Coimisinéir um Fhaisnéis Comhshaoil
Commissioner for Environmental Information

Public Consultation: Review of the European Communities (Access to Information on the Environment) Regulations 2011 to 2018

Submission of the Commissioner for Environmental Information

1. The Office of the Commissioner for Environmental Information (OCEI) welcomes the opportunity to make a submission in response to the second public consultation on the review of the European Communities (Access to Information on the Environment) Regulations 2007 to 2018 (the Regulations). The OCEI was established under article 12 of the Regulations for the purpose of providing an external administrative review procedure in accordance with Article 6(2) of Directive 2003/4/EC on public access to environmental information (the Directive) and Article 9(1) of the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Convention).

2. This review of the Regulations is an opportunity to improve the operation of the access to information on the environment (AIE) regime, taking into account the experience of all parties over the last decade, to clarify outstanding matters of interpretation and to bring the Regulations within one consolidated piece of legislation. Our proposals as set out below are important and pragmatic amendments to the draft Regulations. We consider the implementation of these proposals will result in furthering the objectives of the Directive and the Convention, as set out in Article 1 of each of those instruments.

3. We also enclose a copy of our previous submissions, dated 16 April 2021. While we reiterate all points raised in those submissions, we have highlighted in this document the key issues that arose in our review of the new draft Regulations as follows:

    a. Timeliness of Review
    b. Clarification of the powers of the Commissioner
    c. Clarification on the exemption provided for in article 7(1)(a)(iv)
    d. Clarification on appeal timelines
    e. Clarification on the duty to separate out information for release

Timeliness of Review

4. We are cognisant of the findings of the ACCC dated 9 November 2020, in particular regarding the failure on Ireland's part to comply with the requirements of the Convention by an absence of measures to ensure that appeals to the OCEI are resolved in a timely manner. Progress has been made in recent years, with a significant increase in the dedicated staffing resources of the OCEI. We have succeeded in delivering a large increase in the number of formal decisions issued and appeals finalised. In 2021, 75 appeals were finalised while in 2023, 200 appeals were finalised by the Office. We are committed to continuing to improve our operational efficiency.

5. The Office continues, however, to face challenges due to the large increase in demand for our services in a relatively short period of time and the time it takes to increase resources to a commensurate level. The Office recorded a 158% increase in the number of new appeals accepted in 2022 over 2021 (136 appeals accepted in 2021, 352 appeals accepted in 2022). The high demand continued in 2023, with 319 appeals accepted, representing a 134% increase on 2021. This has unfortunately created a situation where the Office is working through a large backlog of cases. Many of these cases concern large amounts complex environmental information, or novel legal issues. This Office has a *de novo* jurisdiction, which requires a sufficiently detailed review and investigation into all cases received in order to comply with the requirement for fair procedures. The length of time required to carry out a review will vary depending on the individual case.

6. In our previous submissions, we suggested that the new Regulations should include a duty on the Commissioner to make a decision in a timely manner and that a package of measures was needed to achieve this, including provisions to ensure that public authorities give adequate reasons for their decisions, improve public authority engagement and to reduce OCEI participation in Court appeals.

7. In the new draft Regulations, the following has been added:

> *"10(8)(a) A decision by the Commissioner under paragraph (5) shall be made in a timely manner and, insofar as practicable, not later than four months after the date of receipt by the Commissioner of the application for the review concerned.*
>
> *(b)The timeline in paragraph (8)(a) shall be suspended—*
> *(i)where paragraph (3) applies, until such time as the public authority complies with the direction under paragraph (3)(a),*
> *(ii)where paragraph (4) applies, or*
> *(iii)where further information is requested by the Commissioner from the applicant or a third party to the appeal, until such time as the information requested is provided."*

Recommendations

8. Our view is that the four-month timeline is not achievable in the vast majority of appeals that come before our Office. We take very seriously the findings and recommendations of the ACCC which criticised the absence of any requirement in Irish law for the Commissioner to take a decision within a certain time frame or to act in a timely manner. We consider the stating of "*four months*" to be impractical and unrealistic from an operational perspective.

