Submission to

the public consultation on

proposed amendments to:

the Access to Information on the Environment (AIE) Regulations 2007-2018

From:

[redacted], Environmental Law Officer, IEN

Version 1.0.

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1. Preface

This submission has been prepared by the Environmental Law Officer of the Irish Environmental Network, IEN, the coalition of national eNGOs. Given the practical implications of the demands of this role, the timeframes pertaining and the technical complexity of the matters pertaining – the views expressed are mine, and do not necessarily represent the views of our member groups. However they may of course rely on the content of this submission, as may any member of the public, given the arguments made have been submitted to the Department and are in the public domain.

This submission is a further submission, following on a preliminary submission made via email on 7th of December 2023*. That preliminary submission, was focused more on challenges for the public to engage with the consultation, given a number of omissions and issues on the consultation webpage.

The ongoing delay in Ireland responding to findings of non-compliance by Aarhus Convention Compliance Committee Findings against in case ACCC/C/2016/141 was of core concern. However, it was felt in the context of the issues laid out about the consultation webpage, that an extension of time was needed to enable the wider public engage more effectively in the consultation. So an extension to the consultation was called for following on from the corrections and updates to the consultation page.

I wish to acknowledge that the Department then provided for an extension to January 8th, and sought a meeting to better understand the issues highlighted and their impact. That meeting was held on the afternoon of December 21st 2023, and the Department then moved to address certain changes on the consultation webpage to address some of the issues of concern highlighted on the webpage including to:

- Provide clarity on and a link to the relevant Aarhus Convention Compliance Committee Findings in case ACCC/C/2016/141 which had not been provided,
- Provide a link to the Law Reform Commission's consolidated version of the current AIE regulations,
- Indicate the nature of the changes and updates made to the consultation webpage on the 21st of December – which was very important for transparency, and to avoid possible confusion over the extent of changes made.

This further submission should therefore be read together with that initial submission, but is more focused on outlining more substantive issues with the Draft Regulations as proposed.

It is hoped and that there will be an opportunity to engage and meet to clarify the issues in this submissions further, and to discuss possible way forward, following on from the earlier positive discussion with the Department.

I would also highlight that the issues raised here are a forerunner to certain of the issues which I will be tabling in the response to the progress reported to the Aarhus Convention Compliance Committee, ACCC on the compliance issues for Ireland detailed in Decision VII/8i. Submissions on the progress reported have been requested from communicants and observers by the 15th of January 2024. Therefore it would be ideal for early and effective engagement from the Department on these matters to offset or limit the extent to which they need to be pursued further with the ACCC as issues of major concern.

2. Structure of the submission

Following on the general information and prefacing remarks in section 1, some specific requirements in relation to the other submissions relied upon are set out in section 3.

Then in section 4 – more substantive commentary on the context and overarching issues with the consultation and the approach to the review of the regulation are set out.

Section 5 is concerned with technical legal issues arising from the use of regulations to transpose these requirements, and the reliance on s.3 of the European Communities Act 1972.

Section 6 highlights the problems arising for those being consulted and the concerns on the lack of clarity and audit of the change being made. The unreliability of the summary of changes made documents provided in the consultation which is supposed to be a summary highlighting all the changes made – is incorrect is inrespect of its first 3 entries. Therefore it is unreliable,and a recommendation is made about the need for a comprehensive and accurate cross-referencing of the provisions of the Convention, the AIE Directive, the current and proposed regs – as the structures of each do not map easily and oversights and confusion can easily arise.

Section 7 steps through each of the Regulations proposed in the Draft Regulations and make observations and further recommendations.

A brief conclusion is then provided, inviting further engagement.

For ease of reference – recommendations are flagged by bullet points with this chevron symbol

- ➢ Example recommendation.

I regret it has not been possible in the timeframe to provide a summary of the recommendations as an Annex for ease of reference – but it is probably preferable as the recommendations rely to an extent on the exposition of issues and observations made and may not stand well enough alone.

3. Adoption of submissions to be read together with this submission:

For the avoidance of doubt, given:

a) The failure in the current consultation to rationalise the Departments response in preparing the proposed Draft Regulations in light of points raised in the submissions made to the previous consultation, and
b) The Department once again solicits input on the response for communication ACCC/C/22016/141 and seeks comments on changes needed on the regulations generally

I request the following be observed:

- I adopt and repeat my submission prepared on behalf of the Environmental Pillar here made to the earlier public consultation on the AIE regulations run in 2021.
- I adopt the submissions prepared on behalf of Right to Know for the earlier consultation here
- I additionally adopt Right to Know's submission to the current consultation.
- This submission should be read together with the preliminary email submission made on December 7th 2023 on concerns about the execution of the public consultation engagement.

4. Introduction and context for the consultation and serious deficits in supporting information, data and analysis:

3.1 Context for the obligations:

The public consultation on the proposed revision of the Access to Environmental Information Regulations, The AIE regulations or the Regulations, is most welcome. Access to environmental information is the foundational pillar for environmental democracy, providing:

- Relevant information which the public and appropriate agencies and bodies require to enable them determine the need to engage in environmental decision-making in the first instance, and then
- Mechanisms for informing them of environmental decisions being undertaken in which they may wish to participate.

It then also enables the public and appropriate agencies and bodies have access to environmental information so they can then move on to:

- Participate in an informed way in environmental decision-making on activities and projects, plans, policies, legislation etc.
- Pursue access to justice as necessary on certain environmental decisions, acts or omissions.

In the context of a world faced with what the Intergovernmental Panel on Climate Change, the IPCC, has described as interdependent climate and biodiversity crises – existential challenges of our age, the objective of Article 1 of the Aarhus Convention[1] has never been more relevant and important. It provides as follows: (emphasis and formatting added)

> "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."

That is the central context and rationale for the rights and obligations provided for by the Aarhus Convention, as a Human Rights Convention, on information, participation and access to justice rights for environmental democracy.

Following on from this, general obligations of the Convention in Article 3 General Provisions commence in paragraph 3(1) with a mandatory obligation requiring each party to: (emphasis added)

> "..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**

[1] CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS done at Aarhus, Denmark, on 25 June 1998, here

enforcement measures, to **establish and maintain** a **clear**, **transparent** and **consistent** framework to implement the provisions of this Convention."

Further important obligations on Parties to the Convention in respect of i.a. assistance, awareness, education for the public on the rights, support including specific requirements for eNGOs, and non-discriminatory requirements are also set out in sub-paragraphs 2-9 of the general obligations of Article 3 (General Provisions)

While very specific obligations in respect of environmental information including on proactive dissemination and access request are then set out particularly in Articles 4,5, 6 and 9(1) and (4) – I wish to flag at the outset, the wider context and importance of the objective Article 1, and general obligations in Article 3 in respect of the rights and obligations which need to be implemented. Too often these are over-looked – and for example the non-discriminatory requirements need increasing focus in the context of the rise in diversity and differing challenges experienced by the public in Ireland.

Ireland is of course not just a full party to the Aarhus Convention in its own right, following on from its ratification of the Convention in 2012, but it is of course also a member of the European Union. It is therefore also bound by the obligations under the EU Treaties including in respect of implementing EU Directives. The EU has also ratified the Aarhus Convention in 2005, and the EU Court of Justice has clarified the Convention is an integral part of the EU legal Order[2]. The adopted Directive 2003/4/EC, the AIE Directive[3], which is binding on Ireland.

Both this wider perspective of the Convention referred to above, and the AIE Directive are the wider legislative context in which the adequacy of legislative provisions and further regulatory and other measures need to be evaluated by the Department, not just in terms of the proposed Draft regulations – but Irelands overall implementation response on environmental information.

[2] Judgment of the Court, 8 Mar. 2011, C-240/09 - *Lesoochranárske zoskupenie LZ I*, EU:C:2011:125, para 30 refers here

[3] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC here

3.2 Failure to provide relevant data and analysis to inform the review of the implementation obligations:

It is therefore regrettable and of serious concern, that in coming to this reworking of the legislation – that there is no data, and no assessment of the adequacy and efficacy of what has been put in place on delivering on the obligations required. There is also no setting out of the further complementary measures and the overall adequacy and efficacy of the total implementation solution.

Instead, only a set of draft regulations is provided with a list of new text provided in a summary document. Also there is no clarification of the effect or nature of the changes made to the current version of the regulations, and no rationale is provided for the proposed changes.

This is not just unsatisfactory – it is unacceptable, particularly following on from a previous consultation on the same regulations and issues which concluded practically 3 years ago[4], and which the same failures were in focus, and in which there was also no supporting analysis or data of the system.

3.3 Practical issues within the Department - do not exonerate Ireland's failure to deliver on its obligations.

It is understood and appreciated that certain of the resources within the Department dealing with this matter are new in post, and that the circumstances for handover from previous incumbents has been less than ideal. However, while one can of course, and does empathise with the practical difficulties for those involved now in the Department, nonetheless – such practical difficulties do not operate to absolve or excuse Ireland for failure to deliver on its legal obligations. The EU Court of Justice has made that abundantly clear.[5] **As a matter of law - practical issues within the Department do no exonerate Ireland's failure to deliver on its legal obligations.**

These more recent delays and inadequacies in the consultations must also be set in context of the years of delay experienced on this matter. For instance:

- In August 2016 - a communication to the ACCC[6] alleging non-compliance by Ireland was lodged by Right to Know. This was further to frustration with years of delay across countless AIE requests and multiple OCEI appeals, and Court cases, which are well documented in the communication and data provided during the hearings and in subsequent updates, and the experience of which were not limited to the communicant.
- In October 2020 - Ireland's response as far back as October 2020, to the draft findings, provided i.a. for it's effective acceptance of the implications for action and engagement under Article 36(b) of the Annex to Decision 1/7 of the Meeting of the Parties. That commitment arose further to the relevant assumptions and requirements clearly set out in the ACCC Secretariat's letter from August 2020, accompanying the circulation of the draft findings for comment.
- In November 2020 - the findings of non-compliance by the ACCC were adopted by the ACCC.

