Coimisinéir um Fhaisnéis Comhshaoil
Commissioner for Environmental Information

Decision of the Commissioner for Environmental Information on an appeal made under article 12(5) of the European Communities (Access to Information on the Environment) Regulations 2007 to 2018 (the AIE Regulations)

Case: OCE-93470-B9V8X6

Date of decision: 14 December 2021

Appellant: Thomas Freeman

Public Authority: Coillte

Issue: Whether the information requested is "environmental information", whether the appellant has been provided with all "environmental information" held by or for Coillte within the scope of his request and whether Coillte is entitled to rely on article 9(1)(c) of the AIE Regulations as grounds for refusal of certain information requested by the appellant.

Summary of Commissioner's Decision: The Commissioner found that the information at issue (i.e. payment information, the Schedule to a Wayleave Notice and a Deed of Easement relating to the placement of electricity lines by ESB on Coillte lands) was "environmental information". He remitted the matter to Coillte for further consideration.

Right of Appeal: A party to this appeal or any other person affected by this decision may appeal to the High Court on a point of law from the decision, as set out in article 13 of the AIE Regulations. Such an appeal must be initiated not later than two months after notice of the decision was given to the person bringing the appeal.

Background

1. On 19 March 2019, the appellant requested the following information from Coillte:
   (1) Information on:
      (a) the areas and types of forestry removed by Coillte and/or ESB to facilitate the construction of the Salthill-Screebe 110kV line by ESB; the age of the various plots of forestry removed;
      (b) the payments received by Coillte from ESB for the removed forestry and/or for the reduction in value of those de-forested/sterilised areas/lands as a result of the 110kV line.
   (2) Copies of:
      (a) the wayleave notices served on Coillte by ESB in respect of the placing of the Salthill-Screebe 110kV line on Coillte controlled land; and
      (b) any Deed of Easements granted to Coillte in respect of the 110kV line together with compensation paid for such wayleaves and/or easements.
   (3) Information showing Coillte's consideration of ESB's proposals and showing Coillte's decision making process regarding the granting of wayleaves and easements to ESB and in relation to the negotiation of payment to Coillte for the lost forestry and for the reduction in value of the relevant lands arising from the placing of the Salthill-Screebe 110kV line.
   (4) Copies of AA or EIA, including any screening for AA of EIA, carried out by Coillte and/or ESB in relation to the removal of forestry for the Salthill-Screebe 110kV line.

2. Coillte issued its decision in response to the appellant's request on 13 May 2019. It provided the appellant with a document detailing the areas, types and age of forestry removed to facilitate the construction of the Salthill-Screeb 110kV line, in response to his request at Q1(a) above. It refused to provide information in response to Q1(b) on the basis that it did not consider this to be "environmental information" within the meaning of the AIE Regulations, and, even if it were, Coillte considered that the grounds for refusal set out in article 9(1)(c) of the Regulations would apply. It provided a document entitled "Wayleave Notice" in response to Q2(a) but refused to provide any information in response to Q2(b) on the basis that it did not consider this to be "environmental information", and, even if it were, it considered that the grounds for refusal set out in article 9(1)(c) of the Regulations would apply. In response to Q3, Coillte pointed the appellant to section 53 of the Electricity Supply Act 1927 and noted that "information relating to negotiation of payments and reduction in value of land does not constitute environmental information". It noted that Q4 should be addressed to ESB.

3. The appellant requested an internal review of Coillte's decision. He disputed Coillte's conclusion that the information sought in Q1(b) and Q2(b) was not environmental information. He also argued that the information sought could not be deemed commercially sensitive such that article 9(1)(c) would provide grounds for its refusal. The appellant noted that the Wayleave Notice provided to him in response to Q2(a) did not include the Schedule referenced in that Notice indicating the affected area. He considered that further information in response to Q3 must have been available as Coillte must have had its lands valued in order to ascertain appropriate levels of compensation and that some engagement with ESB must have taken place in this regard. He also considered that further information must have existed in relation to Q4 as his understanding was that it was Coillte, rather than ESB, who had removed the forestry in question.

4. In its internal review outcome, Coillte reiterated its position that the information sought in Q1(b) was not environmental information and, in any event, would be commercially sensitive as such information could be leveraged in future negotiations that would penalise Coillte for transacting business with other State bodies. Coillte also noted that having conducted a search for the Schedule referred to in the Wayleave Notice, it had not been able to locate such a document. The internal review outcome again asserted that the information sought in Q2(b) was not "environmental information" and noted that article 9(1)(c) would provide grounds for refusal in any event on the basis that "the disclosure of the information contained within the documents sought would pertain to release of commercially negotiated terms specific to the land to which those deeds relate particularly in respect of rights being granted to ESB and the monetary amount of compensation agreed between contracting entities" and that such disclosure "could prejudice Coillte in respect of its commercial position in negotiating future agreements". Coillte also argued that the information sought in Q3 was not "environmental information" and could, in any event, be withheld on the basis of article 9(2)(d) since it constituted internal communications between Coillte and ESB and under article 8(a)(iv), which protects the confidentiality of "proceedings" of public authorities. Coillte argued that the "proceedings" in question were its internal workings and that release of costs or amounts of compensation would adversely affect Coillte's commercial negotiating position with potential to adversely affect negotiations with third party entities in respect of other projects. Coillte also invoked article 9(1)(c) to refuse the release of any information within the scope of Q3. Coillte noted that it did not hold any information in relation to Q4.

5. The appellant appealed to my Office on 9 July 2019.

Scope of Review

6. In submissions received by my Office, the appellant clarified that he was not appealing Coillte's decision with regard to Q1(a), Q3 or Q4 of his request. My review in this case is therefore concerned only with the information requested in Q1(b), Q2(a) and Q2(b) of the appellant's request. Coillte's position is that it does not hold a copy of the Schedule to the Wayleave Notice disclosed in response to Q2(a). While Coillte has expressed in its internal review outcome that the payment information and the Deed of Easement were not "environmental information", it has noted in submissions to my Office that it is not maintaining this position but it does maintain that it is entitled to rely on grounds for refusal contained in the Regulations, in particular article 9(1)(c) which allows for refusal where the disclosure of information would adversely affect "commercial or industrial confidentiality, where such confidentiality is provided for in national or Community law to protect a legitimate economic interest". ESB, which was contacted in its capacity as a third party which might be impacted by release of the information concerned, maintains that the information in question is not "environmental information" and also argues that article 9(1)(c) provides grounds for refusal in any event.

