Public Consultation on proposed amendments to the Access to Information on the Environment (AIE) Regulations 2007-2018

EirGrid plc submission

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1 Background

On 14 November 2023, the Department for the Environment, Climate and Communications ('DECC') published its 'Public consultation on proposed amendments to the Access to Information on the Environment (AIE) Regulations (2007-2018)' with the aim of gathering stakeholder feedback on the draft Access to Information on the Environment Regulations 2023 (the 'Draft AIE Regulations').

EirGrid is the licensed electricity Transmission System Operator ('TSO') for Ireland, responsible for (among other things) developing, managing, and operating the electricity grid in Ireland. EirGrid is also a 'public authority' for the purposes of the European Communities (Access to Information on the Environment) Regulations 2007 to 2018 (the 'AIE Regulations').

EirGrid welcomes both this review of the Draft AIE Regulations, and the opportunity for stakeholders to provide feedback. The AIE Regulations are a key piece of environmental legislation, providing a means for members of the public to access environmental information and obliging public authorities to actively maintain and disseminate environmental information. EirGrid is committed to transparency in carrying out its functions.

The publication of the Draft AIE Regulations represents a welcome opportunity to ensure the continued functioning of the AIE Regulations, particularly in light of the Aarhus Convention Compliance Committee's findings regarding Ireland's non-compliance with the Access to Information pillar of the Aarhus Convention in November 2020.

EirGrid's views in respect of the Draft AIE Regulations are set out below. For the avoidance of any doubt, EirGrid does not consider any element of this submission to be commercially sensitive or confidential.

2 Consultation Questions

DECC provided the following suggested questions for stakeholders considering a submission:

1. *Should any of the proposed updates outlined be amended? If yes, please provide details of the suggested amendment and why you consider such an amendment to be necessary.*
2. *Should any other 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.*
3. *Any other comments on the existing AIE Regulations and their implementation of the AIE Directive 2003/4/EC.*

2.1 Commentary on the Draft AIE Regulations

We have set out below our comments and/or recommendations in respect of each of the proposed updates contained within the Draft AIE Regulations. These updates are arranged in order of their appearance in the Draft AIE Regulations and utilise the revised numbering of the Regulations used in the Draft AIE Regulations.

2.1.1 Regulation 2 (Interpretation)

The introduction of a definition of 'personal data' is a useful update which will harmonise the language of the AIE Regulations with that of other data protection legislation in Ireland, particularly Regulation (EU) 2016/679 (the 'GDPR') and the Data Protection Act 2018 (as amended). The use of 'personal information' in the current AIE Regulations introduces unnecessary uncertainty, particularly as this phrase lacks a definition within the AIE Regulations.

However, while the new 'personal data' definition has been utilised in Regulation 7(a)(i), Regulation 6(10)(a) still utilises the old term 'personal information'. EirGrid's preference would be for uniformity across the Draft AIE Regulations, in terms of definitions used.

2.1.2 Regulation 4 (General Duties of Public Authorities)

The Draft AIE Regulations propose to considerably expand the general duties of public authorities, as set out in Regulation 4.

In particular, EirGrid notes the newly-introduced positive obligation on public authorities to inform the public of where authorisations with a significant impact on the environment, environmental agreements, and environmental impact studies and risk assessments concerning elements of the environment may be requested and located for review.

While we also note that the Draft AIE Regulations provide for the publishing of new ministerial guidelines which may provide clarity, it is not immediately apparent to EirGrid the steps that a public authority might take in order to comply with these obligations.

By way of example, under the extant AIE Regulations, EirGrid maintains a designated web page on its website setting out for the benefit of the public their right to request environmental information. This web page informs members of the public that they may make a request to EirGrid by contacting the information officer employed by EirGrid to handle such requests, either electronically or in writing. If a member of the public seeks access to an authorisation with a significant impact on the environment, or an environmental agreement, they submit an AIE request in the same manner as they would for any other environmental information.

It is not clear to EirGrid how a public authority will comply with the obligations under Regulation 4(1) to inform the public of where these particular pieces of environmental information can be requested or located for review, save by amending any existing web page to clarify that such environmental information (authorisations, environmental agreements, etc.) may be requested in the same manner as any other.