[4] The earlier consultation on the current AIE Regulations concluded on April 16th 2021 can be found here
[5] Judgment of the Court, 28 Sep. 2023. C-692/20 – Commission v UK, EU:C:2023:70, para 49-50 refers here
[6] Communication reference ACCC/C/2016/141 – full case details available here

- In October 2021, the findings were endorsed at the 7th session Meeting of the Parties in decision VII/8(i) as adopted. (A specific excerpt on Ireland's compliance issue from the full addendum report can be found here for convenience)
- June 30 2022, Ireland submitted its Plan of Action[7] to the Compliance Committee in respect of Paragraph 4(b)(i) of decision VII/8i – and indicated: (my emphasis)

  "It is anticipated that the revised Regulations will be finalised during **Q3 2022**"
- That date of Q3 2022 was stated in response to the question on the: "Final date by when implementation of recommendation will be completed".
- Q3 2023 – a year past the deadline for finalising the regulations – a consultation on the draft regulations was commenced, and no timeline is clear for the implementation of the necessary changes. Additionally significant concerns arise in respect of the changes proposed to address the findings in ACCC/C/2016/141, and on the format of the new provisions.

The issue of delay in responding to the findings of non-compliance in ACCC/C/2016/141 – have in fact been going on for years, and progress on resolution is of major concern. I also understand from Right to Know that their analysis indicates that they have analysed the OCEI decisions made in 2023 and have found that on average the appeals decided in 2023 took 444 days to reach a final decision. They indicate this is 40% longer that the 316 days in 2016 which was the worst year cited by Right to Know, R2K, in its communication ACCC/C/2016/141.

They also advise that 70% of the decisions annulling the public authority decision (46/65) in 2023 resulted in remittal. Therefore these were not final decisions meaning that the ongoing delay in these cases is potentially twice as long as the data would appear to suggest in terms of when a requestor actually gets the information requested.

The particulars of these statistics have been provided for in the R2K submission to the current consultation.

It is worth noting that on page 15 of its Findings the ACCC reflected in respect of the timelines detailed in the R2K communication, (which are now much worse according to R2K) that:

> "105. Moreover, the average time taken by the OCEI in 2018 and 2019 to publish decisions on appeals (279 and 249 days, respectively) far exceeds the deadlines set for public participation in decision-making procedures or commencing court proceedings. In any case, this figure is only an average, so a significant proportion of the appeals decided by the OCEI take longer.
>
> 106. The Committee is aware that the OCEI carries out a full review of the facts and the law, but that cannot justify systemic delays that prevent members of the public from exercising their rights under the Convention to participate in decision-making or seek access to justice regarding the environment."

3.4 Specific highlevel recommendations on analytics and other matters

Before turning to a specific recommendation in respect of data and systems analysis to support the consultation, and the practical issues presented in delivering on the Convention and ACCC's specific

[7] The UN link to Ireland's Plan of Action on this page is currently incorrect. But the quotes provided here are based on the copy of the Action Plan circulated by the secretariat for comment on July 4th 2022, and that available on the Government website here

compliance requirement that reviews on AIE requests must be timely – it is worth also considering the benefits generally from the Department, Governments and Exchequer's perspectives from a more proactive approach to environmental information. In summary -

a) Information requests are undoubtedly the most onerous, tricky and complex elements of the information obligations to comply with, and
b) Information requests should be the exception – with most information being provided proactively.

So in short the more effective we become at proactive dissemination – the likely Ireland is to: 'end up in the soup' so to speak; and/or expending resources on the access to environmental information requests and appeals and associated litigation and communications to the ACCC in circumstances where this is avoidable or the extent of effort expended could be feasibly reduced if a more proactive approach to implementation was pursued. (I also note at time of writing - 3 further information related communications are now pending before the ACCC[8])

In short, avoidance is not just better than cure – it is more optimal especially when it is very tricky and quite challenging to deliver a cure where that cure ultimately requires timely responses to environmental information requests – including at all stages of the procedure – not just the reviews by the OCEI and in judgments of the Courts. Reviews cannot realistically ever be timely if the earlier stages have been so long that they have already compromised the purpose for which the information has been sought.

While there are 3 issues to be addressed in the findings of non-compliance, and to which I will turn to in more detail later – a central issue for is the timeliness of the appeal of the OCEI and of the Courts – with both processes being found to fall foul of the requirement for timely reviews as required under Article 9(4) of the Convention, and as ultimately concluded in paragraph 133 of the ACCC Findings.

"Timeliness" of course does not mean within a specific time fixed timeframe – it has a qualitative dimension relevant to the matter in hand – for something to be timely – its delivery is relevant to the need for it. Therefore, while a 4 months might be acceptable in one instance for an appeal – it might be hopelessly inadequate in the context of another request for environmental information. A requirement to specify a deadline does not necessarily mean a single deadline for all matters. It could be taken to mean a deadline which is meaningfully relative to, and relevant to a process for which the information may be being sought.

This admittedly makes responding to a requirement for timeliness complex. But analysis can break matters down into manageable components to help identify an appropriate architecture in which the timeframes can be specified. But it is ultimately important to address the and resolve the complexity which arise consequent on the relevance of the timeframes. This is particularly so given the further requirements to achieve compatibility between the provisions under Article 3(1) of the Convention. This is compounded by the increased pressure on the timeframes for environmental decision-

[8] The 3 cases pending hearing are:

- ACCC/C/2023/198 Failure to comply with Article 5 of the Aarhus Convention in relation to active dissemination of environmental information by public authorities
- ACCC/C/2023/199 Unlawful charging for access to environmental information and breach of the requirement that the OCEI procedure not be prohibitively expensive
- ACCC/C/2023/204 Unlawful formality requirements for a valid request including requirements that the requestor must cite the AIE Regulations and a request must be in writing.

making, in which public participation is a key and unavoidable procedural requirement, and where information may be needed in order to meet the requirements for effective public participation etc. Hence why it makes so much sense to focus on effective proactive dissemination and to ensure information likely to be needed is available, and/or well indexed so it can be identified and provided quickly.

It is widely acknowledged that you can't manage what you don't measure. The efficacy or otherwise of the regulations is not evaluated in terms of compliance, or at least that is not evidenced. Quite apart from there being no setting out of the rationale for the changes proposed throughout the draft regulations, there isn't even any attempt to provide any evidential basis to justify the timeframe proposed in the draft regulation to meet with compliance with the obligation of timeliness in ACCC/C/2016/141, the findings which are supposedly a key driver for the changes to these regulations. It is impossible for Ireland to stand over this proposed timeframe of no later than 4 months in Regulation 10(8) in the absence of relevant data. (That is even putting to one side the deeply contentious issues around how the timeline proposed in the Draft Regulations can be punctured – a point to which I will return when examining the regulations in detail later below.)

So while clearly some data analysis would appear as an obvious basic requirement in assessing what is needed to be changed and improved, it is also recommended here, that notwithstanding such analysis, that overall there is clear merit in pursuing a more robust approach to provision of environmental information generally and increasing a focus on proactive dissemination. This is with a view to heading problems 'off at the pass' so to speak – so that the challenge of dealing with timely decisions on requests and appeals and court judgments – is something which is left to be resolved only for more exceptional requests. The contentions and burdensome issues of dealing with requests and internal reviews and appeals and search and retrieval can also be minimimsed by focusing on:

- more proactive dissemination of information,
- better systems for collating information on the expectation that it will be required for transparency and dissemination,
- more robust compliance and improved quality of decisions on requests,
- targeting of persistent offenders.

Recommendation:

- The Department should undertake as a priority a comprehensive and structured review of the adequacy of all the implementation measures adopted to implement the environmental information obligations of the Aarhus Convention and the AIE Directive.
  I would be happy to facilitate engagement with the Department to discuss the scoping and phasing of such analysis, and how it might be structured so as to maximise outputs and reduce costs including in how it is executed and to maximise learning opportunities for the public authorities involved and to secure their buy-in to the solutions proposed. The scope of such review should not be limited to the adequacy of the regulations, but should also extend to i.a.
    - objective assessment on the provision of environmental information both though progressive proactive dissemination and access requests across all relevant public authorities,
    - evaluation of the efficacy and impact of the internal review request step, and objective determination of its merits and demerits, with a view to informing associated recommendations on maintaining or dispensing with it,

- sharing the burden in identifying the core functions and information dissemination requirements for public authorities;
- identification of problems for public authorities in managing information and in responding to requests, and problem solving;
- analysis of functionality and compliance by public authorities with their duties, what works and why, and what doesn't and why,
- evaluation of the adequacy of training materials and activities given their impacts, and the issues which arise in the provision of environmental information both though progressive proactive dissemination and access requests, and in responding to internal reviews, and appeals,
- analysis of costs associated with non-compliance,
- analysis of persistent offenders amongst public authorities with a view to targeting actions to reduce the burden on appeals and extent of non-compliance experienced by the public,
- consideration of effective enforcement measures, and consideration of appropriate measures which will be sufficiently dissuasive,
- evaluation of the efficacy of current metrics in meaningfully informing on compliance,
- consideration on what are the key metrics and how to establish and collate them effectively and efficiently,
- analysis of throughput and resource management issues amongst AIE officers (to include workload consideration, and the frequency with which they are replaced, and the basis of their performance assessment),
- analysis of the role and effectiveness of the Office of the Commissioner for Environmental Information, including on their internal operational procedures
- identification of pinch points,
- identification of conflicting legislative provisions triggering contention and confusion on the over-riding Aarhus and EU law obligations on information,
- consideration of Governance requirements and the need to enhance the role of the Environmental Information Commissioner and DECC.

This is by no means a complete or indeed a prioritised scoping list. It is merely to highlight the extent of certain key unknowns facing anyone trying to engage in a meaningful and constructive way on the open questions posed by the Department in this consultation. The questions ask how should the draft regulations be amended in terms of the updates proposed, and what further changes should be made. In sum – you need effective monitoring information and data to be able to assess the real adequacy or otherwise of the draft provisions in addressing issues and system requirements.

There is also little point, and indeed potential harm to be served, by perpetuating dysfunctional and/or inadequate training for Public Authorities. There is also an issue with the failure to leverage training opportunities to collate information and solve problems. But you can't address either of these – if you don't have the data to inform the management of and leverage of the training opportunity.

Phasing an approach to prioritising the structuring of such a review exercise will require a collaborative approach – including engaging with the client – the public, and those involved in delivering on environmental information obligations, and those ultimately responsible for its effective implementation.

3.5 Lack of clarity on the Objective for the consultation and the rationale for changes proposed to the regulations.

In terms of aim or objective for the consultation – there is none explicitly stated as such on the webpage. The website page simply indicates only under the heading of "Consultation Overview" that – (emphasis added)

> "The **aim** of this consultation is to gather stakeholder feedback on the draft AIE Regulations."

It then sets out the following broad questions for the consultation:

> 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.