7. This leaves the following issues to be determined:

   (i) Whether the information requested by the appellant is environmental information;

(ii) Whether Coillte holds further environmental information within the scope of the appellant's request;
(iii) Whether Coillte is entitled to rely on article 9(1)(c) of the AIE Regulations to withhold access to any environmental information held by or for it within the scope of the appellant's request.

8. The question of whether the information at issue in this case is "environmental information" is a threshold jurisdictional question. In other words, if the information requested is not "environmental information" that would be the end of the matter as far as my Office is concerned as my powers only apply with respect to environmental information held by or for a public authority. As a general rule, my Office makes decisions on threshold jurisdictional questions before proceeding with any subsequent review. As noted above, in this case Coillte and ESB have both maintained that article 9(1)(c) provides grounds for refusal of certain information requested by the appellant, even if that information is considered to be "environmental information". As this appeal has been with my Office since July 2019, I have given careful consideration to the scope of my review as I am conscious that my usual approach of making a decision on the threshold issue in the first instance might give rise to further delays in the resolution of the appellant's request. However, Coillte's and ESB's reliance on article 9(1)(c) is premised on the interplay between that article and the provisions of the Freedom of Information Act. As I have recently referred a question of law to the High Court on this issue, I have concluded that the best way to achieve a fair and comprehensive outcome in relation to the appellant's request for information is for me to reach a conclusion on the issues outlined below in the first instance. However, I acknowledge that this outcome may be disappointing to the appellant in the context of the overall delay in this case. I continue to be committed to improving the efficiency of my Office in order to achieve timely reviews in future.

9. This decision is therefore concerned with:

(i) Whether the information requested by the appellant is environmental information; and
(ii) Whether Coillte holds further environmental information within the scope of the appellant's request.

Analysis and Findings

10. I have now completed my review under article 12(5) of the Regulations. In carrying out my review, I have had regard to the submissions made by the appellant, Coillte and ESB. I have also examined the contents of the records at issue. In addition, I have had regard to:

- the judgments in *Minch v Commissioner for Environmental Information* [2017] IECA 223 *(Minch), Redmond & Anor v Commissioner for Environmental Information & Anor* [2020] IECA 83 *(Redmond), Electricity Supply Board v Commissioner for Environmental Information & Lar Mc Kenna* [2020] IEHC 190 *(ESB) and Right to Know v Commissioner for Environmental Information & RTÉ* [2021] IEHC 353 (*RTÉ*);

- the judgment of the Court of Appeal of England and Wales in *Department for Business, Energy and Industrial Strategy v Information Commissioner* [2017] EWCA Civ 844 *(Henney)* which is referenced in the decisions in *Redmond, ESB and RTÉ*;
- the decisions of the Court of Justice of the European Union in C-321/96 *Wilhelm Mecklenburg v Kreis Pinneberg - Der Landrat (Mecklenburg)* and C-316/01 *Eva Glawischnig v Bundesminister für soziale Sicherheit und Generationen (Glawischnig)*;
- the decisions of the High Court and Supreme Court in *ESB v Gormley* [1985] IR 129, *ESB v Burke* [2006] IEHC 214 and *ESB v Harrington* [2002] IESC 38;
- Directive 2003/4/EC (the AIE Directive), upon which the AIE Regulations are based;
- the 1998 United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention); and
- The Aarhus Convention—An Implementation Guide (Second edition, June 2014) ('the Aarhus Guide').

What follows does not comment or make findings on each and every argument advanced but all relevant points have been considered.

11. As outlined above, the information requested by the appellant which is within the scope of this appeal is information on payments made by ESB to Coillte as compensation for the line placement (**Q1(b)**), the Schedule attached to the Wayleave Notice showing the lands to which the Notice applied (**Q2(a)**), and the Deed of Easement agreed between Coillte and ESB with respect to the line placement (**Q2(b)**). ESB has confirmed that only one payment was made to Coillte in respect of the line placement and this payment is the consideration referred to in the Deed of Easement sought by the appellant in Q2(b).

12. However, Coillte maintains in its submissions to this Office that it does not hold an executed or final copy of the Deed of Easement in question and the copy provided by Coillte to my Office does not include a completed reference to consideration. Coillte has instead provided a table detailing the relevant payments. Coillte also submits that it does not hold a copy of the Schedule contained in the Wayleave Notice. The issue of whether or not Coillte holds copies of the Schedule to the Wayleave Notice and the executed or final version of the Deed of Easement will only be relevant insofar as these are considered to be "environmental information". As such, I will consider the "environmental information" issue in the first instance.

Is the information requested "environmental information"?

13. The appellant has argued that the payment information, Wayleave Notice and Deed of Easement are all "environmental information" within the meaning of article 3(1) of the Regulations. Coillte originally maintained that the payment information and Deed of Easement were not "environmental information" although it has since revised its position. Its original position with respect to the Wayleave Notice is less clear although it might be inferred from the fact that Coillte provided a copy of the Wayleave Notice (without the Schedule) to the appellant that it considered the Notice to be "environmental information".

14. ESB's position is that the Wayleave Notice, Deed of Easement and payment information are not "environmental information" as these constitute mere follow-on matters which occur after a decision on line placement has already occurred and are thus not capable of having an environmental impact in the manner required by the AIE Regulations. It accepts that projects involving the placement of electricity lines are measures or activities likely to affect the environment "in the sense that such activities might pose a 'real and substantial possibility' of affecting" elements and factors of the environment referred to in paragraphs (a) and (b) of the definition contained in article 3(1) of the Regulations. However, ESB relies on the fact that the process through which decisions on the placement of transmission lines is undertaken and implemented involves distinct procedures carried out by separate actors (i.e. EirGrid which decides on line placement of transmission lines and ESB which implements those decisions by arranging for the construction and maintenance of the lines). ESB's argument is that the decision on where a transmission line is to be placed is set in stone before a wayleave notice is served, before any easement acquisition occurs and before any compensation is paid. Its argument is that the environmental "die is cast" by the time a wayleave notice is served and that all considerations and decisions, both generally, and insofar as they might impact on the elements and factors of the environment, will have been made. Its position therefore is that all later, follow-on, or consequential matters, such as easement acquisition, and compensation for loss of development, or devaluation of property, will not affect the already-determined plan or the decisions that have been made (in the first instance by EirGrid, not ESB). It therefore argues that information on wayleaves, easement acquisition or compensation is not information "on" the line placement project nor can any of those matters themselves be a measure or activity within the meaning of article 3(1)(c).