Similarly, it is unclear to us whether the obligations under the Regulation 4(1)(h) is intended to apply to all public authorities equally. The establishment of facilities for the examination of information and the provision of information points would appear to be most applicable to public authorities which deal primarily or largely in physical records. Alternatively, this could be construed as a requirement to establish a facility within the public authority's premises for members of the public to view information stored electronically, which raises security concerns.

As stated above, we are conscious that the publication of the new ministerial guidelines may provide more clarity around compliance with the new obligations.

2.1.3 Regulation 5 (Request for Environmental Information)

The proposed amendment to Regulation 5 is of great concern to EirGrid, particularly in light of a recent case which has come before the courts in Ireland (*Coillte and the Commissioner for Environmental Information v Person(s) Unknown* [2023 IEHC 640]).

Under the new formulation, an applicant submitting a request for environmental information would be required only to provide a name and contact information, the latter of which is expressly satisfied by the provision of an email address. While this change has the clear and laudable intention of making the process of requesting information less onerous on requestors, in EirGrid's view, this change will also aid those who seek to use the AIE regime to lodge frivolous and vexatious requests.

As evidenced by the above-mentioned case, Article 6 of the AIE Regulations is already capable of exploitation by bad actors. The "Person(s) Unknown" in this case submitted almost 100 anonymised/pseudonymised requests to Coillte, and almost 30,000 requests to the Department of Agriculture, Food and the Marine in 2022 alone. This was noted by Humphreys J. as being "*hard to do other than in an automated manner*".

Despite the clear evidence that this manifestly unreasonable number of requests was submitted by a single person (or persons acting in concert) using an assortment of false names, and despite the vexatious manner in which the applicant dealt with the public authorities concerned, the Commissioner for Environmental Information ('OCEI') found that Coillte was not entitled to seek evidence that these requests originated from the same person/persons, either by seeking proof of their identity or the existence of a physical address which would prove they came from the same person/persons.

While several questions raised by the court in this case have now been referred to the Court of Justice of the European Union, proceeding with Regulation 5 of the Draft AIE Regulations as currently drafted would entrench this approach of forcing public authorities to process applications even where they are transparently unreasonable and/or vexatious.

As noted below, the Draft AIE Regulations include a welcome change to widen the scope for refusal of an AIE request where it is 'manifestly unreasonable'. This change clearly recognises that requests may be manifestly unreasonable for reasons other than the volume or range of information sought. However, by permitting functionally anonymous requests using only a name and email address, the Draft AIE Regulations will, In EirGrid's view, facilitate the approach used by the vexatious requestor(s) in the above *Coillte* case.

As demonstrated by that case, it is trivial for a bad actor to generate thousands of requests by electronic means, each of which must then be processed individually by the public authority. Were an individual to submit these requests under their own name, they would rightfully be rejected as manifestly unreasonable. By breaking these requests up under false names and submitting them via anonymised email accounts, a bad actor could cause administrative paralysis within a public authority. Without an effective means to separate legitimate requests from frivolous ones, public authorities will remain vulnerable to such attempts.

EirGrid firmly believes in the principles set out in the Aarhus Convention and is committed to remaining as open and transparent as possible in its dealings with the public. Every year journalists, citizens, and other interested parties utilise the AIE Regulations to seek environmental information and engage with EirGrid and other public authorities on their activities. Frivolous and vexatious requests impact upon these parties just as severely as they do public authorities.

EirGrid would therefore urge that Regulation 5 of the Draft AIE Regulations be amended to provide that a requestor must be a legal and natural person, that they must give their true legal name and address, and that a public authority should be entitled to seek proof of identity/address where there is a reasonable suspicion that a false name or address is being utilised.

Similarly, a public authority should be able to query the legitimacy of a request, or series of requests, where there is a suspicion that they have been generated using 'Artificial Intelligence' programs. DECC should strongly consider some measures to 'future-proof' the Draft AIE Regulations to prevent exploitation using these tools, given their rapid development in recent years (ChatGPT, etc.).

Finally, EirGrid would urge that the provision of a false name and/or address, or the use of an AI-generated request should be considered grounds for a public authority to consider the request frivolous and/or vexatious.

2.1.4 Regulation 6 (Action on Request)

EirGrid welcomes many of the changes and clarifications in Regulation 6 of the Draft AIE Regulations.

A minor but welcome change is the rewording of Regulation 6(2)(a) which now provides that a public authority shall make a decision "not later than one month ***after the date*** on which such request is received by the public authority concerned" [emphasis added]. This change has been replicated in Regulation 9 as well. It should be transparently clear that the time period for processing a request is one month, and that a request is "received" when it is received by a public authority during normal business hours. Where received outside of business hours, the request should be considered "received" at the beginning of the next working day.