As an important aside – in relation to the above, it must of course be highlighted here that the omission of an explicit reference to the Aarhus Convention here is very concerning insight into the mentality prevailing in updating these regulations – with a such a focus on compliance being articulated by the Department only in respect of the Directive.

Turning back then to the issue of objective for the consultation - under the title Heading "Background" the consultation indicates that

> "In 2020, Ireland committed to amending the AIE Regulations in response to findings of non-compliance by the Aarhus Convention Compliance Committee (ACCC). Informed by a public consultation that took place between February and April 2021, the regulations were reviewed and updated. These updated regulations will ensure Ireland's continued compatibility with EU law and with the Aarhus Convention."

That prior consultation also sought wider views on the adequacy of the regulations, not just the requirements to address the ACCC findings of non-compliance in case ACCC/C/2016/141.

But there has been no rationalisation or response provided on why points raised in submissions to that earlier consultation have been rejected in the approach outlined in the current Draft Regulations.

I would submit that Article 8 of the Convention at the very least applies to the revision of the AIE Regulations and that the Department has failed to demonstrate to any extent how the "result of the public participation" has been "taken into account".

Separate to this, even the Government's own basic guidelines on best practice guidance in consultation haven't been observed in this regard in respect of providing feedback on Consultation input.[9] The Guidance states:

[9] Department of Public Expenditure and Reform, Consultation Principles & Guidance, 2016 , here

"Providing feedback 26.

Feedback is an important part of consultation. To encourage active participation, officials should publish a consultation report which may, in the form of a summary table identify the number of submissions received, key points raised in the submissions, whether these were taken on board or not, and future plans (if any) for further engagement. Where stakeholder input could not be reflected in the proposed policy, officials should provide a brief explanation as to why not."

This feedback has not been provided as an outcome of the earlier consultation – even in the context of embarking on a further consultation, and in presenting a set of apparently consequential draft regulations. In fact the current consultation states specifically that "Informed by a public consultation that took place between February and April 2021, the regulations were reviewed and updated."

However, even more fundamentally of issue to any general feedback on the earlier consultation, is that there is no specific rationalisation or reason provided on why the changes proposed in the draft regulations are been made. Yet it is clear that certain of the changes proposed have nothing to do with the findings in Communication ACCC/C/2016/141. So the drivers for changes and the expected impacts are unacceptably clear. This has wider legal significance also in the context of the changes being made via regulation and the use of powers to make these regulations under s.3 of the European Communities Act, 1972, as is cited at the start of the Draft Regulations – a point to which I will

Associated Recommendations:

- There should be full and timely publication of all consultation responses
- The Department should prepare a consultation report detailing the points raised in the submissions and the Departmental response to them outlining its rationale for accepting or rejecting the submission point
- The rationale for the changes proposed and their intended purpose and how their impact and efficacy are to be measured should be clearly set out.
- There should be greater clarity on the core objectives to be served in changes to the legislation/regulations, and to the priorities which need to be observed.
- It is submitted the priorities should be as follows:

1. The central priority and objective must now be to address the findings of non-compliance in communication ACCC/C/2016/141.

   This is not just consequent on the wider legal framework and reputational issues pertaining to the handling of the non-compliance – but also given how the delays in reviews operate to undermine the credibility and efficacy of the system for environmental information with all the associated negative consequences.

2. The second priority, must be to address other compliance issues. This should address

   A) Concerns on Irelands non-compliance in the environmental information raised in new Communications to the ACCC through proactive engagement.

   This would avoid the overhead to all concerned of engaging in communications where the issues can be addressed and resolved quickly at national level.

B) Wider issues of non-compliance in respect of environmental information under

I) the Convention (including addressing findings for other Parties which have relevance for Ireland's failures)

II) the AIE Directive

3. The third priority should then be on improved implementation generally – driving enhanced efficiencies and better implementation. (Of course certain improvements will invariably be delivered consequent on the focus on the earlier priorities)

5. Concerns on the limitations of using regulations to implement the provisions of the Directive and Convention.

As mentioned in the discussion on the 21st December and in the earlier consultation – there is a serious concern that the use of regulations is not an appropriate vehicle for certain of the provisions which Ireland needs to address in transposing the Directive, and to address certain key obligations of the Convention, and to ensure its effective implementation in respect of environmental information.

The draft regulations cite the powers under s.3 of the European Communities Act 1972, (the 1972 Act) to give effect to the AIE Directive. No mention is even made to giving effect to the Aarhus Convention which is very alarming!

Given the express limitations to the use of regulatory powers under the 1972 Act, the Minister may be acting *ultra vires* his powers under the 1972 Act, and that certain of the provisions in the proposed regulations which arise consequent on discretionary choices may not be legally robust.

Further issues arise in respect of the deficit in implementation on what Ireland needs to do to transpose properly and effectively implement the obligations in respect of environmental information of the Aarhus Convention, and to provide for a really effective and managed regime.

Put crudely and simply – the 1972 Act can be used to implement EU law via regulation where that is necessary to give effect to EU law, or where the provisions are "*incidental, supplementary and consequential provisions as appear to the Minister making the regulations to be necessary for the purposes of the regulations (including provisions repealing, amending or applying, with or without modification, other law, exclusive of this Act".* The Minister's regulatory powers under the 1972 Act however do not extend to matters which are discretionary in nature and where there are policy choices to be made which should be made by the Oireachtas given Article 15.2 of the Constitution.

Certain key aspects of the AIE Directive and the Aarhus Convention are optional or discretionary in nature or require policy choices and detailed legislative measures. For example, it is for the Member State to choose whether bodies performing judicial or legislative functions should be classified as public authorities. By way of highlighting the optionality of this matter it should be noted that the EU has in fact chosen not to implement this optional exclusion for its institutions. There is no reason why Ireland could not choose to follow suit.

It would also seem that the exceptions under Article 4 of the Directive are not clearly expressed as mandatory requirement, and that it is open to the Member State on whether to provide for such exception or not, given the phrasing in the Directive. (It is however also acknowledged that it would appear that certain further EU law or national obligations in respect of personal data privacy might mandate a requirement for refusal where confidentiality is provided for by national or community law – but that there is a lack of clarity on those requirements. In summary the issue of the exceptions is particularly tricky in terms of the legitimacy of their implementation via regulations.

However, the matter of implementation of charges for environmental information is again detailed in the Directive as a discretionary matter for the Member State, and appears to be much more straightforward as something which should not be addressed via these regulations. (More detail on these matters is provided in the section with detailed analysis of the Draft Regulations.)

Ultimately the issue for the transposition via regulations hinge on how the implementation of these articles appears to be a political and policy matter. It therefore cannot be delegated to the Executive

having regard to the Constitutional separation of powers and the limitations of the Constitution on the role of the Oireachtas in law making, and s.3 of the 1972 Act cannot overcome this.

Additionally, in considering and providing for a really effective role in managing and policing implementation of the Convention's obligations on environmental information, functionality which is clearly necessary to assist with effective monitoring, implementation of and enforcement action for obligations under the Convention – primary legislation would seem to be necessary to provide for such additional powers for the OCEI.

This is a complex issue, and not entirely clear, and while I set out certain of the issues in a little more highlevel detail below, I am hesitant to add to the length of this submission and over document the detail provided here.

I recommend the following therefore:

- It is recommended to have a further engagement and discussion on the use of regulations to transpose and implement environmental information obligations, given the complexity and the particular issues arising. This should include discussion on the need to expedite progress on the matter of ACCC/C/2016/141, and explore possible interim solutions.

There may be differing legal views on this matter, and it may ultimately need to be settled by the Courts. However I would also at the outset highlight that on the other hand there is no legal bar to stop the Minister avoiding such a legal debacle and simply seeking to address these legal requirements via primary legislation. The Minister would thus avoid the potential doubts and legal uncertainties pertaining.

I am conscious that concerns will invariably be raised in response to this suggestion about the extensive demands on the legislative schedule and agenda, and the lack of capacity to accommodate another bill. However, I submit that these are simply not a credible arguments or obstacle. There have been numerous instances under this administration and Government, where the Government has moved to amend standing orders in one House of the Oireachtas and tabled a major amendment changing the scope of a bill significantly to include matters entirely separate from the bills original scope, and which have been extensive and material changes to legislation.[10] In those instances the Government has argued urgency and need and has been generously accommodated in appropriate circumstances by the opposition. This is therefore a pathway which the Department should consider and indeed push as a policy matter, which is its domain and remit. It does not need to be confined here by the views of the AG's office on whether regulations are a valid vehicle or not. It can opt as a policy matter to pursue this with the robustness of primary legislation.

Such a path is clearly open to the Government in addressing environmental information obligations via primary legislation either by prioritising a bespoke bill, or by amending a bill on the legislative agenda to accommodate the changes needed. Additionally, in the intervening window as an interim measure to address progress on c-141 – pragmatic progress on the issue of delay including with the OCEI's office could be made by engaging to address their internal operational procedures and Practice Directions could address the issues of timeliness for the Courts.

[10] A bill on animal welfare was amended in the Seanad to provide for extensive changes allowing for unlicensed forestry, another bill on archaeological and historic monuments was amended to provide for extensive changes to marine and planning legislation, another bill an 18 page planning bill on substitute consent provisions was subject to a somewhat notorious 60+ pages of amendments on a whole range of other provisions – including on marine, residential tenancy provisions. The specifics of the legislation involved can be provided on request.

It is worth noting in this regard that in the recent public consultation on the Practice Direction for the new Environmental Court – Humphrey's J responded positively to a submission I made, which proposed that environmental impact and significance., and not just commercial value should be included as the basis for prioritising cases in the list. Mr Justice Humphrey's made this welcome and positive adjustment in finalising the Practice Directions on how certain cases needed to be prioritised – which shows a very important openness on such matters.