9. The ACCC contrasts the position of the Commissioner with that of the Information Commissioner under the Freedom of Information Act 2024. We note that the FOI Act has an obligation to provide

a decision within four months. In 2022, 54% of reviews before the Office of the Information Commissioner were closed within a four-month period. We have strong reservations about the Department's proposal to mirror in Regulation 10(8)(a) the four-month timeframe as stated in the FOI Act, and apply it to decisions by the Commissioner under AIE regime. The FOI regime and AIE regime are different regimes, and in our experience consideration of appeals under the AIE regime is often more time consuming than reviews under the FOI regime. In our view, our experience should carry particular weight in this context, as the Commissioner also holds the office of Information Commissioner and the Senior Investigator in this Office is also a Senior Investigator in the Office of the Information Commissioner. We are well placed to identify the operational similarities and the differences between the regimes.

10. Our experience is that reviews under the AIE regime are often more time consuming due to factors such as the volume of records involved; the complexity of the subject matter; a lack of clarity on how the law should be interpreted; delays in receipt of information from the parties; strongly contested disputes on threshold jurisdictional issues; and the frequent requirement to consult third parties. Some of these factors we hope will be improved by the new AIE Regulations, but it remains that the parties to AIE appeals, in our experience, raise more novel legal issues and often involve large amounts of complex information which will inevitably take longer than an appeal under the FOI regime. The differences between the nature of the regimes mean that, in our view, mirroring the approach of the FOI regime in respect of timeliness is not appropriate.

11. In particular, there are a significant number of bodies that are covered by the Regulations that are not FOI bodies. Some of these hold significant amounts of environmental information. One of the key issues for these bodies is the threshold issue as to whether they are a public authority or not. For such entities it can also be difficult to use data storage systems that are not designed for an access regime to comply with the transparency obligations in the Directive.

12. The Commissioner carries out his function in accordance with Article 6(2) of the Directive, and the second paragraph of Article 9(1) of the Aarhus Convention on which that provision is based. The OCEI conducts a review which is not purely administrative but is quasi-judicial, with safeguards to guarantee due process, in a manner which is independent of both the Government and any private entity. As such, the OCEI is not required to carry out an 'expeditious' review in accordance with Article 6(1) of the Directive, but carries out a review under Article 6(2) as an 'independent and impartial body established by law'. The Aarhus Implementation Guide recognises, at p.192, the difference between an expeditious and a timely review. It remains our firm view that the requirement that should be placed on the Commissioner is one of *timeliness* in line with the wording of Article 9(4) of the Aarhus Convention, rather than a mirroring of the requirements contained in the Freedom of Information Act 2014, which would not be realistic. This would provide flexibility in relation to complex investigations which may take longer than usual.

13. While the OCEI continues to work to reduce the number of appeal cases on hand, in the last 12 months just over 11% of cases were issued with a decision within 4 months (this number does not include cases that were withdrawn or settled informally). Our primary concern is that the introduction of a four-month timeframe may prove counterproductive and give rise to disputes around compliance which might in turn give rise to further delays around the resolution of appeals.

14. In the event the "*four months*" timeline remains within the Regulations, we propose that this time should run from the point at which all information relevant to the appeal is received by the Commissioner. Regulation 10(8)(a) should be amended to read:

> *10(8)(a) A decision by the Commissioner under paragraph (5) shall be made in a timely manner and, insofar as is practicable, not later than four months after the date of receipt by the Commissioner of ~~the application for the review concerned~~ information that, in the opinion of the Commissioner, is sufficient to enable the appeal to be fairly determined.*

15. We also suggest that Regulation 10(4) should be amended to read:

> *10(4) The Commissioner may at any time endeavour to effect a settlement between the parties concerned and may for that purpose suspend, for such period as the Commissioner considers reasonable and appropriate ~~agreed with the parties concerned~~, and if appropriate discontinue, the appeal concerned.*

16. We propose that, as an alternative to providing a timeframe within which a decision should be made, the Regulations could place an obligation on the Commissioner to provide regular updates to the parties concerned on the estimated timeframe for a decision. Regulation 10(8)(a) should be amended to read:

> *"10(8)(a) A decision by the Commissioner under paragraph (5) shall be made in a timely manner.~~insofar as practicable, not later than four months after the date of receipt by the Commissioner of the application for the review concerned~~*
> *(b) Where it is not practicable to make a decision within four months of the date of receipt by the Commissioner of the appeal concerned, the Commissioner shall notify the parties of the estimated timeframe in which a decision may be made and the reasons for the estimated timeframe.*
>
> *(c) Where paragraph (b) applies, the Commissioner shall notify the parties of any change to the estimated timeframe and the reasons for it at intervals of four months until such time as a decision is made or an appeal is withdrawn."*

17. We also note in this regard that the Superior Courts, which were also the subject of the ACCC's recommendation in ACCC/C/2016/141, are subject to a similar obligation under section 46 of the

Courts and Court Officers Act 2002 (as amended) to report on the progress of reserved judgments upon the expiration of a specified timeframe as opposed to a definitive deadline.

18. We are also concerned about the practical operation of the provisions of Regulation 10(8)(b)(iii). First, the most significant cause of delays in completing appeals arises from the OCEI's engagement with public authorities, whether on the provision of records or in fully addressing questions raised by the Commissioner. There is no reference to public authorities in Regulation 10(8)(b)(iii).

19. Second, and moreover, the Commissioner's engagement with parties to an appeal varies substantially depending on the requirements of the appeal. The Commissioner has an inquisitorial, rather than an adversarial, remit. In some instances, the investigation follows a simple path, with one set of submissions sought and received from the public authority and the applicant. However, more often than not, the engagement with the parties is more complex, with several exchanges of correspondence with each of the parties. This more complex engagement may be necessary in order to properly notify parties of material issues arising in the case, including developments in the law, or to offer parties the opportunity to comment on evidence identified by the OCEI. It would be operationally extremely challenging to apply Regulation 10(8)(b)(iii) in such a case. It could require the OCEI to source and implement a different ICT system, with all of the significant challenges that would entail. Alternatively, a substantial portion of each investigator's time may be spent recording and monitoring whether the time limit has been suspended each time correspondence is sent or received, taking that investigator away from the core work of recommending a decision on the appeal itself. The investigator may also be required to engage with the parties on whether a given piece of correspondence meets the test in Regulation 10(8)(b)(iii), again taking that investigator away from the core work of recommending a decision on the appeal itself.

20. As a result, it is our view that these 'stop the clock' provisions would adversely impact on the amount of appeals determined by the OCEI, which is the opposite of what it is intended to achieve.

Clarification of the powers of the Commissioner

Power to direct the provision of a statement of reasons

21. In the new draft Regulations, Regulation 10(3)(a) has been amended to include the following: "*Following receipt of an appeal under this Regulation, where the Commissioner considers that the reasons for the decision provided in accordance with Regulation 9(4)(a), or in the case of Regulation 6(4)(c), are not adequate, the Commissioner shall direct the public authority concerned to provide to the requester and to the Commissioner, in writing or such other form as may be determined by the Commissioner, a statement of reasons which complies with Regulation 9(4)(a) or 6(4)(c), as the case may be*."

22. We welcome this amendment which was proposed in our previous submissions. This will strengthen the powers of the Commissioner in dealing with cases where the reasons given by the public authority for their decisions are not adequate, and should assist in resolving some cases of this type at an earlier juncture. In our view, this should be a discretionary power for the Office, rather than a mandatory obligation, which is how this is currently drafted. This will allow the Commissioner to assess what action is appropriate on a case by case basis.

23. We recommend that in the amended Regulation 10(3)(a) of the Regulations, the phrase "*shall direct*" should be changed to "*may direct*".

