be done by way of a register of public bodies. It is suggested that the onus be placed on the body falling into the category of public body to register themselves with the relevant authority (the Department or OCEI could be nominated to manage the database). This obligation could be constructed in a similar manner to that required under the Lobbying Act 2015.

It is also recommended that the full list of categories of information required to be disseminated be transposed into the AIE Regulations in order to ensure the consistency with the Directive and clarity of the obligations. Particularly the AIE Regulations do not make reference to the categories listed in Art 7(2)(d)-(g) and Art 7(3) of the Directive (State of the Environment Reports). It is acknowledged that many of these obligations are implemented elsewhere, but it would enhance clarity and accessibility of implementation information if these categories were to be added to Regulation 5 of the AIE Regulations.

[5] Observers Submissions, 18th February 2018, available at https://unece.org/DAM/env/pp/compliance/C2016-141_Ireland/Correspondence_with_Observer/frObserverC141_Irish_Environmental_Pillar_18.10.2018.pdf

One area where dissemination is patchy and sometimes not completed is in the area of the planning system. While there is quite a lot of information available online, frequently there are issues with the accessibility and searchability of both the local authority and An Bord Pleanala level information.

"Active" Dissemination

Article 7 of the AIE Directive requires that public authorities engage in "active and systematic dissemination". No where in the AIE Regulations is this obligation transposed. This should be remedied immediately.

Capacity Building

Awareness training was carried out for Local Authorities by the Department of Communications, Climate Action and the Environment on the introduction of the updated 2014 AIE Regulations, and on occasions since then, but this training appears to have been insufficient to achieve the kind of access envisaged by the Regulations, if the contentions raised in the Case 141 are taken on board.

Public awareness of the regulations appears to be low (Ryall, 2016) and capacity building with the public is urgently needed. Obligations in this regard should be transposed into the AIE Regulations from Art 3(5) (obligation on public authorities to inform the public of the rights they enjoy). This capacity building needs to be carried out in local communities as well as at national level, ranging from periodic national media campaigns to webinars and workshops by local authorities and PPNs. It needs to be delivered in a range of different accessible media in order to reach those with various kinds of accessibility issues.

Linking the training in to the PMDS system (Ewing, et al., 2011), or other more comprehensive/intensive approaches may be required, up and including collaboration with educational institutions to develop certified short courses credited on the National Qualifications Framework to ensure that those dealing with requests are fully aware of how to process them correctly.

Mandatory Exceptions

The AIE Regulations provide for mandatory exceptions. The Directive does not provide for any mandatory exceptions, and the default presumption should be access (Ryall, 2016). Refusal should be subject to a balancing test. Where refusal is presumed there is no balancing test applied. This should be remedied.

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

Consideration should be given to

1. Establishing lists or registers of public authorities. This would avoid the kind of confusion as to whether a body is a public body evident in the case law. The duty of holding and disseminating the list or register could be placed on the Department of Communications, Climate Action and the Environment or on the OCEI. The obligation could be placed on the body that falls within the definition to register, in the same way as the obligation to register for lobbying is set out in the Lobbying Act 2015.

2. Introducing provisions indicating that the High Court may on appeals from the OCEI quash, remit or amend the decision. There are no separation of powers issues, in my view with outlining the powers the court may exercise, as long as its freedom to determine the legal issues and select the appropriate remedy is not unduly fettered. This was a core finding of Case 141 by the ACCC.
3. Despite the detailed legislative regime in place, there appears to be a low level of awareness of access to information rights among the general public (Ewing, Hough, & Amajirionwu, 2011) and more needs to be done to raise public awareness of the entitlement under the AIE Regulations and how to exercise it.

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