More detailed considerations, albeit still at a highlevel are set out on this issue below, including a summary of the issues:

- First of all - the AIE Directive addresses some, but not all of the environmental information obligations under the Aarhus Convention.
- Ireland has not made declarations on ratification that carve out any of the Conventions obligations[11]. Therefore it has committed to implement the Convention in full.
- I am of course conscious of the fact that Ireland can and does frequently choose to rely on Article 29.6 of the Constitution – which provides that:
    - "No international agreement shall be part of the domestic law of the state save as may be determined by the Oireachtas."
- So while Ireland may choose to argue that Aarhus does not have effect save for what has been given effect to by the Oireachtas – it then of course leaves itself open to argument of the most extensive and basic transposition and implementation non-compliances, in areas where the deficit cannot be argued to be addressed by EU law obligations covered by the AIE Directive.
- A further issue arises then in respect of using the powers under the 1972 Act to transpose the AIE Directive, as outlined earlier above.
- In summary, in section 3 of the European Communities Act 1972[12], the Oireachtas provided for certain Ministerial powers to make regulations necessary to give effect to EU law obligations, or where the amendments are simply "incidental, supplementary or consequential" to the EU obligations.
- Put simply, this has meant that a Minister could in fact use regulations to over-write primary legislation where this was necessary to bring Irish legislation in line with our EU law obligations, and where there were no policy choices left open to be determined by our Oireachtas, who has the sole right to determine such matters under Article 15.2 of the Irish Constitution.
- Therefore the 1972 Act powers does not extend to matters in the Directive which are discretionary or optional in nature as the policy choices should have been made by the Oireachtas through the enactment of primary legislation.
- Given Ireland's propensity to transpose Directives at the 11th hour or even late, the use of the powers under the 1972 Act has been widespread, with many Directives being transposed by Regulation. I would note also that this has the additional disadvantage of compromising the level of Oireachtas scrutiny on the transposition of our EU law obligations.
- As mentioned above – specific concerns arise in respect of the use of regulation to implement what appear to be clear discretionary provisions in the directive including on

[11] See details of Ireland's ratification here where no associated declarations have been made as in the case of Sweden, the EU and others.
[12] For convenience – a link is provided here to an annotated version of the Law Reform Commission's, LRC revised version of the European Communities Act, 1972

exemptions under Article 4, and charges under Article 5 and on the matter whether bodies acting in a judicial or legislative capacity should be classified as public authorities.

- The limitation to the regulatory powers under the 1972 Act was very helpfully set out by Simons J. in *Friends of the Irish Environment Ltd v Minister for Communications*, neutral citation [2019] IEHC 646, albeit the focus in that case was essentially on the use of regulations to amend primary legislation and given the nature and impact of the changes. But the judgment includes a very comprehensive review of relevant case law and the relevant provisions of the Act and the Constitution, in paragraphs 138 - 173 of the judgment which is very helpful in setting out these complex matters more fully.
- The following paragraphs are particularly helpful in some of the essentials:

> "Application of the "Principles and Policies" test
>
> 154. The case law discussed above prescribes the legal test for determining, in any particular instance, whether the use of secondary legislation to transpose EU legislation is permissible, or whether it trespasses upon the exclusive legislative function of the Oireachtas. The application of this test entails identifying the extent of the policy choices, if any, left over to the Member States under the relevant EU legislation. If there are significant policy decisions to be made by the Member States, then it will not be permissible, as a matter of constitutional law, to rely on secondary legislation. Conversely, if the discretion to be exercised is so constrained by principles and policies set out in the EU legislation as to leave no real choice to a Member State, then the use of secondary legislation will be legitimate. As Keane C.J. put it pithily in Maher, the discretion may have been reduced almost to "vanishing point"."

- I would also highlight the following paragraph:

> 168. As the case law discussed earlier indicates, in some instances it can be difficult to identify the line between merely implementing policy, and actually making policy. As O'Donnell J. emphasised in O'Sullivan v. Sea Fisheries Protection Authority [2017] IESC 75; [2017] 3 I.R. 751, every delegate of a power to make secondary legislation must make some choice, and a choice does not imply a capacity to determine policy.

- In the *Friends of the Environment, FIE* case – there were of course multiple issues, but the single issue I wish to focus for the purposes of this submission, concerned the legitimacy of using the 1972 Act to make regulations which impacted on existing primary legislation, given the nature of that impact. The Judge contrasted the situation pertaining in the *FIE* case to that posited by Denham J in *Meagher*, where he noted that:

> "The secondary legislation at issue in that case was upheld on the basis that to require primary legislation would be "artificial" and would result in a "sterile debate" before the Oireachtas. This was because there was no "policy or principle which can be altered by the Oireachtas". See Meagher v. Minister for Agriculture [1994] 1 I.R. 329 at 367 as follows.
>
> > "In the Directives herein the policies and principles have been determined. Thus there is no role of determining policies or principles for the Oireachtas. While the Directive must be implemented there is no policy or principle which can be altered by the Oireachtas, it is already binding as to the result to be achieved.

> That being the case the role of the Oireachtas in such a situation would be sterile. To require the Oireachtas to legislate would be artificial. It would be able solely to have a debate as to what has already been decided, which debate would act as a source of information. Such a sterile debate would take up Dail and Senate time and act only as a window on community directives for the members of the Oireachtas and the nation. That is not a role envisaged for the Oireachtas in the Constitution.
>
> Consequently, solely because the Minister is making a regulation which repeals a statute, does not of itself invalidate the regulation which as a vehicle, as a choice, can be intra vires the Constitution under Art. 29.4. To say that the regulations breach Art. 15.2.1 simply because it repeals or amends a statute is to hold the false premise that the Minister is determining principles or policy."

- As set out by Simons J. there are however clear limitations to what can be done using the 1972 Act, and the draft regulations and indeed existing regulations do not seem sound in respect of matters which are discretionary in nature and require substantial policy choices. For example on the matter or exemptions, whether or not to implement charges – not just the specific more granular matter of the charges, on whether or not to consider bodies acting in judicial or legislative capacity to be public authorities. At the very least there is a question mark to be asked and answered in respect of the use of s.3 of the 1972 Act for the Draft regulations proposed, and what falls to be of issue as a consequence. Moreover, effective and robust implementation of the Convention would seem to warrant the implementation of a more considered approach to management, monitoring and enforcement of the regime for environmental information which is more a matter for primary legislation.

6. Unreliability of the changes highlighted document provided in the consultation.

The text of the very first three changes detailed in the Access to Information on the Environment Regulations Highlighted Changes 2023 document provided on the consultation website are incorrect. The document in being inaccurate in detailing certain of the changes becomes entirely unreliable. No further audit checks were done on its accuracy given the limitations on my time and resource.

Some examples right at the start of the document are highlighted to show the difficulties which arise and why it is recommended in the interests of all concerned that a comprehensive (and accurate), cross-reference document is developed which tracks and maps the provisions of the Convention, the Directive, the existing regulations and new regulations.

On the first change included in the highlighted changes document, the text detailed says under Part 1 – Preliminary and General indicates the following change highlighted in yellow:

> " (1) This document can be cited as the EU Communities (AIE) Regulations 2023."

However the phrasing used in the original regulations and the draft actually uses the word "may" instead of "can". This may seem a small and inconsequential error. However it means that the highlighted changes document simply cannot be relied upon as an accurate reflection of the changes made, and the document is useless and potentially misleading.

On the second change, included in the highlighted changes document, more significantly it highlights only one of the changes made following text and does not highlight other additional text added.

The Highlighted document indicates the following changes from the current regulations, highlighted in yellow:

> "(2) "Commissioner" means the holder for the time being of the office of Commissioner for
>
> Environmental Information established under article 12(1) of the Regulations of 2007;
>
> has been added"

However the current regulations have a definition of Commissioner as follows:

> "Commissioner" means the holder of the office of Commissioner for Environmental Information established under article 12;

While the text detailed is the same as in the draft regulations – the issue here is the failure to properly identify the changes made relative to the current regulations. As the draft regs have also added "for the time being" not just the phrase"of the Regulations of 2007".

It is also noted that the provisions of Regulation 12(2) of the current regulations are to be maintained via the 2007 regulations – given the carve out in Draft Regulation 15(a). The provision concerns the dual mandate of the Commissioner for Information and the Commissioner for Environmental Information. It is not clear if there is therefore scope to consider the extent of multiple remits the Commissioner holds, and the potential to reconfigure the role in light of proposals herein to discuss potential increase responsibilities in oversight, monitoring and enforcement of the AIE regime.

On the third change – the definition of the Directive in the current regulations includes a reference to the text of the Directive being included in the schedule to the regulations. The proposed draft

regulations do not make any such reference and do not provide for the inclusion of the Directive in the regulations. But the only change indicated in the highlighted changes document is indicated as follows by the yellow highlight:

> " 2) "Directive" means Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC"

Whereas the current regulations state the following:

> "Directive" means Directive 2003/4/EC of the European Parliament and of the Council of 28 January 20031 , which, for convenience of reference, is set out in the Schedule;

They also include a full copy of the Directive in the regulations.

In summary just based on the first 3 changes highlighted – the document is misleading in highliging and reflecting changes. Anyone using it to drive their analysis of changes made may be misdirected. The full scope of issues with it has not been examined fully here for obvious reasons.

So it is recommended that -

- The Department need to check the highlighted changes document for accuracy against the draft regulations and determine whether there are further discrepancies between the summary of changes and the actual draft regulations, and provide an update on which version of the change is the one proposed. If the discrepancy is significant and the consultation input has been compromised – it should consider engaging further to get appropriate consultation feedback.

It has become abundantly clear at this point in the exercise also that as mentioned earlier above -

- It would be very helpful, nay invaluable to all concerned, to have a proper cross-reference of the provisions of the Directive and the Provisions of the Convention with the Draft Regulations. The different sequencing and structuring of the obligations in the draft regulations makes checking on the adherence to all requirements quite a headache, and it would be a useful tool going forward.

7. More detailed commentary on specific aspects of the draft regulations

Note: The remainder of this document, save for the Conclusion, tracks each of the headings provided in the Draft Regulations and makes some observations and recommendations in respect of them.

Notification:

The original notification for the 2007 Regulations stated:

> **"**Notice of the making of this Statutory Instrument was published in "Iris Oifigiúil" of 3rd April, 2007. I, DICK ROCHE, Minister for the Environment, Heritage and Local Government, in exercise of the powers conferred on me by section 3 of the European Communities Act 1972 (No. 27 of 1972) and for the purpose of giving effect to Directive 2003/4/EC of the European Parliament and of the Council of 28 January 20031 , hereby make the following regulations:.."

The current regulations as consolidated by the LRC[13], refer only to the AIE Directive and were made in advance of Ireland's ratification of the Aarhus Convention. However, it is also noted that the proposed draft regulations problematically also make no reference to the Aarhus Convention.

However, in the National Implementation Reports provided by the Department to the UNECE every 4 years in advance of the Meeting of the parties, Ireland clearly relies on the AIE regulations in responding to how it has implemented certain requirements of the Convention in respect of environmental information.