Powers to obtain information

24. In the draft Regulations the following amendment has been added:

    10(10) – *The commissioner may, for the purposes of this Regulation do any of the following:*
    (a) require a public authority to make available such information as may be necessary for the Commissioner to determine the appeal, and where appropriate—
    (i) require the public authority concerned to attend before the Commissioner for that purpose, and
    (ii) where the public authority is a body corporate, require its chief officer to attend;
    (b) examine and take copies of any environmental information held by a public authority relevant to the appeal;

25. We note that sub-paragraphs (a) and (c) refer to "information as may be necessary for the Commissioner to determine the appeal" and "information relevant to the appeal", respectively. However, sub-paragraph (c) refers to "environmental information", which is narrower than is necessary for the Commissioner to effectively exercise powers for the purpose of determining the appeal. We would recommend that sub-paragraph (b) should be amended consistently with sub-paragraph (a) or (c).
    (c) enter any premises occupied by a public authority and there require to be furnished with such information relevant to the appeal as he or she may reasonably require, or take such copies of, or extracts from, any information relevant to the appeal found or made available on the premises.

26. We welcome the provision in Regulation 10(10) expanding the purposes for which the Commissioner may require information. However, there is no specific provision as to what may occur should a public authority fail to comply with a requirement under Regulation 10(10). A public authority's failure to comply has the potential to substantially delay the determination of an appeal, so in our view it is essential to have an expeditious method for dealing with non-compliance. We recommend that provision be made enabling the Commissioner to apply to the High Court for an order mandating compliance (in a similar manner as the power to seek an order

enforcing a decision in Regulation 10(12). We recommend that an additional provision be added after Regulation 10(12) as follows:

> *"(13) Where a public authority fails to comply with a requirement under paragraph (10), the Commissioner may apply to the High Court in a summary manner for an order directing the public authority to comply, and on the hearing of such an application, the High Court may grant such relief accordingly."*

Clarification of the exemption provided for in article 7(a)(i)(iv)

27. We welcome the redrafting of article 8(a)(iv), now Regulation 7(a)(i)(iv), to ensure the language is faithful to Article 4(2)(a) of the Directive.

28. The Court of Justice in case *C-204/09 Flachglas Torgau GmbH v Federal Republic of Germany* (*Flachglas*) made it clear that "the concept of 'proceedings'" referred to in article 4(2)(a) of the Directive "refers to the final stages of the decision-making process of public authorities" (para. 63). A similar conclusion was reached by the Court of Justice in case C-60/15 *Saint-Gobain Glass Deutschland GmbH v European Commission* (*Saint Gobain*). Although this case dealt with Regulations 1049/2001 and 1367/2006 rather than the AIE Directive, it considered the provisions of the Aarhus Convention on which both the Directive and the Regulations are based. Indeed, the Advocate General, when referring to the ground for refusal at issue in *Saint Gobain* noted that "the same ground for refusal is laid down in article 4(2)(a) of [the AIE Directive]" before concluding that "the concept of 'proceedings' must be understood as covering only the deliberation stage of decision-making procedures" (see para. 51). The Court of Justice found that "as observed by the Advocate General at point 76 of his Opinion, Article 4(4)(a) of the Aarhus Convention provides that a request for environmental information may be refused where disclosure of that information would adversely affect the confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law, and not the entire administrative procedure at the end of which those authorities hold their proceedings" (see para. 81).

29. In *Flachglas*, paragraph 65, the CJEU stated that national law must clearly define the concept of "*proceedings"* in Article 4(2)(a) of the Directive, with the judgment stating:

> "*In those conditions, the answer to question 2(a) and (b) is that indent (a) of the first subparagraph of Article 4(2) of Directive 2003/4 must be interpreted as meaning that the condition that the confidentiality of the proceedings of public authorities must be provided for by law can be regarded as fulfilled by the existence, in the national law of the Member State concerned, of a rule which provides, generally, that the confidentiality of the proceedings of public authorities is a ground for refusing access to environmental information held by those authorities****, in so far as national law clearly defines the concept of 'proceedings',*** *which is for the national court to determine*".

30. The term "proceedings" has not been defined in the draft regulations. This lack of clarity creates confusion in the appeals where a public authority is seeking to rely on this exemption. We recommend that the concept of "proceedings" is clearly defined in the Regulations.

Clarification on time for appeal versus time to comply with a decision

31. The new Regulations should provide for consistency between time for compliance with Commissioner's decision and time for appeal to the High Court, while also ensuring that an appellant has sufficient time to consider the content of any partial disclosure of information.