Legal framework for placement of electricity infrastructure

15. In order to assess ESB's argument, it is necessary to analyse the legal framework relating to the placement of electricity lines on land and the provision of compensation to affected landholders. While historically, many of the functions related to the generation and provision of electricity in the Irish market were carried out by ESB, the liberalisation of the market has diversified electricity generation, transmission and supply. Section 14 of the Electricity Regulation Act 1999 empowers the Commission for Regulation of Utilities to grant licences "to any person" to generate and supply electricity as well as to discharge the functions of transmission system operator, transmission system owner, distribution system operator, public electricity supplier and Distribution System Owner. The 1999 Act also provides that a licence to act as transmission system operator may only be granted to EirGrid while a licence to discharge the functions of transmission system owner, distribution system operator, public electricity supplier and Distribution System Owner may only be granted to ESB or, in the case of transmission system owner and distribution system operator, to one of its subsidiaries. As such, both ESB and EirGrid bear a degree of responsibility for the construction and operation of the electricity transmission system.

16. ESB submits that EirGrid, in its capacity as transmission system operator, is responsible for planning the development of the transmission system while ESB, as the transmission asset owner, is responsible for constructing and maintaining transmission lines on foot of instructions from EirGrid. It submits therefore that decisions with regard to the placement of transmission lines are

undertaken by EirGrid. It is EirGrid's responsibility to comply with the regulatory requirement to identify the "least cost technically acceptable" (LCTA) solution and to obtain any planning permissions required with respect to the line placement.

17. ESB submits that once the location of the line placement is decided by EirGrid, ESB makes preparations for the construction of the line and is also responsible for maintenance of the line, once constructed. As part of its preparations for construction, ESB must serve a Wayleave Notice on the owners and occupiers of any lands impacted by the line placement.

18. The service of a Wayleave Notice is governed by section 53 of the Electricity Supply Act 1927 as amended. Section 53 permits ESB to place electricity lines above or below ground across any land and to affix support infrastructure to any buildings on such land provided a notice is served on the owner and occupier "stating [ESB's] intention to place the line or attach the fixture (as the case may be) and giving a description of the nature of the line or fixture and of the position and manner in which it is intended to be placed or attached". Section 53(4) provides that ESB may proceed to place the line or attach the fixture if the owner or occupier provides consent within seven days of receipt of the Wayleave Notice and that such consent may be unconditional or subject to conditions which are acceptable to ESB. If the owner or occupier's consent is not forthcoming, section 53(5), as amended by section 1 of the Electricity (Supply) (Amendment) Act 1985, allows ESB to proceed with the placement of the line or fixture, subject to the entitlement of the owner or occupier to compensation which is to be assessed in default of agreement under the provisions of the Acquisition of Land (Assessment of Compensation) Act.

19. Compensation is thus specifically referred to in section 53(5) of the 1927 Act, which provides that although the consent of a landowner or occupier is not required in order to place an electricity line on land, adequate compensation must be paid to the landowner or occupier in question. The level of compensation may be agreed between the parties or it may be the subject of arbitration. My understanding is that the statutory reference to an entitlement to compensation was introduced following the decision of the Supreme Court, in *ESB v Gormley* [1985] IR 129, that the previous iteration of section 53 was unconstitutional as it failed to provide for a right to compensation which could be assessed, in default of agreement, by an independent arbiter or tribunal.

20. Section 53(4) of the 1927 Act provides for situations in which the consent of the owner or occupier of the land is forthcoming and envisages situations where such consent is subject to conditions, so long as those conditions are acceptable to ESB. In this case, Coillte appears to have granted its consent to the line placement and entered into a Deed of Agreement with ESB (referred to above as the Deed of Easement) setting out the conditions pursuant to which ESB was granted access to Coillte lands for the purposes of the line placement including the compensation to be paid by ESB to Coillte in return for such access.

21. The position is therefore that once ESB serves a valid Wayleave Notice (i.e. a notice which complies with the requirements of section 53 of the 1927 Act) on the owner or occupier of lands on which an electricity line is to placed, broadly speaking, one of the following can occur:

(i) The owner/occupier can agree to grant their consent subject to certain conditions (which presumably always include an appropriate compensation payment) and, if those conditions are agreeable to ESB, a Deed of Agreement or some form of contractual agreement is entered into relating to ESB's entry on the lands.

(ii) The owner/occupier can refuse to grant consent. In this case, section 53(5) entitles ESB to proceed with the line placement or the erection of infrastructure in any case subject to the requirement to pay the owner/occupier of the land appropriate compensation. As such, in cases where an owner/occupier does not grant consent they may either:

a. Accept the compensation offered by ESB; or
b. Reject the compensation offered by ESB and seek to have an appropriate level of compensation determined by an independent arbitrator.

22. Consent of the owner/occupier of the lands in question is not required but in some cases ESB do enter into Deeds of Agreement with landowners/occupiers relating to the placement of electricity lines either over or under land. In its submissions to this Office, ESB notes that it "usually acquires easements by agreement with landowners, and it only does so in a limited number of cases – and, generally, after lines are placed".

23. ESB notes in its submissions that Deeds of Agreement are entered into by it "to have a formal written record of the settlement/transaction between ESB and the landowners stating the agreed amount to be paid to, and accepted by, the landowners concerned by way of compensation for the placing of the electric line across their lands by virtue of Section 53 of the Electricity (Supply) Act 1927 as amended. The instrument records formally the agreement reached between the parties to include the compensation amount to be paid, and the appropriate safety clearance corridor centred on the electric line within which the landowner may not encroach. Deeds are also executed to record the fact that there is an easement, and this helps put future purchasers on notice of same, and of the line that is present on the lands". ESB characterises the Deeds as "wholly unnecessary and optional" and "to be used as an additional layer of clarity to minimise any potential for disagreement or misunderstanding generally as between the landowners concerned, and/or any future purchaser, and ESB, when it comes to payment of the agreed amounts, the placement and/or maintenance of lines or the extent of the appropriate safety clearance corridor".