The draft regulations also propose to rely on the powers s.3 of the European Communities Act 1972 The issues with this approach have been set out in an earlier dedicated section of this submission, and should be taken as read here.

Citation

See earlier dedicated section of this submission in respect of concern on the use of regulations to transpose the AIE Directive and to transpose and implement provisions of the Aarhus Convention and associated recommendations.

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[13] Annotated LRC revision of the **European Communities (Access to Information on the Environment) Regulations 2007**, updated to 1 Nov 2022, and accessed on 8 January 2024.

Commencement

The current regulations provide for a commencement date for the regulations.
However, no reference is included in the draft regulations to commencement at all.
It is unclear at time of writing if the signing of the regulations by the Minister together with their proper notification would be sufficient to commence them.

Recommendation:

- Provide clarity on the commencement requirements to be provided in the provisions.

Interpretation

"applicant"

No change is proposed in the draft regulations. But there are issues to be addressed here.

The AIE Directive provides for a definition of applicant in Article 2(5) which is any natural or legal person requesting environmental information, and this is the basis for the Irish regulations approach to an applicant.

However the current and draft regulations also add a caveat to the definition of applicant of requesting environmental information "pursuant to these Regulations". This requirement to cite a legal basis for the request is an impermissible additional requirement which is nowhere reflected in the Convention or the Directive, and should be deleted.

Additionally, and even more importantly, Article 4(1) of the Convention refers to the obligation of Parties to respond a request for environmental information and make such information available to the public .."

The concept of the public as defined in the Convention in Article 2(4) encompasses more than natural or legal persons, and the public is also similarly defined in the Directive Article 2(6). Thus the concept of applicant as applied in the regulations risks limiting those entitled to have information made available to them.

Thus in summary it is recommended that

- The concept of an applicant or requestor for environmental information should be broadened to accord with the definition of the public in the Convention, or the relevant provisions should be reframed so the rights of the public and the obligations to them under the Convention are correctly implemented
- The concept or definition of a party making a request for environmental information should not be contingent on making a request pursuant to the regulations.

"The public"

The current and draft version of the regulations provide for no definition of the public. But the Directive and the Convention define this important term, and do so in the same way in Article 2(6) of the Directive and Article 2(4) of the Convention. It is recommended that:

- The Department should also include in the Interpretation section, a definition of the public consistent with the Convention and Directive's definition of "the public". This is so no ambiguity arises in respect of the use of the term – as the term "the public" arises elsewhere in the regulations. For example in Article 5(1) of the current and Article 4(1) of draft regulations on the "General duties of public authorities."

"Commissioner"

While no specific issue is raised in respect of the definition proposed, it is simply noted here that the provisions of Regulation 12(2) of the current regulations do not appear to be highlighted as removed in the highlighted changes document – but such a removal is provided for in the proposed regulations. (The provision concerns the dual mandate of the Commissioner for Information and the Commissioner for Environmental Information. It is not clear if this is a deliberate change and what it ultimately envisaged in respect of the configuration of the roles of Commissioner.) I am conscious in this regard of concerns that the mandate is stretched over multiple responsibilities. It is therefore recommended that

- Further discussion and consideration should be facilitated on the optimisation of the role of the OCEI to support effective and robust implementation of the convention, rather than simply as an appeals body, and in configuring the role of the Commissioner responsible for environmental information appropriately and fairly given the potential increased responsibilities.

"Directive"

It is simply noted here that the current regulations provide for a copy of the Directive for reference, in the Schedule. However the proposed draft regulation – remove this detail from the definition and also do not provide a copy in the schedule. Regulation 2(3) of the Draft regs includes a provision stating that "A word or expression that is used in these Regulations and

that is also used in the Directive has, unless the context otherwise requires, the same meaning in these Regulations as it has in the Directive." Therefore it would make sense to provide a copy of the Directive conveniently with the national provisions, as is currently the practice.

It is recommended that

- The inclusion of the Directive is reinstated in the provisions, and the defintion of the Directive should reflect the inclusion of the Directive as an additional convenience similarly to how it is currently done.

"Electronic means"

This is a new definition added to the draft regs. It provides as follows

> "electronic means" means through such electronic systems as a public authority have available for the purposes of these Regulations;

It is submitted this is potentially ambiguous, and may create the idea of systems associated simply with processing of AIE requests. It is recommended that:

- The definition be amended to refer to the full set of systems available to a public authority for the holding and management of environmental information, including archives and backups.

"public authority"

The Directive provides for a discretionary option for Member States to exclude Public Authorities acting in a judicial or legislative capacity.

It would seem that there is a desire to go beyond the categories of public authorities provided for in the Directive. The regulations include a list of public authorities. However, the Supreme Court Judgment in NAMA held the list of public authorities cannot be relied upon as a standalone basis as the definition of public authorities has to come within the definition of the Directive and given the limitations of the European Communities Act, 1972. It is also of concern that the regulations provide for exclusions to the definition of public authority which rely on discretionary decisions under the Directive.

Therefore it is recommend that

- Primary legislation should be used to transpose the requirements, so that the concept of public authority can be clarified as intended, and that issues regarding discretionary exclusions included in the regulations (see Article 2(2) of the draft regulations are resolved.)
- It should also be clarified that public bodies or bodies prescribed under the Freedom of Information, FOI Act, including exempt agencies and partially included agencies are in fact public authorities for the purposes of the AIE provisions. It should also be clarified that the list is non-exhaustive to allow for it to be dynamically added to.
- Ideally there should also be an annual obligation on the Minister to trigger an update to the primary legislation to add to the list of public authorities to keep it abreast of developments.

Scope

The current and draft regulations provide for an exclusion from the scope of the regulations, environmental information, which is required to be made available under any other statutory provision, whether for inspection or otherwise, other than the 3 exceptions listed under Article 3(2).

This is a deeply problematic approach. In summary the scope and minimum requirements in respect of environmental information and access to it and proactive dissemination obligations are set by the Directive and the Convention. Also the provisions transposing and implementing the Convention and Directive and the standards and safeguards for the processing and management of access to environmental information are not necessarily transposed and correctly reflected in other legislation, as they should be in the AIE regulations/legislation, and conflicts and confusion may arise.

It is recommended that:

- The regulations scope is amended to reflect that notwithstanding any other statutory provision on access to information or proactive dissemination obligation which falls within the definition of environmental information and under the scope of the Directive and Convention – that the regulations/legislation transposing and implementing them have precedence.

Part 2, General Duties of Public Authorities

To be clear the Directive provides under Article 3 for general duties for public authorities in relation to requests for access to environmental information, and under Article 7 for duties for public authorities in relation to dissemination of environmental information.

Further specific requirements are detailed in respect of weighing of public interest and separation of materials which can be released from that which can legitimately be withheld, but these make sense to deal with in the more specific context of exemptions. However in dealing with general duties it is unclear why the Department bundles the Article 3 and 7 obligations together.

I also wish to highlight very particularly there are major deficits in how extensive requirements in Article 5 of the Convention are addressed on collection and dissemination of environmental information. The Department's attention is drawn to theses extensive obligations provided in the Convention under its Article 5, multiple elements of which the regulations entirely fail to address. Therefore -

- A thorough audit of the regulations versus Article 5 of the Convention should be undertaken to inform an update of the requirements and provisions implementing Article 5 of the Convention, and ensuring this is provided for in appropriate format to ensure their legality and efficacy, and that training and guidance materials are updated accordingly, together with monitoring and enforcement provisions to ensure a holistic and a comprehensive 'all measures' approach to implementing the provisions of the Convention.

The following recommendations are also made

- Particularly in respect of highlighting the primary importance of proactive dissemination and increasing focus on this as a major function of the public authorities there is merit in keeping the transposition of the Directive's Article 3 and Article 7 obligations separate and distinct, and perhaps including the proactive dissemination obligations as an earlier provision in the transposing provisions to increase focus on it, and in highlighting the further obligations on collection and dissemination of environmental information in Article 5 of the Convention.

There are also subtle omissions in the language transposing the Directive's Article 3 obligations to inform the public on their rights. The draft regulations detail a more *de minimis* approach requiring only that the public authority -

> " inform the public of their rights under these Regulation and provide information and guidance on the exercise of those rights"

Whereas by comparison, the Directive provides for a more qualitative approach based on achievement of relevant outcomes stating (emphasis added)

> " Member States shall ensure that public authorities inform the public **adequately** of **the rights they enjoy as a result of this Directive** and to **an appropriate extent** provide information and guidance and advice **to this end**"

Even more importantly the regulations only operate to impose the duty on the Public Authority to comply, whereas the Directive imposes the obligation on the Member State to ensure public authorities comply. Therefore arguably to ensure effective implementation it is recommended that -

- There should also be a provision requiring not just oversight body or role but one which also executes a qualitative evaluation of the conduct of the public authorities in complying with the imposed obligation on the public authority to inform the public adequate of their rights

and to provide information and guidance to an appropriate extent to that end. The extent to which such duties should be a function of the OCEI warrants further consideration and discussion.

There are significant concerns also in respect of the phrasing on environmental significance and impact in new provisions proposing to deal with these matters in 4 (1) indents (b-d). The language used risks is not consistent with the language of other EU Directives such as in the screening determination for Appropriate Assessment under Article 6(3) of the Habitats Directive "likely to have a significant effect" or in Article 2 of the EIA Directive "likely to have significant effects on the environment". The issue of access to screening determinations is most particularly relevant where negative screening determinations have been made. Yet it is not clear if the regulations are proposing only to provide information in respect of positive screenings. In fact in examining the text of the draft regulations – it is not entirely clear what is proposed and how this relates to other legislation, albeit it is clearly an attempt to address certain of the Directive's requirements under Articl7(2)(e) – (g) but where further specification and clarification is now necessary. This is a key change where the absence of the rationale for the change in the draft regulations is an issue. It is also a classic example of a change that has nothing to do with the findings in ACCC/C/2016/141. The following are recommended:

- There should be a clarification on the specific rationale and intent behind the provisions in draft regulations 4(1) (b) – (d) and exactly what information is intended to be addressed.
- The language used in draft regulations 4(1) (b) – (e) is ambiguous in these provisions and needs to be clarified, and is elsewhere unclear and perhaps incorrect. Ultimately, as mentioned it would seem these provisions are being made in relation to Article 7(2)(f) and (g) of the Directive, but some confusion has arisen given the wording proposed and the failure to provide for updated and current terminology in the prosed transpositions. For example -
    - It is possible to interpret 4(1)(b) of the draft regs as an obligation to inform on how to apply for an authorisation for an EIA project, this may be what is intended, but ultimately is unclear and makes no sense given the further reference in this indent to "environmental agreements". Equally it may be intended to reflect where decisions (authorisations) can be found as per Article 7(2)(f) of the Directive/
    - It is entirely unclear what is encompassed by the term used in indent (b) of "environmental agreements".
    - The language and terminology used in indents (d) and (e) is odd and it is not clear if this is supposed to relate to the EIA directive in which instance the terminology is incorrect and outdated referring as it does to "environmental impact studies"– or if there is some other matters envisaged and what these are in essence. It is also unclear what is intended to be encompassed by the term risk assessments concerning element of the environment and the relationship of these to any particular public authority.
    - A requirement in indent (e) to inform the public on where something "may be located for review" is most odd. It is a bit like obliging a public authority to guess or offer an opinion where something might be found – as opposed to where it <u>can</u> be found for review.
- There should also be provision to provide for information and access in respect of negative screening determinations.