32. Regulation 10(11) provides that "subject to Regulation 11" a public authority shall comply with a decision of the Commissioner within three weeks of the date of its receipt, with non-compliance enabling the Commissioner to apply to the High Court for enforcement under Regulation 10(12). Regulation 11(1) provides that a party has two months within which to appeal a decision.

33. The current approach of this Office is to interpret the two-month timeframe for appeal to the High Court as running consecutively to the three-week timeframe for compliance with a decision, meaning that in practice a public authority has 2 months and three weeks to comply with a decision. However, this is the subject of much confusion for appellants and public authorities and gives rise to a number of queries to the Office. The Regulations should clarify the interaction between these two provisions, with the timeframe for compliance specifically stated in the Regulations.

Clarification on the duty to separate out information

34. Article 4(4) of the Directive provides: "*Environmental information held by or for public authorities which has been requested by an applicant shall be made available in part where it is possible to separate out any information falling within the scope of paragraphs 1(d) and (e) or 2 from the rest of the information requested*".

35. Article 10(5) of the Regulations currently places an obligation on public authorities to consider whether information that is exempt from release due to articles 8 or 9 of the regulations can be separated from non-exempt information to allow the latter to be released. This provision reads: *"10(5) Nothing in article 8 or 9 shall authorise a public authority not to make available environmental information which, although held with information to which article 8 or 9 relates, may be separated from such information."*

36. We note that this obligation is now contained in article 8(3) of the draft Regulations and reads:

"8(3) Environmental information held by, or for, a public authority which has been requested by an applicant shall be made available in part where it is possible to separate out any information refused under Regulation 7(1), that falls within the scope of-
(a) subparagraph a(i), (iv) or (v),
(b) subparagraph (b)(ii) or (iii), or
(c) subparagraph (d)(iii) or (v),
of that Regulation, from the rest of the information requested."

37. Our view is that this provision appears to limit the obligation to separate out non-exempt information in a manner which is not in keeping with Article 4(4) of the AIE Directive. In particular, the duty in Article 4(4) of the Directive applies to Article 4(1)(d) and (2)(b), (g) and (h), but the duty in Regulation 8(3) does not apply to the equivalent provisions in the Regulations. In the event of a conflict between EU law and national implementing law, the Commissioner is required to apply EU law. We recommend that this inconsistency is remedied in the Regulations.

Special cost rules

38. Appeals against a decision of the Commissioner are subject to the "special costs rules" under the Environment (Miscellaneous Provisions) Act 2011. These rules serve to limit the financial risk to parties bringing appeals against a decision of the Commissioner, where costs can only be awarded against a party in limited circumstances. The OCEI recognises the importance of rules limiting the costs of litigation, particularly where such rules facilitate the access to justice mechanisms envisaged by the Convention. However, as noted in our submissions on the review of the AIE Regulations, the application of those rules in appeals under the AIE Regulations results in costs being awarded against the Commissioner (a quasi-judicial body with no vested interest in the outcome of the case), rather than against the public authority (the decision-maker with a vested interest in the outcome of the case).

39. In such cases, the defence of appeals by the Commissioner results in the resources of the Commissioner's small office being used to defend a decision based on a particular set of facts. This has significant implications for the Office from a costs perspective, as well as a knock on effect on the resolution of appeals, give the diversion of staff focus to deal with legal submissions and preparation for appeals before the Courts.

40. We strongly believe that, in relation to the majority of appeals by a requester or another person affected by the decision, the staffing and financial resources of the OCEI would be better used progressing appeals under the AIE Regulations, rather than defending appeals to the High Court (except in cases where an appeal is brought by a public authority).We continue to suggest in this regard, that where an appeal is brought by a requester or other person affected by the decision: (a) the public authority shall be the respondent in the appeal, with the Commissioner as a notice party; and (b) where the Commissioner does not participate in the appeal, there should be a presumption that the special costs rules in the Environment (Miscellaneous Provisions) Act 2011 do not apply against the Commissioner.