24. The crux of ESB's argument is that "environmental and other factors, and the overall determination of the only acceptable solution in planning and energy-regulation terms, are rehearsed at junctures preceding the service of a Wayleave Notice" such that information on "later, follow-on, or consequential matters" including easement acquisition and compensation, does not constitute "environmental information".

25. The appellant argues that the payments made by ESB to Coillte as compensation for the removal of forestry are intrinsically connected to the removal of the forestry and the erection of the 110kV line and an essential component of the calculation of the cost-benefit and/or economic analysis of those activities. He argues that the Schedule showing the affected areas is important in identifying the impact of the line and structures on the lands. He also submits that the Deed of Easement granted by Coillte consists entirely of environmental information as it describes the characteristics

of the line, the effects of the line on the land over which it crosses and the measures employed by ESB and Coillte in relation to the activities related to the construction of the line and the resulting sterilisation of the land and landscape.

Definition of "Environmental Information"

26. Article 3(1) of the AIE Regulations defines "environmental information" as any information in any material form on:

    (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms and the interaction among these elements,
    (b) 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,
    (c) measures (including administrative measures) such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements,
    (d) reports on the implementation of environmental legislation,
    (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c), and
    (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are, or may be, affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c).

27. The AIE Regulations transpose the AIE Directive at national level and the definition of "environmental information" in the Regulations, mirrors that contained in the Directive. The AIE Directive was adopted to give effect to the first pillar of the Aarhus Convention in order to increase public access to environmental information and enable an informed public to participate more effectively in environmental decision-making. It replaced Council Directive 90/313/EEC, the previous AIE Directive.

28. According to national and EU case law on this matter, while the concept of "environmental information" as defined in the AIE Directive is broad (*Mecklenburg* at paragraph 19), there must be more than a minimal connection with the environment (*Glawischnig* at paragraph 25). Information does not have to be intrinsically environmental to fall within the scope of the definition (*Redmond* at paragraph 58; see also *ESB* at paragraph 43). However, a mere connection or link to the environment is not sufficient to bring information within the definition of environmental information. Otherwise, the scope of the definition would be unlimited in a manner that would be contrary to the judgments of the Court of Appeal and CJEU.

29. The right of access to environmental information that exists includes access to information "on" one or more of the six categories at (a) to (f) of the definition. The element of the definition of relevance in this case is paragraph (c) which provides that information on "measures (including administrative measures) such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements" is environmental information. An activity is "likely to affect" the elements and factors of the environment if there is a real and substantial possibility that it will affect the environment, whether directly or indirectly. While it is not necessary to establish the probability of a relevant environmental impact, something more than a remote or theoretical possibility is required (*Redmond* at paragraph 63).

30. In his decision in *RTÉ*, Barrett J expressly endorses the approach set out in *Henney* to determine the "information on" element of the definition of "environmental information" (*RTÉ* at paragraph 52). Where an assessment under article 3(1)(c) is to be carried out, the first step is to identify the relevant measure or activity. It is important to note that information may be "on" one measure or activity, more than one measure or activity or both a measure or activity which forms part of a broader measure (*Henney* at paragraph 42). In identifying the relevant measure or activity that the information is "on" one may consider the wider context and is not strictly limited to the precise issue with which the information is concerned, and it may be relevant to consider the purpose of the information (*ESB* at paragraph 43).

31. The Aarhus Guide notes that the Aarhus Convention expressly includes "administrative measures, environmental agreements, policies, legislation, plans and programmes" when referring to "measures" and "activities" likely to affect the environment in the context of its definition of "environmental information". Similar wording is used in article 2(1)(c) of the AIE Directive and article 3(1)(c) of the AIE Regulations. The Aarhus Guide notes that the use of these terms suggests that some degree of human action is required. The Guide also describes the terms "activities or measures", as referring to "decisions on specific activities, such as permits, licences, permissions that have or may have an effect on the environment". The Court of Appeal in *Minch* was of the view that the reference to "plans" and "policies" in article 3(1)(c) is significant, and suggests that the "measure" or "activity" in question must have "graduated from simply being an academic thought experiment into something more definite such as a plan, policy or programme – however tentative, aspirational or conditional such a plan or policy might be – which, either intermediately or mediately, is likely to affect the environment" (paragraph 39). Hogan J went on to explain that this requirement for there to be a plan or something in the nature of a plan, curtails a potentially open-ended or indefinite right of access to documents (paragraph 41). If this were not the case, then virtually any information held by or for a public authority referring, either directly or indirectly, to environmental matters would be environmental information. This would run contrary to the CJEU's judgment in *Glawischnig* (paragraph 21; see also *Glawischnig* at paragraph 25).

32. The CJEU in *Mecklenberg* stated at paragraph 20 of its judgment that "the use in Article 2(a) of the Directive of the term 'including' indicates that 'administrative measures' is merely an example of the 'activities' or measures' covered by the directive". It noted that "as the Advocate General

pointed out in paragraph 15 of his Opinion, the Community legislature purposely avoided giving any definition of 'information relating to the environment' which could lead to the exclusion of any of the activities engaged in by the public authorities, the term 'measures' serving merely to make it clear that the acts governed by the directive included all forms of administrative activity".

33. Barrett J remarked in *RTÉ* that "the European Court of Justice [in *Mecklenberg*] could not have taken a more expansive view of what comprises an administrative measure for the purposes of the 1990 directive" (paragraph 19). He also noted that Recital 2 of the current AIE Directive should be borne in mind when approaching case-law, such as *Mecklenberg*, which is concerned with Directive 90/313/EEC, the predecessor to the current AIE Directive (RTÉ, paragraph 7). Recital 2 of the AIE Directive provides as follows:

> "Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment initiated a process of change in the manner in which public authorities approach the issue of openness and transparency, establishing measures for the exercise of the right of public access to environmental information which should be developed and continued. This Directive expands the existing access granted under Directive 90/313/EEC…."