There is also a failure to adequately and properly cover all the requirements in Article 3. For example the duty in Article 3(4) of the Directive to maintain environmental information held by or for a public

authority in forms or formats that are readily reproducible and accessible by computer telecommunications or by other electronic means is not transposed. It is therefore recommended that

- The adequacy of the transposition in the draft regulations of Article 3 and Article 7 of the Directive on requests and proactive dissemination respective needs to be undertaken and the gaps and issues addressed fully.
- In particular obligations such as Article 7(3) in respect of national and where appropriate regional or local reports on the environment need to be transposed and addressed. This requirement goes further than any remit associated with the EPA state of the environment reports required under s.70 of the Environmental Protection Agency Act, 1992, as it extends to the publication obligation of regional and local reports including on the quality of and pressures on the environment.

There is a some confusion in how Article 7(1) and (2) of the Directive are provided for in the draft regulations Article 4(2) with reference to Article 4(1)(f). It is recommended that -

- The obligation to organise the wider set of environmental information in accordance with Article 7(1) of the Directive is clarified, and the subset of information detailed in Article 7(2) is also appropriate addressed within the regulations/transposing provisions.

In respect of Regulation 4(3) on the obligation for a public authority to disseminate information held by it immediately and without delay which could enable the public to mitigate harm arising from an imminent threat to human health or the environment – it is submitted that the provisions here and in regulation 4(4) and 4(5) and are too highlevel. They fail to provide for a credible level of oversight and granular specification to ensure that this important obligation can be delivered upon.

- The regulations should be amended to include an obligation on the public authorities to assess risk of activities and substances on which they hold information on, and to assess and ensure they have mechanisms capable of proactively disseminating information immediately and without delay which could prevent or mitigate against harm arising from such matters which they hold. This necessarily involves the identification of such information and the establishment of procedures and mechanisms capable of delivering on this and an increased level of granularity in the provisions is required to ensure this is adequately provided for. There is also a need to ensure that the relevant exceptions are appropriate dealt with, and information links identified which may be relied upon are adequately maintained.

Regulation 5- Request for environmental information.

The regulations problematically require that requests for environmental information be made in writing or electronic form. This is overly restrictive, and without basis in either the Convention or Directive.

The regulations should be amended to remove the requirement in Regulation 5(1)(a) that requests be made in writing or electronic form, and requirements should be established to provide for requests in other formats – including the maintenance of registers and processes to deal with oral requests, and oral interfaces.

The current and draft regulations problematically require in Regulation 5(1)(b) that the request for environmental information state it is made under the regulations. This is an impermissible

requirement. The ACCC has made findings on communication ACCC/C/2007/21 which make clear in paragraph 34 that -

> "the Convention does not does not require a person making an information request to explicitly refer to (a) the Convention itself, (b) the implementing national legislation or (c) even the fact that the request is for environmental information."

However admittedly in so doing, the ACCC does acknowledge that there may be some practical advantage in a requestor doing so, and in facilitating a quick response from the response of a responsible public authority. This is particularly where only part of the requested information constitutes environmental information as defined in article 2, paragraph 3, of the Convention, or where the relevance of the requested information to the environment might not be obvious at first glance. However it is clear that this requirement to state the request is made under the regulation in the draft regulations and indeed in the current regulations is not permitted.

It is therefore recommended that:

- The requirement in Regulation 5(1)(b) to state the request for environmental information is made under the regulation should be deleted. However, a provision might be included which suggests a requestor may choose to indicate they are making a request for environmental information and/or to include reference to the relevant provisions, but the provisions must makes it clear there is no obligation to do either of these.

- Public Authorities as a consequence of this are necessarily required to be sufficiently expert in being able to identify a request which falls within the AIE regime, and to assist a requestor accordingly. It is important therefore to ensure the request is dealt with under the correct regime – as to do otherwise may compromise the interests and rights of a requestor – including in respect of the additional underpinning of their request by the AIE Directive and the Convention with the associated implications for access to justice under Article 9(1) and 9(4) of the Convention.

The draft and current regulations problematically require the name of the applicant. There is no valid legal basis for this. The only practical requirement is to facilitate contact and liaison with the requestor. Such a requirement for disclosure of the requestors name, ,is also in contrast with the meticulous efforts to protect confidentiality of resources in public authorities and commercial information and operators or other third parties.

There may be very valid reasons why a person or group requesting environmental information do not wish to have their name published or disclosed. Particularly in the context of SLAPP and a range of intimidatory practices aimed at deterring members of the public from exercising their rights – it is important that confidentiality and/or non-disclosure of names is respected. It is therefore recommended that -

- Regulation 5(1)(c) should be deleted. Additionally regulation 5(1)(d) should be amended to make clear a requestor does not need to disclose their name and need only provide contact information which could be an address for receipt of electronic mail or information relating to the request.

The obligation to provide environmental information on request is according to Article 3(2) of the Directive to be "as soon as possible" and within one month of receipt of the request, or within two months if the volume and complexity of the request are such that the one-month period cannot be complied with. Therefore the obligation is as soon as possible – and the one and two-month deadlines are the upper limits. However it would seem that the upper limits are generally taken by Public Authorities to be the timeframe and targets for dealing with the request.

It is recommended that -

- Regulation 5(1) should be amended to also encourage a requestor to stipulate the timeframe in which they need the information requested. It should also be make clear the requestor is in so doing under no obligation to state his/her interest in making a request for environmental information, but prompt them to indicate a considered timeframe in which they need to receive the information in order for them to be able to utilise it effectively. It should encourage them not to be conscious of the burden on public authorities and to not abuse the stipulation of a timeframe which they wish the public authority to comply with, in order that other more urgent requests are not potentially compromised.

  This will add further focus to the fact the obligation on the public authority is provide the information 'as soon as possible' and the upper timelimits indicated within the Directive, and the further requirement in Article 4(2) of the Directive for the public authority to 'have regard to any timescale specified by the applicant'.

Regulation 6- Action on Request.

Regulation 6(1) – provides an obligation to make available environmental information held by or for it and stipulates this is notwithstanding other statutory provisions, and subject only to these regulations. This begs a question about the limitation envisaged by regulation 3(1) on scope discussed earlier, and it might suggest that regulation 3(1) is clearly at odds with this – or that there is some confusion, including on my part, on how it is to be interpreted given the rather difficult phrasing involved.

On first glance there is an inherent issue within the upper timelimits specified in the Directive and Convention and the requirements for reviews to be timely under Article 9(4) of the Convention. If the processing of an initial request, and/or the internal review runs to a timeframe which compromises the purpose for which the information has been requested – it becomes effectively unrecoverable to deliver a timely review where timeliness connotates a relevant and effective timeframe. The issue is however created by timeframes for public participation which are not configured in line with the upper limits of the timeframes for requests in the Directive and Convention and given the failure to provide for compatibility within the pillars. The absence of measures to provide for a stay on the ticking of the clock for a participation window, or to allow for further submissions when information is finally become available are complex issues to manage in the context of a world which is intent on facilitating faster decisions for authorisations, and yet which fails to commit to ensuring faster decisions to enable the public engage effectively in exercising their procedural rights to participate. While a requestor may seek information in a timescale which is consistent with the public participation windows set – realistically he/she may have to wait at least a month, with a possible further month for an internal review, before they can even hope to pursue an appeal to the OCEI. Yet timeframes for public participation are typically 4, 5, 6 or 8 weeks depending on the development

type. This is why it was suggested earlier that a key and pragmatic approach must be to focus on improved proactive dissemination, management of information and increased compliance with requests. There is also merit in considering what value is delivered by the internal review step. I have experienced cases where it has reversed an earlier unfavourable decision, but empiracle evidence on the extent to which this occurs and why authorities have failed to make the correct decision in the first instance requires serious focus if there is to be any realistic chance of impacting the timeframes for requests and ultimately ensuring the timeliness of reviews.

The Directive in Article 3(4) refers to making the information available in in specific forms or formats – whereas the regulations in 6(3), replace the term "format" with manner. It would seem that the term "manner" has the potential to introduce a more significant distinction, and is a departure from what the Directive actually provides for. It is therefore recommended that -

- That the term "manner" in regulation 6(3) be replaced with "format" where it pertains to the requirements transposing Article 3(4) of the Directive.
- The caveat to the start of regulation 6(3)(c) should be removed which states "for the purposes of subparagraph (a),"

It is therefore recommended that:

- Clarification be provided in relation to regulation 3(1) and its wording and how this sits with regulation 6(1), noting my earlier comments in relation to:
    a) ensuring that the scope of environmental information provided in the Directive and Convention is respected, and
    b) the importance of keeping the scope of the provisions transposing the Directive and implementing the Convention sufficiently broad to ensure the relevant standards and safeguards required sit with the relevant legislation on environmental information.

In respect of the reference to provision of the information in another form which is reasonable - in regulation 6(3)(a)(ii) – it is recommended that -

- Considerations relevant to what constitutes reasonable in terms of the other forms should be made clear at the very least in guidance and training materials, and need to be informed by the perspective of the requestor and not simply by what is convenient for the public authority.

In refusing a request in whole or in Part – there are concerns on the timeframes indicated in Regulation 4(a). It is recommended that

- Regulation 4(a) be amended so it properly reflects the timelimits indicated in the last paragraph of Article 3(4) with reference to paragraph 2(a) of Article 3. This would seem to means that at the very least the refusal should be provided as soon as possible, and may also require it be delivered with regard to any timescales for the request stipulated by the requestor, and an upper limit of one month. Whereas the regulations simply indicate an obligation to provide the refusal "not later than one month". It is imperative that refusals in particular are handled very promptly or expeditiously as there is more likely to be follow-on activity arising from them, and the overall system context of the timeframes for the process need to be borne in mind. Public Authorities need to be conscious of and reminded in training of how their action or delay being a contributory factor in how the overall timeliness of Ireland's response to environmental information requests will be evaluated, and not be focused purely on their small window of operation.

