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-93472-R5M8V0

Date of decision: 10 December 2021

Appellant: Mr Lar McKenna

Public Authority: Kildare County Council (the Council)

Issue: Whether the monetary value of consideration referenced in Deeds of Easement entered into by ESB and landowners in the context of line placement projects is "environmental information".

Summary of Commissioner's Decision: The Commissioner found that the information in question was "environmental information" and remitted the matter to the Council 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 24 May 2019, the appellant requested "a copy of Instrument No. D2004KW013781Q" from Kildare County Council (the Council). The request noted that the Instrument was part of Folio No 47656F which related to lands owned by the Council. The Instrument in question consisted of Deeds of Easement between ESB and third parties granting ESB certain rights in respect of lands for the purposes of the placement and retention of electricity infrastructure.

2. The Council issued its decision on the request on 13 June 2019. It part granted access to the Instrument by providing the appellant with a copy of the Deeds from which the names of third parties and the monetary values referred to in those Deeds had been redacted. The Council relied on article 8(a)(i) as the basis for redaction of "personal information relating to a natural person" and on article 9(1)(c) as the basis for redaction of the monetary values which it said were commercially sensitive.

3. The appellant requested an Internal Review of the Council's decision to refuse information relating to the identity of the persons who granted the easements and the monetary value of the compensation paid by ESB for the easements. He argued both that the redacted information was "environmental information" and that the monetary value of compensation provided by ESB could not be considered commercially sensitive as it was not the subject of a commercial transaction given that the Acquisition of Land (Assessment of Compensation) Act 1919 applied to the acquisition of rights over the land by ESB and provided that a landowner was only entitled to compensation for the value of loss and damage suffered as a result of the line placement. He argued that even if the transaction could be considered commercial, there was no basis for considering the particular transaction to be sensitive as each easement acquired by ESB as part of a line placement project (or across multiple projects) would be entirely different in terms of its value and the rights it provided for. He also argued that ESB essentially operated as monopoly with regard to its line placement functions and that it was in the public interest that the amounts expended by ESB as compensation for the placing of lines and for the acquisition of rights for those lines would be open to the public. Finally, he argued that information on the identity of the persons who granted the easement was already in the public domain.

4. In its Internal Review decision, the Council reiterated its reliance on articles 8(a)(i) and 9(1)(c) but also set out its position that the redacted information was not "environmental information" within the meaning of article 3(1) of the AIE Regulations.

5. The appellant appealed to my Office on 7 August 2019.

Scope of Review

6. The appellant's appeal form noted that he was appealing the Council's decision that the requested information was not environmental information. He noted, in subsequent submissions to my Office that he was appealing the decision that the "monetary values" were not environmental information as well as the Council's reliance on article 9(1)(c) as grounds for refusal of information relating to those monetary values. He clarified that he was not appealing the decision to redact information relating to the identity of the third parties.

7. As noted above, the position of the Council as set out in the internal review outcome is that the information relating to the monetary value of compensation provided by ESB as part of the Deeds of Easement is not "environmental information". The Council has not made any submissions to my Office in support of its position as part of this appeal and has instead indicated that it would be happy to release the unredacted report "subject to the agreement of the Electricity Supply Board".

8. 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.

9. This leaves the following issues to be determined:

   (i) Whether the information on monetary values requested by the appellant is "environmental information" within the meaning of article 3(1) of the AIE Regulations;
   (ii) Whether article 9(1)(c) of the Regulations provides grounds for refusal of information on monetary values if such information is "environmental information".

10. 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 a general rule, my Office makes decisions on threshold jurisdictional questions before proceeding with any subsequent examination of the application of exceptions to the information at issue. As noted above, in this case the Council and ESB have both maintained that article 9(1)(c) provides grounds for refusal of the information requested by the appellant, even if that information is considered to be "environmental information". As this appeal has been with my Office since August 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, the reliance on article 9(1)(c) in this case 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 whether the information in question is "environmental information" in accordance with my usual approach. 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.