34. Barrett J considered the reference to the current AIE Directive having "initiated a process of change" to be noteworthy and concluded that "what had been in play over the course of the lifetime of [the previous AIE] directive and its more recent successor is an evolutionary process", the consequence being that "one must approach the current directive as being not just expansive but increasingly so" (*RTÉ*, paragraph 8). He also stated that it was "difficult to conceive of how the Community legislature could have taken a more expansive approach to the scope of the concept of "environmental information", having regard to Recital 10 of the current AIE Directive (*RTÉ*, paragraph 9).

35. Having identified the relevant "measure" or "activity", it is then necessary to consider the information in question with a view to determining whether it is information "on" that measure or activity. Again, *RTÉ* (see paragraph 52) endorses the approach set out by the Court of Appeal of England and Wales in *Henney* which is as follows (see paragraphs 47 and 48):

> "…the way the line will be drawn [i.e. in determining whether one is dealing with 'information on…'] is by reference to the general principle that the Regulations, the Directive, and the Aarhus Convention are to be construed purposively. Determining on which side of the line the information falls will be fact and context-specific. But it is possible to provide some general guidance as to the circumstances in which information relating to a project will not be information on the project for the purposes of section 2(1)(c) because it is not consistent with or does not advance the purpose of those instruments.
>
> My starting point is the recitals to the Aarhus Convention and the Directive, in particular those set out at para 15 above. They refer to the requirement that citizens have access to information to enable them to participate in environmental decision-making more

> effectively, and the contribution of access to a greater awareness of environmental matters, and eventually, to a better environment. They give an indication of how the very broad language of the text of the provisions may have to be assessed to provide a framework for determining the question of whether in a particular case information can properly be described as on a given measure".

Does this case involve measures or activities which give rise to an environmental impact in the manner required by article 3(1)(c) and is the relevant information, information "on" those measures or activities?

32. I note that there is nothing in the AIE Regulations or Directive to suggest a requirement that the measure or activity under consideration is one performed by the public authority from whom the information was requested. ESB accepts that projects involving the placement of electricity lines are measures or activities likely to affect the environment "in the sense that such activities might pose a 'real and substantial possibility' of affecting" elements and factors of the environment. However, I do not consider this to be the only "measure" or "activity" to be of relevance in this case which falls within the definition set out in article 3(1)(c) of the Regulations.

33. In the first instance, I consider the construction of an electricity line (as opposed to a decision on its placement) to be a measure or activity. The construction of an electricity line has a "real and substantial possibility" of environmental impact. In this case, it involved the removal of 23,596 hectares of forestry. In broader terms, I also note that, in the case of *ESB v Burke* [2006] IEHC 214, one of the arguments raised by the landowner in question, in response to an application by ESB for an interlocutory injunction to gain access to lands, was that the construction of the relevant line was not taking place in accordance with the planning permission granted. While this argument was ultimately unsuccessful, the High Court noted that while the planning permission granted was for an entirely over-ground line, "it is common case that since the planning permission was granted, an arrangement has been entered into with certain landowners which will allow the initial connection from the wind farm to a point some 3.5 kilometres from the wind far to go underground" (see paragraph 6). It does not therefore appear to me that environmental matters are in fact "set in stone" prior to the service of a Wayleave Notice in the manner contended for by ESB.

34. A Wayleave Notice (including the Schedule or portion of that Notice which delineates the affected lands) is information "on" the construction of an electricity line in the sense that service of such Notice is an integral feature of that construction. Regardless of whether the owner or occupier of land ultimately consents to the construction works, the service of a Wayleave Notice is the first step in any construction process. I am also of the view that the service of a Wayleave Notice is in itself a measure or activity within the meaning of article 3(1)(c) as there is a "real and substantial possibility" that the service of that Notice will have an environmental impact on the lands to which it relates. Indeed, as the Supreme Court noted in *ESB v Gormley* (at para 29):

> The results of the exercise of th[e] power [to compulsorily impose a burdensome right over land under section 53], are, firstly, that the use of the land for agriculture is permanently interfered with to a greater or lesser extent, depending on whether at any time the area in which the masts are situated is used for grazing or tillage; secondly, that in the case of any particular land-owner who wished to erect a building or other structure on the portion of

land occupied by one of these masts he would be prevented from doing so; and, thirdly, that in the case of this Defendant's land, at least, there is major permanent damage to the amenity of the lands surrounding the house.

35. In addition, the decision by Coillte and ESB to enter into a Deed of Easement setting out conditions with respect to the placement of electricity infrastructure on Coillte land in accordance with the provisions of section 53(4) of the 1927 Act, is also a measure or activity within the meaning of article 3(1)(c) as it has a "real and substantial possibility" of environmental impact. While I accept ESB's submission that the entry into a Deed of Easement with an owner/occupier of land is "wholly unnecessary and optional" as section 53(5) of the 1927 Act allows ESB to proceed with the construction of line infrastructure without consent, it remains the case that ESB entered into a Deed of Easement with Coillte. A decision to enter into a Deed of Easement with an owner/occupier carries with it a "real and substantial possibility" of environmental impact as the conditions agreed by ESB and the owner/occupier are likely to impact on the land concerned. Thus, for example, the landowners referred to in the *Burke* case above reached an agreement which meant the line placement occurred underground rather than over-ground. In this case, having considered the unexecuted copy of the Deed of Easement, it is clear that it provides for additional entitlements on the part of ESB as well as additional obligations (such as obligations to reinstate the land to the standard normally applicable to forestry development, to comply with reasonable directions of Coillte's Forest Manager and obligations to carry appropriate insurance) which are not provided for pursuant to the Wayleave Notice. It is clear that those obligations have an environmental impact, in particular, an impact on the forestry which exists on those lands. I am therefore satisfied that the entry into the Deed of Easement is a measure within the meaning of article 3(1)(c) and the Deed of Easement itself is self-evidently information "on" that measure.

36. The next issue to be determined is whether the payment information requested in Q1(b) of the appellant's request is "environmental information". As I have determined that the placement of electricity lines, the construction of electricity lines, the service of a Wayleave Notice and the entry into a Deed of Easement are each measures or activities within the meaning of article 3(1)(c) given the "real and substantial possibility" that they will result in environmental impacts as outlined above, the payment information will be "environmental information" if it is information "on" any one or more of the above measures.