Regulation 6(8) is particularly problematic. Under the Directive Article 3(3) – a public authority may engage on a request which is "formulated in too general a manner" to "specify the request" and to "assist the applicant in doing so." It does not entitle the public authority to invite the applicant to make a more specific request as provided for in Regulation 6(8)(a). Even more concerningly the subsequent paragraph (b) of the regulations proposes to reset the clock – from the time this new request is received, and paragraph (c) operates to withdraw the original request when a more specific request is made. Under the Directive it remains open to the Public Authority to refuse the request if it remains formulated in too general a manner. Such a formulation should be immediately apparent to a public authority who should engage promptly to ensure the request is specified. This does not appear in the Directive to be a carte blanche to reset the clocks, and such practices will invariably backfire on genuine endeavours to refine requests in the interests of all concerned.

There is a real danger here on abuse of bona fide positive engagement to clarify or refine requests, and to really compromise the timeframes in which decisions are to be made.

It is therefore recommended that

- Regulation 6(8)(a) be reworded to reflect the terminology of the Directive invite the applicant "to specify a request" and sub-paragraphs (b) and (c) be deleted.

Regulation 6(9) is not consistent with Article 8(2) in that the regulations appear to require the applicant to specify a requirement for information on measurement procedures in order to be provided with such information. Whereas Article 8(2) of the Directive provides that where information is sought on Article 2(1)(b) that is " factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);" that the public authority shall automatically additionally reply as follows:

> "reporting to the applicant on the place where information, if available, can be found on the measurement procedures, including methods of analysis, sampling, and pre-treatment of samples, used in compiling the information, or referring to a standardised procedure used."

This potentially goes beyond merely replying to the information sought and provides a qualitative dimension to the experience of the information on the factors provided, by accompanying this with information on how the information has been collected which may have material implications for its quality. That is consistent with the title of Article 8 of the Directive which is "Quality of environmental information". Therefore -

- The requirements of Article 8(2) of the Directive should be used to replace Regulation 6(9). Additionally, consideration should be given to creating a specific regulation on quality of environmental information consistent with the Directive rather than leaving this provision within Regulation 6. In that regard, it may be also appropriate to move Regulation 4(1)(h) to any such new regulation on quality to maintain consistency with how Article 8 of the Directive is configured.

Regulation 6(10)-(12) provide for some rather problematic provisions in respect of rights of third parties given how they are inexactly transposed from the Directive and how they rely on what appeart to be discretionary exemptions which may not be implementable via regulation.
The extent to which the public authority is obliged under regulation 6(10) to set out for a third party why the release of information would adversely affect their rights appears very odd. It is

appreciated that there can be valid reasons to contact a third party but the extent of provisions here goes way beyond what is provided for in the Directive.
Additionally, the basis for the requirement in Regulation 6(11) for advance notification of a public authorities intended decision to a third party is unclear – albeit it would seem to arise from the exemption provisions in Article 4(2)(f).
At time of writing a number of unresolved concerns have arisen in respect of Regulation 6(12)(a) Rather than set out these unqualified concerns at this point it is therefore simply recommended here that -

- The basis of regulations 6(10)-(12) be examined and further considered and that any further relevant EU Directive being given effect to here – is referred to clearly in the AIE provisions.

Regulation 7 – Grounds for refusal of environmental information

As highlighted earlier in this submission – the grounds for refusal of environmental information are not mandatory requirements under the AIE Directive. Therefore serious concerns are raised in this submission, as in the earlier consultation on whether the provisions on grounds for refusal of environmental information requests can be transposed via secondary regulation.

It is also unhelpful and confusing that certain grounds for refusal are provided in regulation 6 (eg regulation 6(5) where the information is not held by the public authority, while the majority are provided under regulation 7. There is a real risk of confusion and error in such inconsistencies in the structuring. Also in how the regusals have been structured and positioned in the regulations as have there is a risk that the important provisions on emissions over-ride of certain potential refusals, and the obligations to consider the exemptions restrictively and to always weigh the public interest will be overlooked or lack the focus they deserve.

It is therefore recommended that

- The structuring of refusals and further checks on the emissions overrider, weighing of public interest etc all be reviewed with a view to simplifying and clarifying the decision-making process and creating more consistency with the Directive to avoid confusion, and aid understanding of the obligations.

Regulation 8 – Incidental provisions relating to refusal of information.

Article 4(5) of the Directive requires that information requested shall be made available in part where it is possible to separate out information falling within the scope of

- paragraph 1(d) i.e. (the request concerns material in the course of completion of unfinished documents or data)
- paragraph 1(e), i.e. the request concerns internal communications, taking into account the public interest served by the disclosure
- paragraph 2

from the rest of the information.

- Concerns have been raised that regulation 8(3) does not conform to this requirement and further consideration is needed on this which at this point I simply do not have the capacity to address or comment further on. I therefore recommend that
- The consultation review affords some particular consideration to these draft regulations in 8(3).

Regulation 9 - Internal review of refusal

As submitted earlier – it is recommended that

- Specific evaluation be given to the efficacy and impact of the internal review procedure and the implications it has on the timeframes for access to environmental information considering empirical data on the process and how the impact of internal reviews decisions could be brought to bear on the quality of the initial decisions. This is with a view to determining the merit of dispensing with the internal review process with a view to eliminating a potentially significant delaying factor in advancing the pathway to the information sought in requests

Regulation 10, Appeal to Commissioner for Environmental Information.

It is noted here that as mentioned previously the Convention provides for the rights of the public to environmental information on request and the definition of the public encompasses more than natural and legal persons The Directive refers to an applicant which is defined as a natural or legal person. The in moving to access to justice provisions, the Convention refers in Article 6(1) to an applicants right to a review, and Article 9 of the Convention refers to a person's right to review.

It is therefore simply recommended here that

- Further consideration be given to who is entitled to appeal a decision to the OCEI.

It is also recommended that

- The basis on which the Commissioner extends the time for initiating an appeal should also be based on a requirement to consider fairness and equity in light of the over-arching characteristics for a review required under Article 9(1). I am conscious where the ability to secure a review has been compromised by confusions created over the relevant deadline or other matters which put the requestor at a disadvantage.

The implications of regulation 10(3)(a) and (b) which appear to be new provisions in allowing the OCEI request that a public authority to furnish further reasons following receipt by the OCEI of an appeal are unclear. It is recommended that

- The rationale and purposes of these provisions in Regulation 10(3)(a) and (b) need to be clarified so they can be evaluated and commented on properly.

Regulation 10(4) provides for the suspension of the period of the review (apparently the counting of the time for the review) – where the Commissioner is endeavouring to secure a settlement for such period as may be agreed with the parties concerned, and if appropriate allows for the discontinuation of the review.

Serious concerns arise here. A requestor/applicant may be under significant pressure to engage in a settlement in the hope of securing the information – but where the potential release and parameters for the initiating of the settlement discussion are entirely within the discretion of the OCEI, and where there is absolutely no guarantee that a settlement satisfactory to the requestor will be realised. Further the provision allowing for the discontinuation of the review facilitates a distortion of what is actually happening in the system. As it happens there is already an issue where certain authorities refuse information and only when the OCEI is about to make a decision against them – they provide the information with a view to avoiding a precidentory decision.

The reliance on remittal in the provisions has to be of serious concern for the reasons which R2K has set out robustly, in that a public authority can run through a full menu du jour of reasons for refusal with the OCEI's focus being limited to the one before it. Thus a requestor can be endlessly frustrated in accessing the information sought. The ACCC viewed the role of the OCEI as being a review for the purposes of Article 9(1). It is unquestionably therefore bound to deliver a review consistent with the characteristics of Article 9(4) of the Convention. Remittal does not equate with the requirement for a remedy to be adequate and effective as per Article 9(4) of the Convention. Therefore I concur with the position of R2K and recommend that

- The OCEI should and must be afforded the powers to fully determine a request the subject of an appeal which has come before it.
- It is incumbent on the Department and the OCEI to justify why a system of mandatory remittal is justified as provided for under Regulation 10(7) of the draft regulations in the context of:

    a) the issues with the system as it is being experienced, including extensive remitals as reported by R2K,

    b) the implications this has on adding further cycles of delay for requests for environmental information, and

    c) the undermining of any adequate or effective remedy resulting from the OCEI review, given the lack of any express powers for the OCEI to ensure the request does not simply disappear into an interative black-hole in the public authority, punctuated by further appeals to the OCEI.

The proposed timelimit of 4 months in Regulation 10(8)(a) for the OCEI to make a decision under regulation 10(5) appears as entirely unacceptable and is no adequate resolution to the findings in ACCC/C/2016/141 by the ACCC that the OCEI review were not timely in accordance with Article 9(4) of the Convention. There is no empirical data provided as basis to defend or justify the proposed 4 months. It appears entirely arbitrary in nature and bears no reflection on any meaningful evaluation of the timeframes in which information is likely to be required by a requestor.

It is even more egregious that the regulation 10(8)(b) the provides for the puncturing of the timeline for the review for a number of reasons.

- Sub paragraph (i) allows it be suspended to allow a public authority up to 3 weeks to provide new reasons for its refusal where the OCEI is not satisfied with the original reasons given. There is no clarity on what the OCEI can will or should do, if the Public Authority does not comply with an order under 10(3) – at all or provides another set of unsatisfactory reasons.
- Sub paragraph (ii) allows for it be suspended during settlement talks – taking the pressure off the OCEI and any possible pressure on the Public Authority in achieving a resolution.
- Sub-paragraph (iii) allows for it be suspended where further information is requested by the OCEI of the requestor or some third party to the appeal – where the latter could hold the whole appeal in an indefinite limbo, until all the information requested has been provided.

The ACCC's findings in ACCC/C/2016/141 indicated clearly that the fact the OCEI conducts a review of both fact and law does not excuse it from delivering on a review which must be timely[14]. To allow for the counting of the time of the review to be suspended, and to given the OCEI discretion on the

[14] Paragraph 106 of the findings in ACCC/C/2016/141

various mechanisms for doing this, as is proposed in the draft regulations is to render any requirement to be timely null and void.