Further welcome changes include Regulation 6(6) which no longer requires public authorities to transfer a request which should have been directed to another public authority, instead only requiring the public authority to inform the applicant of the authority it believes to be the proper recipient. This will reduce unnecessary administrative work for that public authority, and allow it to focus on processing its own requests.

Similarly, the clarifications in paragraph (8) that a more specific request submitted by an applicant following an invitation from a public authority (i) constitutes a new request made on that date and (ii) which constitutes the withdrawal of a previous request are both very helpful.

A much more substantial change is that introduced by Paragraphs (10), (11), and (12) of Regulation 6 of the Draft AIE Regulations, which appear to introduce a 'third party consultation' procedure akin to that contained within Section 38 of the Freedom of Information Act 2014 (the 'FOI Act'). Public authorities would also be required to inform third parties of their intended decision in respect of any request and give that party an opportunity to appeal. The release of any environmental information to an applicant would be delayed until such time as the appeals process has concluded or has not been pursued by the third party.

EirGrid welcomes the harmonisation of the AIE and FOI regimes in this regard, and third parties are likely to welcome the opportunity to appeal the release of information which might, in their opinion, adversely affect their interests.

However, the Draft AIE Regulations do not set out a timeframe for this new appeals process, as is the case for the FOI Act. Under Section 38 of the FOI Act, the period for the processing of a request is extended by three weeks where the formal third party consultation procedure is initiated. This extension of time permits the third party to collate its arguments for or against the release of the information without prejudicing the FOI body by taking from its four week period to process the FOI request.

EirGrid would strongly recommend that, if this third party consultation procedure envisioned by Paragraphs (10), (11), and (12) is to be retained, Regulation 6 (and Regulations 10 and 11 of the Draft AIE Regulations dealing with appeals) should be amended to clearly set out the timeframes for such consultations and appeals, to ensure that both requestors and public authorities have clarity in this regard. DECC may wish to mirror the provisions of the FOI Act again by affording a three-week period for consultation with third parties, with a corresponding extension to the time period under Regulation 6(2)(a).

2.1.5 Regulation 7 (Grounds for Refusal of Environmental Information)

As a body subject to both the FOI Act and the AIE Regulations, EirGrid has a particular interest in the effect of the proposed amendment to Regulation 7(1)(a)(iv) of the Draft AIE Regulations. As with Regulation 4 above, EirGrid is conscious that new ministerial guidelines may provide clarity on the interpretation of proposed amendments, but considers it prescient to raise concerns in this forum also.

Following the decision of the High Court in *Commissioner for Environmental Information v Coillte Teoranta and People over Wind* [2023] IEHC 227, it is settled law that the FOI Act represents a law which provides for the "confidentiality of public authorities", for the purposes of Article 8(a)(iv) of the AIE Regulations. Provided the public authority dealing with an AIE request is also one which is subject to the FOI Act, the public authority may invoke the FOI Act's exemptions using Article 8(a)(iv) to resist the disclosure of environmental information.

Regulation 7(1)(a)(iv) of the Draft AIE Regulations is quite clearly intended to act in the same manner as Article 8(a)(iv) of the AIE Regulations, save that there is no longer any explicit reference to the Freedom of Information Acts under the new drafting.

EirGrid would be grateful for clarity (either through ministerial guidelines or otherwise) as to whether this change to the text is a reflection of the High Court's decision which renders the inclusion of a reference to the FOI Act moot, or whether DECC's intention is to exclude use of the FOI Act's exemptions under the Draft AIE Regulations.

As previously mentioned, the amendment to Regulation 7(1)(d)(i) is a welcome recognition that AIE Requests may be manifestly unreasonable for reasons other than the volume or range of information sought. EirGrid would urge that this ground for refusal be expanded to explicitly include unreasonable request which are frivolous or vexatious. As discussed in the commentary on Regulation 5, the AIE Regulations as written are not fit for purpose when asked to deal with a transparently vexatious requestor, shortcomings which have been exposed by decisions of the OCEI on the matter.