37. It was not necessary for me to consider the meaning of the term "information on" in detail to determine that the Wayleave Notice or the Deed of Easement were "environmental information". It is my view that those are self-evidently integral or critical elements to the service of a Wayleave Notice and the entry into a Deed of Easement, both of which are measures or activities which form part of a broader measure i.e. the line placement project generally. However, it is necessary for me to consider this issue more closely when dealing with the "payment information".

38. In this case, ESB has submitted that the only payment made to Coillte in relation to the placement of the relevant portion of the Salthill-Screebe line on its land was the consideration referenced in the Deed of Easement. It is therefore clear that the compensation information is information which relates to the Deed of Easement, but the question remains whether or not it can be said that such

information is information "on" the Deed of Easement. In addition, the payment information provided to my Office by Coillte in response to Q1(b) is not a reference to compensation in the Deed of Easement but rather, a more detailed table, setting out the compensation received and how that compensation relates to the land and timber value of various portions of the land affected by the line placement. This information is undoubtedly within the scope of the appellant's request at Q1(b) for information on "the payments received by Coillte from ESB for the removed forestry and/or for the reduction in value of those de-forested/sterilised areas/lands as a result of the 110kV line". However, I must consider whether this information is information "on" the line placement, the wayleave notice and/or the Deed of Easement (all of which, as outlined above, I consider to be measures or activities within the meaning of article 3(1)(c)). In order to answer these questions, it is necessary to look in more detail as to the guidance contained in the case law relating to the meaning of the term "information on".

39. As noted above, the Irish Courts have adopted the approach taken by the Court of Appeal in England and Wales in its decision in *Henney*. *Henney* suggests that, in determining whether information is "on" the relevant measure or activity, it may be relevant to consider the purpose of the information such as why it was produced, how important it is to that purpose, how it is to be used, and whether access to it advances the purposes of the Aarhus Convention and AIE Directive (paragraph 43; see also *ESB* at paragraph 42). Information that does not advance the purposes of the Aarhus Convention and AIE Directive may not be "on" the relevant measure or activity (*Redmond* at paragraph 99). As the Court noted in *Henney*, the recitals of both the Aarhus Convention and the AIE Directive refer to the requirement that citizens have access to information to provide for a greater awareness of environmental matters, to enable more effective participation in environmental decision-making and to facilitate the free-exchange of views with the aim that all of this should lead, eventually, to a better environment. They give an indication of how the very broad language of the text of the provisions in the Convention and Directive may have to be assessed and provide a framework for determining the question of whether in a particular case information can properly be described as on a given measure (see *Henney* at paragraph 48 and *RTÉ* at paragraph 52). Thus, information that does not advance the purposes of the Aarhus Convention and AIE Directive may not be "on" the relevant measure or activity (see *Redmond* at paragraph 99). Finally, as the High Court noted in *ESB* information that is integral to the relevant measure or activity is information "on" it (see paragraphs 38, 40 and 41) while information that is too remote from the relevant measure or activity does not qualify as environmental information (*ESB* at paragraph 43).

40. I should note however that ESB's submissions made repeated reference to the fact that information was not information "on" a "measure" if it could not be considered integral to the measure. As is clear from my summary of the relevant case-law above, this is not in fact the case. What is clear from the guidance provided by the Courts is that there is in fact a sliding scale with information integral to a measure at one end (in the sense that it is quite definitively information "on" a measure) and information considered too remote from the relevant measure at the other (in the sense that it is not). The example provided in *Henney*, a case which sought to clarify whether the information sought by the appellant was information "on" the UK's Smart Meter Programme, noted that while a report on PR and advertising strategy might be considered information "on" the

Smart Meter Programme "because having access to information about how a development is to be promoted will enable more informed participation by the public in the programme", information relating to a public authority's procurement of canteen services in the department responsible for delivering a road project would likely be considered too remote (see paragraph 46).

41. Thus, while ESB was correct to note in its submissions that the Court of Appeal in *Henney* upheld the trial judge's conclusion that the information at issue in that case was information "on" the Smart Meter Programme, ESB's follow on statement that the basis of the Court's conclusion was that the information "was 'integral' and 'critical' to and a 'key element' in the success of the National Smart Meter Programme" omits key aspects of the *Henney* decision which make it clear that the definition should be applied purposively having regard to matters such as "the purpose for which the information was produced, how important it was to that purpose, how it is to be used and whether access to it would make the public better informed above, or to participate in, decision-making in a better way" (see paragraph 43). Thus, I do not agree with ESB's submission that "it is possible that the UK Court of Appeal would not even have considered the compensation information to be information "concerned with [the line placement] project", whatever about considering it to be information concerning the project that was also "on" it.

42. In the first instance, I consider ESB's focus on the line placement project to be overly narrow. As I have identified above, there are other measures and activities at issue in this case which I consider to come within paragraph (c) of the definition. However, even if the line placement project was the only measure at issue, I do not agree with ESB's contention that information on compensation paid to land owners in connection with line placements cannot be information "on" such projects simply because the decision as to the location of the line placement has already been taken. Firstly, I consider that information on payments made to landowners in connection with line placements is "integral" and "critical" to the line placement project and a "key element" of that project. ESB referred to the case of *ESB v Harrington* [2002] IESC 38 in its submissions, in support of its contention that the question of compensation and all aspects of that question have no bearing on the decision to place a line. However, I consider the finding of Denham J to emphasise another important point, which is that under section 53 of the 1927 Act, ESB's entitlement to proceed with a line placement is dependent firstly on the service of a valid Wayleave Notice and secondly, is, as Denham J noted "<u>subject to</u> the [owner/occupier]'s right to compensation". If the entitlement to proceed with line placement is subject to the entitlement to compensation, it is not clear to me how it could be said that compensation is not an integral part or a key element of the line placement project. Indeed, the import of the Supreme Court's decision in *Gormley* is that the entitlement to compensation and the ability to avail of the arbitration process to exercise that entitlement is an integral part of the line placement powers conferred on ESB under section 53 of the 1927 Act since, in the absence of such entitlements, those powers would be unconstitutional.