It is worth nothing that there is no specific legislative barrier to the OCEI making the decisions it is currently entitled to make in a timely way – but in fact its procedures appear to be such that it simply does not do so, nor does it feel obligated to do so.

It is however notable that mandatory timelimits are to be proposed now for certain planning decisions in the Draft Planning and Development Bill. So it would seem only appropriate that

- The environmental information system be configured to engage accordingly with the timelines proposed for participation and mandatory decisions, if Article 3(1) of the Convention is not to be blatantly flouted.
- Much greater focus in the regulations and in the wider set of implementation measures is needed to drive much greater progress in proactive dissemination of information requirements, and in making every effort to minimise the necessity for having to request environmental information, and by making it generally available.
- The OCEI needs to be empowered to work through obstacles and to be motivated to do so. This means provisions giving the OCEI Powers in respect of: taking evidence under oath; powers to require the production of information; powers to be able to issue relevant directions and to be able to undertake the necessary investigations and hearing at the requisite level to determine disputed facts – are all essential.
- Additionally, the OCEI needs to be freed up from the burden of dealing with persistent repeat offenders in the community of public authorities who are soaking up resource, and it needs to be able to implement dissuasive penalties on such bodies and to have powers to be able to work around the obstacles thrown up.
- Specific consideration is needed on the matter of litigation costs – including for applicants who are notice parties to proceedings where the OCEI is acting effectively on their behalf. Some provision on this appears to be provided under regulation 10(13)(a) but there is a lack of clarity on the extent to which this has been or would be used in earnest, and there is a lack of specification in the regulations of potential reasons to prompt the Court to make any such order. A non-closed list should be included – allowing for further discretion by the Courts including in the interests of justice, and fairness and equity.
- The potential limitation on the engagement of the OCEI given concern over its litigation costs is another issue which may well be distorting the approach to the resolution of requests, and further consideration is needed to establishing the extent to which that may be an issue and addressing it accordingly.
- Regulation 10(10) provides for discretionary powers of the OCEI to compel certain things of the public authority. But the extent to which these powers are or are not effectively deployed is not well documented or evidenced. The utilisation of the powers of entry and to secure and take copies of information "found" may be very powerful if used in a way which triggers wider expectations that such powers will be used in earnest. There is a seeming lack of clarity on what powers of search and seizure pertain here and what additional powers might be advantageous and appropriate.
- Very, very limited powers of enforcement are provided in respect of the powers of the OCEI. For example under regulation 10(12) in respect of decisions of the Commissioner under Regulation 10(5). Further consideration is needed to enhance the regulations in respect of enforcement powers which are dissuasive and effective for the OCEI in assisting the

Commissioner in realising meaningful and effective remedies to the reviews requested in appeals.

- Indicative timelines should be specified for decisions of the Court under Regulation 10(12).
- The absolute discretion of the OCEI on the procedures for conducting an appeal under the regulations does not appear entirely appropriate or satisfactory. While of course the independence of the appeal function must be protected – it would be important to circumscribe that discretion with requirements reflecting the core characteristics for review which are required under Article 9(4) of the Convention.

Regulation 11 – Appeal to High Court on a point of law

The following are recommended

- Despite the findings in ACCC/C/2016/141 in respect of Court reviews also not being timely, it is notable that no timeframe is proposed in the Draft Regulations for court appeals, nor is there even a requirement that the appeal process be "timely". There is simply a requirement in regulation 11(6) to act as expeditiously as possible consistent with the administration of justice in determining any application made to them under the Regs.
- There should be an explicit requirement for the Court to provide an adequate and effective remedy. It is unclear why the issue of Court directions hasn't been appropriate tabled in these draft regulations further to the findings of the ACCC in ACCC/C/2016/141 in paragraph 133 (b) which found that

  > "133. The Committee finds that:
  > ….
  > (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"

- With a view to facilitating ultimate resolution – I am conscious that there are proposals that the window for appeals to the High Court should be reviewed, providing for a shorter window for public authorities, with a longer window for applicants, given the relative disadvantage between the two.
- Further discussion would be useful on whether the strict time limitation on the initiation for an appeal under Regulation 11(2) should be extended for members of the public to allow circumstances where there is good and sufficient reason for an appeal to be made late – using similar language to that in the current Planning and Development Act, 2000 perhaps as a basis. Other relevant considerations would include: where it is in the interests of justice to do so; and where it is necessary or appropriate to support compliance with EU law obligations etc.
- In regulation 11(7) for the OCEI's actions following the determination by the Court the total absence of timelines needs to be addressed, together with a requirement for timeliness and a requirement to ensure the adequacy and effectiveness of remedies. Additionally the OCEI needs to be provided with powers to compel the Public Authority to then make available environmental information to the applicant.

Part 5 Guidelines and Fees

Regulation 12- Guidelines

The following are recommended:

- The requirement to issue guidelines should be with the OCEI, with supporting training provided in conjunction with the Department and which involves a cross section of stakeholders.
- Key metrics to evaluate the efficacy and compliance of the system for environmental information need to be identified and collection of the relevant data and its analysis enabled, with a view to the continual improvement of system.
- The adequacy, correctness and efficacy of the Guidelines and Training need to be evaluated on an annual basis at least in the context of the quality of decisions arising from the system, and meaningful metrics which capture relevant information on the timeframes for different aspects of the system and the timeframes to secure a final outcome for an overall request. The guidance and training should be updated accordingly and at least bi-annually.
- A formal review of the AIE provisions with an associated public consultation should be provided for every 3 years, and relevant data and metrics provided to inform that consultation and review.
- Case law updates and decision updates should also be provided for in appropriate formats by the OCEI.

Regulation 13 – Fees of Public Authorities

As highlighted earlier the AIE Directive does not provide for mandatory requirements in respect of the making of fees. The charging of fees by public authorities is a discretionary matter under Article 5(2) of the Directive. Therefore it is serious questionable as to whether the proposals in the draft regulations (or in the current regulations) are lawful, in that they effect a policy decision to permit Public Authorities to charge fees.

A recent communication to the Compliance Committee against Ireland, ACCC/C/2023/199 highlighted also findings of the ACCC in respect of Spain in ACCC/C/2008/24 and Moldova in ACCC/C/2017/147 where similar issues pertain in the Irish system of charges relating to AIE.

It is of concern that in the context of the Department apparently being of the view it can provide for fees and charges, that the issues identified as impermissible have not been incorporated into the Draft Regulations to ensure any charges arising do not fall foul of the same issues.

It is recommended therefore that -

- There be further engagement to discuss not just the issue of the use of regulations on the matter of charges, but also the relevance of the findings in the communications for Spain in ACCC/C/2008/24 Moldova in ACCC/C/2017/147 on the matter of the fees typically charged by Irish public authorities, including on: search and retrieval costs; the reasonableness of the fees charged; and on the deterrent effect for persons wishing to request and secure an environmental information.
- Additionally, draft regulation 13(3) makes reference to a list of fees specified under Regulation 14 for the provision of copies. However, Regulation 14 provides for no such list.

Respectfully, this all begs serious questions on the extent to which these considerations and their implications have been rigorously considered, and the opportunity to engage constructively to head issues off at the pass so to speak with a view to avoiding issues which will create

administrative burdens, delays and risk non-compliance, and compromise the rights envisaged under the Convention and the environmental benefits which flow from that.

Regulation 14- Fees on Appeals

It is submitted that no useful purpose is served by the appeal fee for the OCEI. The fee proposed remains €50, with a fee of €15 proposed for certain applicants who can evidence certain disadvantage through having a medical card, or being a dependent of a holder of a medical card, or a person who stands to be discriminated against by virtue of the disclosure.

Notwithstanding this reduction – there is no provision to allow for consideration if the €15 is prohibitively expensive for those parties, or if the €50 is prohibitive for the parties who fall to pay €50. The OCEI's review is a review for the purposes of Article 9(1) as confirmed by the ACCC in ACCC/C/2016/141. Clearly a review under Article 9(1) also requires that the review be compliant with all the characteristics of Article 9(4) of the Convention, including that the review is not prohibitively expensive.

The draft regs do not ensure this either at the time of paying the appeal, or when the appeal is determined and even if the applicant wins. It is important to note in this context that given the standard of legal argument which pertains to appeals – that there are cumulative costs which an applicant is exposed to.

Further the provisions for a lower rate of appeal fee – apply only to natural persons – so they are not available to Civil Society Organisations or even to eNGOs.

The overhead of processing the fee appropriately would far outweigh the receipts.

It is therefore recommended that

- The appeal fee be abolished and that the draft regulations be revisited to ensure that appeals are not prohibitively expensive for the applicant. The operation of some form of cost protection and recovery are essential components to this. To be clear a legal aid scheme does not necessarily suffice as a replacement to such measures, albeit it may provide some benefit as an additional or ancillary mechanism. But if the Department is willing to engage in a meaningful discussion on how a solution might be configured this would be welcome – particularly in the context of the deeply dysfunctional and counter-productive other changes to special cost rules are taking in the Planning and Development Bill.

Regulation 15- Revocations

It is unclear at time of writing why the requirements of Regulation 12(1) and (2) cannot be restated to avoid the complications associated with reference to the 2007 regulations. Clarification on this would be appreciated.

Regulation 16 – Transitional Provisions

The practical and legal difficulties of moving and changing provisions with matters still in the pipelines and works of the earlier regime are of course understood. However, in the context of the backlogs and the potential for the engagement of the OCEI to focus in particular on the timeliness requirement and findings of the ACCC in ACCC/C/2016/141 – it would seem important and desirable for some practical operational and procedural solutions to be engaged to limit the extent to which

existing requests need to continue to suffer under the old regime. To be clear – that is not intended to imply there is improvement in the Draft Regs by way of response to ACCC/C/2016/141 – as that is regrettably not the case. In fact the contrary is true. I regret to conclude that the proposals as they pertain to those findings are both inadequate and problematic.

8. Conclusion:

I thank the Department for its consideration of these remarks and for the courtesy of its engagement throughout this consultation. I earnestly hope that this submission marks the end of one formal process and facilitates a more proactive dialog and approach on how best to address the provisions and how an overall solution of measures can be designed and implemented which will have a meaningful and effective approach in improving Ireland's approach to environmental information as an important legacy and first step as we move on from the 25th anniversary of the adoption of the Convention and the 11th anniversary of its ratification in Ireland in 2023. I remain available to engage and to facilitate engagement in that vein.