2.1.6 Regulation 8 (Incidental Provisions Relating to the Refusal of Information)

Article 10(5) of the AIE Regulations has operated to provide that public authorities may separate environmental information which, although held with information to which Articles 8 or 9 relate, is not itself subject to any exemptions. In practice, this provides that public authorities may redact environmental

information which is exempt from release under the AIE Regulations, in order to facilitate the release of other environmental information which is not similarly exempt. This ability to redact otherwise exempt information is a helpful tool for public authorities to make public the largest amount of environmental information possible, while also protecting the sensitivity and confidentiality of certain classes of information protected by the AIE Regulations.

Regulation 8(3) of the Draft AIE Regulations appears to alter this approach by limiting the classes of information which can be separated out. Under the new drafting, it would appear that information refused under Regulation 7(1) that falls within the scope of:

- subparagraph (a)(ii) or (iii)
- subparagraph (b)(i)
- subparagraph (c), or
- subparagraph (d)(iv)

cannot be separated out from the rest of the information requested, with the effect that the environmental information must be withheld in its entirety.

While it may be the case that certain information of this nature (such as information relating to international relations, national defence or public security (subparagraph (b)(i)) or unfinished documents or data (subparagraph (d)(iv)) may be functionally very difficult to separate out from the rest of the information in a given record, requiring a public authority to withhold such records/information in their entirety is likely to give rise to more requests for internal review/appeals, as applicants are likely to be dissatisfied with the increased rate of refusals.

The OCEI has, in EirGrid's experience, preferred public authorities to take the approach of releasing as much information as possible, even where this involves the redaction of large portions of a record. In other words, that it is better to release a heavily-redacted record, than to refuse its release entirely.

By introducing classes of environmental information which can be withheld as exempt under Regulation 7(1), but which cannot be separated out from other information, as was previously the case, the Draft AIE Regulations increase the likelihood that records and information will be withheld entirely. This approach runs counter to the approach adopted by the OCEI in the past and may also increase the administrative burden on public authorities through increased internal reviews/appeals. EirGrid would query the rationale for this change in approach in the Draft AIE Regulations.

2.1.7 Regulation 9 (Internal Review of Refusal)

EirGrid is fully supportive of the inclusion of the new paragraphs 3(b) and 5(b)-(e) in Regulation 9 of the Draft AIE Regulations. These helpful clarifications will reduce uncertainty for applicants and public authorities as to what constitutes a deemed affirmation or refusal of an AIE request.

2.1.8 Regulation 10 (Appeal to the Commissioner for Environmental Information)

The amendments to paragraph 1(b) of Regulation 10 of the Draft AIE Regulations will significantly widen the scope for appeal against the decision of a public authority by a third party. The existing Article 12 of the AIE Regulations limited such an appeal to circumstances where a party "would be incriminated by the disclosure of the environmental information concerned", whereas a third party under the proposed regulations need only hold a "reasonable" belief that their "interests would be adversely affected."

This change will undoubtedly lead to a significant increase in appeals by third parties. EirGrid notes that this right of appeal permits a third party to appeal directly to the OCEI against the decision of a public authority, and pursuant to Regulation 6(11), the third party will have been notified of the intended decision in advance, as part of the consultation procedure. The following scenario is therefore entirely plausible under the Draft AIE Regulations:

1. A public authority receives an AIE request from an applicant, which in the opinion of the public authority, encompasses information the release of which might adversely affect the interests of a third party.

2. The public authority notifies the third party to seek their consent or submissions on the potential adverse effects of the release of the information.
3. The third party maintains that the release of the information would be harmful to their interests. However, the public authority believes the release of the information is in the public interest and intends to release it to the applicant. Notified of the intended decision in advance, the third party appeals the decision to the OCEI.
4. The OCEI varies the decision of the public authority, finding that a portion of the information in question should be withheld. Other information is deemed suitable for release.
5. The public authority issues its decision letter and information to the applicant. Dissatisfied, the applicant seeks an internal review of the decision.
6. The public authority affirms its decision on internal review. Still dissatisfied, the applicant appeals the decision to the OCEI.

The above scenario raises a number of questions:

1. Will the OCEI be required to conduct a full review of the decision of the public authority a second time, bearing in mind that an applicant may put forward new arguments for the release of information which were not put before the OCEI during its first review?
2. As mentioned above, there is as yet no time scale for the third party consultation – is it intended that this would take place within the usual one-month period for actioning a request under Regulation 6(2)?
3. Would it be open to a public authority to vary a decision on internal review which had already been subject to scrutiny by the OCEI as part of an appeal taken by a third party?