43. Secondly, the basis of ESB's argument is that making compensation or payment information publicly available won't influence the line placement project to which that compensation relates because the decision as to the location of the line has already been taken and thus the environmental impact is "set in stone". I would note firstly in that regard that I do not consider this

to be the case, as I have outlined above. Even if the environmental impact of the line placement project was "set in stone" before any issue of compensation, that does not necessarily mean that providing the public with access to information concerning the compensation amounts paid does not contribute to greater public participation in environmental decision-making. Ideally, public participation would take place at a time when the public's views might shape the relevant decision-making. However, at the very least, knowing how much compensation was paid to landowners for one line-placement project might contribute to the public's ability to participate in debate concerning further projects. In addition, while Recital 1 of the Directive emphasises that one of the key purposes of the Regulations is to enable greater public participation in environmental decision-making, it is not the only purpose referred to. Recital 1 also notes that access to environmental information contributes to a "greater awareness of environmental matters" and a "free exchange of views". Information does not therefore need to enable participation in a manner that influences the decision-making process to which that information directly relates in order for it to fall within the definition of "environmental information". Indeed, this is recognised by the Court of Appeal in *Henney* when it notes that regard should be had to "whether access to [the information] would enable the public to be informed about, or to participate in, decision-making in a better way" (paragraph 43, emphasis added). Having information about the compensation process enables the public to better understand the line placement system.

44. Finally, I consider that the compensation amount is a "key element" of the Deed of Easement since it is unlikely that this Deed would have been entered into without such compensation being agreed as part of it. Were it not for the Deed of Easement, the compensation amount would be a "key element" of the Wayleave Notice as section 53 (as amended in light of the Supreme Court decision in *Gormley*) makes it clear that ESB's right to enter on and interfere with lands for the construction of electricity lines is subject to the entitlement of a land owner/occupier to be paid compensation which is to be decided by independent arbitration in default of agreement.

45. I am satisfied therefore that the amount of compensation paid is information "on" the Deed of Easement and that the additional detail contained in the table provided by Coillte is information "on" the line placement project and the Deed of Easement as it was integral to and a key element of the calculations on which the compensation amount was based.

46. I am therefore satisfied that the payment information, the Schedule to the Wayleave Notice and the Deed of Easement sought by the appellant are all "environmental information" within the meaning of the AIE Regulations.

Is additional "environmental information" within the scope of the appellant's request held by or for Coillte?

47. Coillte's position is that it does not hold a copy of the Schedule attached to the Wayleave Notice showing the lands affected by that Notice nor does it hold a copy of the completed Deed of Easement as executed by the parties.

48. Article 7(1) of the AIE Regulations requires public authorities to make available environmental information that is held by or for them on request. Article 7(5) of the AIE Regulations provides that

if a request is made to a public authority for information that is not held by or for it, it must inform the applicant as soon as possible. Article 7(6) notes that in such cases, if the public authority is aware that the information requested is held by another public authority it must transfer the request to that authority or inform the applicant of the public authority to whom it believes the request should be transferred.

49. My approach to dealing with cases where a public authority has effectively refused a request under article 7(5) is that I must be satisfied that adequate steps have been taken to identify and locate relevant environmental information, having regard to the particular circumstances. In determining whether the steps taken are adequate in the circumstances, I consider that a standard of reasonableness must necessarily apply. It is not normally my function to search for environmental information.

50. A number of enquiries were made by my Office to Coillte in order to ascertain the steps taken for the information. According to Coillte's initial response, it expected that the Deed of Easement and Wayleave Schedule would have been retained on the legal file. It submitted that its current legal document management policy requires that all legal files are retained in hard and soft copy format. It explained that it uses a legal case management system to manage legal files and to store correspondence, copies of executed documents and maps. It also noted that in all cases where an instrument constrains Coillte's use of its own lands, details are uploaded to Coillte's internal mapping system noting the location of the constraint and the nature of such constraint. Coillte confirms that the updating of its internal maps did take place for this transaction. However, Coillte notes that the practice of its mapping team is not to update its mapping system on a transaction by transaction basis but rather, to add layers to its internal mapping system on the basis of regular digital mapping updates sent and compiled by ESB. Coillte confirmed that its staff can access the internal mapping system to view the location of a wayleave and can extract maps showing the relevant information.

51. Coillte also noted that, typically in transactions such as the one with which this appeal is concerned, two or three copies of the Deed of Easement will be sealed and executed by it and returned to ESB's solicitors. It explained that ESB executes the Deed and usually returns a copy to Coillte for its records. Coillte submitted that it consulted correspondence on the relevant file and that there was no record of a counterpart Deed being returned to Coillte and suggested that this might be why no such copy of the Deed had been discovered in the course of its searches.

52. Coillte explained that a file reference number for the transaction was located on its Forest Information System. The relevant file was then retrieved from Coillte's archive facility and searched for copies of the Schedule and the Deed of Easement. Coillte noted that while the file retrieved was bulky and contained multiple copies of the same correspondence and documents, it did not contain copies of the documents sought by the appellant in this case. Coillte noted that it was likely that a copy of the Schedule would have been emailed to management at a district level at the time of the transaction to keep them informed of its progress but noted that emails are deleted after a three year period and that Coillte's old email system is no longer accessible. Coillte also noted that its old legal document management system is no longer accessible and that the staff members in the

relevant district at the time of the transaction have long since retired and their email accounts have been deleted.

53. It has not been suggested at any stage that the Schedule to the Wayleave Notice was not provided to Coillte, nor has it been suggested that the Deed of Easement was not signed by Coillte. As such, those documents do exist and I am not satisfied, on the basis of Coillte's responses, that all reasonable steps were taken to identify and locate them. I accept that the transaction took place in 2011 and that it is possible that many of those involved may have left Coillte's employment by the time of the request in 2019. However, it is not clear from Coillte's responses whether it took steps to ascertain whether any staff members involved in the transaction were still in employment, whether it consulted any such staff members or any external advisors involved (if any such advisors were involved). It is not clear whether Coillte contacted ESB to ascertain whether a counterpart of the Deed of Easement had in fact been provided nor is it clear whether they informed the appellant that a copy may have be held by ESB. Neither is it clear whether Coillte considered the possibility that the Schedule and/or the Deed of Easement may have been misfiled or misplaced and there is no suggestion in Coillte's response that it carried out any searches to cover such a possibility.