EirGrid believes that the amendments to the third party consultation and appeals procedures require further consideration, as their current form in the Draft AIE Regulations give rise to too many uncertainties. At a minimum, time frames for each step should be clearly outlined. The scope of internal reviews/second appeals which take place after an initial appeal to the OCEI should also be established to prevent issues being litigated twice.

Other proposed amendments to Regulation 10 are welcome. Paragraph (3) provides that the OCEI may seek a statement of reasons from a public authority for their decision, a sensible first step to establishing whether there is merit to an applicant's appeal. Paragraph (4), which provides for the settlement of appeals, is also a laudable inclusion. The rate of appeals to the OCEI is, per the OCEI's most recent annual report, far higher than the corresponding level of appeals to the Information Commissioner (OIC) under the FOI Act, and any measure which will clear the backlog of appeals and lead to swifter decisions is beneficial.

Similarly, the new paragraph (9) which provides that the OCEI may consider an appeal to be withdrawn where a public authority makes available requested information in whole or in part prior to a formal decision of the OCEI may operate to increase the likelihood of an informal settlement between public authorities and applicants, further reducing the backlog of cases before the OCEI.

2.1.9 Regulation 11 (Appeal to the High Court on a Point of Law)

EirGrid queries the inclusion of paragraph (6) of Regulation 11 of the Draft AIE Regulations, which appears to direct the courts of Ireland to prioritise applications made to them under the Draft AIE Regulations, requiring them to "*act as expeditiously as possible*".

Setting aside questions of whether such a direction can be made, this appears to be an attempt to transpose certain provisions of Article 6(1) of the AIE Directive (2003/4/EC), which provides that applicants must have "*access to a procedure in which the acts or omissions of the public authority concerned can be reconsidered by that or another public authority or reviewed administratively by an independent and impartial body established by law. **Any such procedure shall be expeditious** and either free of charge or inexpensive*" [Emphasis added].

Article 6(1) is the only use of this term throughout the AIE Directive, and a right of access to the courts is provided for separately in Article 6(2). It would appear to EirGrid that the inexpensive and expeditious procedure referred to in Article 6(1) of the AIE Directive, providing for (i) reconsideration of a decision in the first instance and (ii) administrative review by an independent and impartial body, translates to an internal review by a public authority and subsequent appeal to the OCEI.

EirGrid recommends a reconsideration of this proposed paragraph (6). It is questionable as to whether it constitutes an accurate implementation of the AIE Directive.

2.1.10 Regulation 12 (Guidelines)

The introduction of a new requirement for the Minister to publish guidelines on the implementation and operation of the Draft AIE Regulations at regular intervals is an extremely positive change which EirGrid warmly welcomes.

The past years have seen a sharp year-on-year increase in the number of AIE requests received by public authorities as the public becomes more aware of the existence of the AIE Regulations. In that time, a considerable body of decisions of the OCEI has emerged regarding the interpretation of the AIE Regulations, as well as a number of significant cases before the courts. The existing ministerial guidelines are dated and of limited practical assistance to public authorities dealing with AIE requests in 2024.

EirGrid recommends that the interval between the publishing of guidelines in paragraph (2) be reduced to three years, to reflect the fast-moving nature of the law in this area.

3 Conclusion

The Draft AIE Regulations introduce a number of welcome amendments and clarifications which codify existing practices and which operate to bring the AIE regime into line with other legislation regarding access to information, such as the FOI Act. The requirement for new ministerial guidelines is similarly a very positive update.

However, the current Draft AIE Regulations lack detail in a number of critical areas, specifically regarding the expanded third party consultation procedure and appeals mechanism to the OCEI, as well as the operation of some of the new obligations on public authorities. Without further clarification in this area, we believe that serious difficulties may arise in the operation of the new regulations. Timeframes and procedural steps in particular must be clearly understood and "stress-tested" before implementation.

Further, we believe that several omissions remain, including the introduction of a ground for refusal for frivolous or vexatious requests. Recent experience has made it apparent that the AIE regime remains exploitable by bad actors, to the detriment of public authorities and legitimate applicants alike.

EirGrid would like to thank DECC once more for the opportunity to consult on the proposed regulations, and particularly for its accommodations in extending the deadline for submissions. We would be happy to discuss any element of our submission at a future date, and we look forward to an improved regime for access to information on the environment.

8 January 2024