54. As noted above, the existence of the information requested is not in question and if it were held by Coillte at any stage then, having regard to the spirit of the AIE Regulations, it might be expected that Coillte, as a public authority would ensure that such information would be carefully maintained, not only because members of the public might be interested in accessing it but also because it relates to the transfer of interests in Coillte lands. I acknowledge Coillte's original position was that not all of this information constituted "environmental information" and further recognise that it is outside my remit as Commissioner to adjudicate on how public authorities carry out their functions generally, including with respect to their environmental information management practices. I also accept Coillte's submission that it may not have received an executed copy of the Deed of Easement and, while it would appear unusual that an entity would not ensure it was provided with a copy of a Deed relating to a transfer of interests in land, this is ultimately an internal matter for Coillte. That being said, I would remind Coillte that article 5(1) obliges it to "make all reasonable efforts to maintain environmental information that it held by or for it in a manner that is readily reproducible and accessible by information technology or by other electronic means" and to "ensure that environmental information compiled by or for it, is up-to-date, accurate and compatible. Article 7(6) also obliges Coillte to inform an applicant in circumstances where it is aware that the information in question is held by another public body.

55. In addition, it does not appear to me that Coillte has adequately addressed the question of whether the Schedule to the Wayleave Notice and/or an executed copy of the Deed of Easement might be held "for" it by another entity. As noted above it is not clear whether external advisers were involved in this transaction and, if so, whether they were consulted to ascertain whether they held a copy of the Schedule or Deed of Easement. As also noted, Coillte has suggested that it may not have been provided with an executed copy of the Deed by ESB, as was usually the case in such transactions. Coillte was asked to make submissions on this point by my Investigator but did not respond to this request. ESB was also invited to comment on whether it might be said to hold the relevant Deed "for" Coillte. Its response was to indicate briefly and without any further reasoning

that it did not hold any copy of the Deed "for" Coillte and to "suggest that the Commissioner first determine [whether the information in question was "environmental information"] and that only if it is validly determined against ESB, would ESB then address the Commissioner on whether an executed copy of the Deed was held "for" Coillte by ESB". While I am always happy to consider submissions on any matter a party considers to be of relevance to an appeal and to consider arguments on a without prejudice basis to other points made by a party, I should point out that it is not helpful, particularly where the issue of delay is a significant factor, that a party would decline to respond to a reasonable question posed by my Investigator.

56. That being said, a decision as to whether environmental information is held by or for a public authority must be based on the facts of the particular case and I do not consider that the factual matrix to be sufficiently clear on the basis of the information before me. While it would be open to me to seek further submissions from the parties, as I have outlined above, Coillte has not responded to my Office's last attempts to do so and I am therefore reluctant to occasion further delays to the issuing of a decision by making a further request which may also go unanswered. I am also conscious that grounds for refusal under article 9(1)(c) have been invoked. I consider, in light of the ongoing High Court reference on this point, in addition to my findings on the "environmental information" issue, the best way to achieve a fair and comprehensive outcome in relation to the appellant's request is to remit the matter, rather than reaching a conclusion on the applicability of article 9(1)(c).

57. As such, I am directing that as part of the remittal, this point should be considered in further detail. Coillte should therefore take all reasonable steps to locate the Schedule and an executed copy of the Deed of Easement. I would also remind Coillte that in the event it seeks to rely on article 7(5) as a basis for refusal, it must specify the reasons for such refusal in accordance with article 7(4). It should also consider whether it might be said that the information in question is held "for" it by another entity. If the Schedule or the Deed of Easement is held "for" Coillte by another entity, then this information should be provided to the appellant unless Coillte can demonstrate that there are grounds for refusal which are provided for in the Regulations and that the public interest balancing test weighs in favour of refusal.

58. If Coillte is satisfied following such further consideration that the information is not held by or for it, then it should comply with its obligations under article 7(6) and advise the appellant if it is aware that the information he seeks is held by another public authority. I note in this regard that it appears that a copy of the Schedule and the Deed of Easement are held by ESB and it also remains open to the appellant to make a separate request to ESB in this regard.

Article 9(1)(c)

59. As outlined above, I consider that the best way to achieve a fair and comprehensive outcome in relation to the appellant's request is to remit the decision in light of my findings on the "environmental information" issue, rather than reaching a conclusion on the applicability of article 9(1)(c). That being said, the applicability of any grounds for refusal contained in article 9(1)(c) and, should be considered afresh as part of the remittal. The "commercial and industrial confidentiality" protected by article 9(1)(c) must not only be provided for by law, it must also protect a "legitimate

economic interest". Article 10(4) of the Regulations makes it clear that grounds for refusal should be interpreted on a "restrictive basis" and it should therefore be considered whether time constraints might apply to information concerning a transaction which, at this juncture, was entered into over 10 years ago. It may be the case that sufficient grounds still exist and that the public interest served by disclosure is outweighed by the interest served by refusal but I would remind the parties that if article 9(1)(c) continues to be relied upon with respect to the information concerned, then the requirements of the AIE Regulations must be substantially and procedurally adhered to, including by carrying out the balancing exercise required by article 10(3) and (4) of the AIE Regulations and by providing the appellant with sufficient reasoning for any decision reached in this respect (see *Right to Know CLG v An Taoiseach (No. 2)* [2018] IEHC 372, paragraphs 67-71 and 106).

Decision

60. Having carried out a review under article 12(5) of the AIE Regulations, I annul Coillte's decision. I find that the information requested by the appellant (i.e. the payment information, Schedule to the Wayleave Notice and Deed of Easement) is "environmental information" within the meaning of the AIE Regulations and remit the matter to Coillte who should process the appellant's request in accordance with the AIE Regulations.

Appeal to the High Court

61. A party to the appeal or any other person affected by this decision may appeal to the High Court on a point of law from the decision. Such an appeal must be initiated not later than two months after notice of the decision was given to the person bringing the appeal.

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Peter Tyndall
Commissioner for Environmental Information
[Date]