11. This decision is therefore concerned with whether the information on monetary values requested by the appellant is "environmental information" within the meaning of article 3(1) of the AIE Regulations.

Preliminary Matters

12. I wish to express my regret that there has been a considerable delay in the resolution of this appeal which was due to a combination of factors. I accept that some of those factors are attributable to my Office. However, it is also necessary to set out the contribution of the Council with respect to the delays occasioned in this case. It is not satisfactory for a public authority to refuse a request

without specifying the reasons for such refusal. As the High Court noted in *Right to Know CLG v An Taoiseach (No. 2)* [2018] IEHC 372 the mere invoking of the statutory ground upon which disclosure of environmental information may be exempted does not constitute a sufficient reason for refusal (paragraph 106). In this case, the Council refused the appellant's request while providing minimal reasoning for its decision, only to assert at appeal stage that it was open to providing the appellant with such information subject to the agreement of ESB. The Council is obliged to process requests for environmental information in accordance with the provisions of the AIE Regulations. If the Council considers the information to fall outside the definition of "environmental information", it should be in a position to set out both to the appellant and to my Office why it considers this to be the case on the basis of the AIE Regulations. If it accepts that the information constitutes "environmental information", it is only entitled to refuse that information if grounds for refusal as provided for in the Regulations apply and if the public interest weighs in favour of refusal having regard to the particular circumstances of the case. As such, while the views of ESB may be relevant to the question of whether grounds for refusal apply, its position on release of the information is not a ground for refusal in itself. If it is the case that the Council forms the view that environmental information should be released, the Council should issue a decision to that effect (ideally having consulted any third party which it considers might be impacted), allowing any affected party the opportunity to appeal that decision through the appropriate mechanism, namely a third party appeal to my Office. In the interests of fairness and efficiency, I would urge the Council to engage more fully with AIE requests and the appropriate processes in future.

Analysis and Findings

13. 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 and ESB. As I noted above, no submissions have been made by the Council. I have also examined the contents of the record 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.

14. The issue to be addressed in this case is whether the information contained in the Deeds of Easement request, which refers to the monetary compensation provided to the grantor of those Deeds, is "environmental information" within the meaning of the AIE Regulations.

15. 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).

16. 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.

17. 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.

18. The appellant has argued that the information detailing the consideration provided for in the Deed is "environmental information". He submitted that the erection of a 110kV electricity line was a measure or activity which affected or was likely to affect that state of elements of the environment including through the sterilisation of lands and the creation of visual impacts. He also argued that electricity lines emitted heat, noise and electromagnetic fields. As such, he argued that the information contained in the Deeds of Easement was information on measures and activities within the meaning of article 3(1)(c). He further submitted that the monetary values expressed in the Deeds were intrinsic to an understanding of the effects of the line on the relevant land as a result of ESB's line placement activities as it was compensation for the loss and damage suffered by landowners for matters such as physical interference with land, sterilisation and the introduction of health and safety risks. He submitted it was therefore information on a measure or activity carried out by ESB.

19. ESB accepted that owners/occupiers of land on which electricity lines or infrastructure had been placed were entitled to compensation if they could demonstrate a compensable loss. However, it did not consider the payment of compensation to be a measure or activity within the meaning of article 3(1)(c) in its own right, nor did it consider it to be information "on" the placement of electricity lines or infrastructure (which it accepted was a measure or activity for the purposes of the definition). It argued that decisions on the location of line placements were taken far in advance of any determination of compensation and were not influenced by potential compensation amounts such that compensation information was not integral to the development of the electricity network and was too remote from that measure to constitute information "on" it.

Legal framework for placement of electricity infrastructure

20. 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.

21. 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.

22. 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.

23. The service of a Wayleave Notice is governed by section 53 of the Electricity Supply Act 1927 as amended (the 1927 Act). 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.

24. 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.

25. 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, the relevant landowners appear to have granted their consent to the line placement. They entered into Deeds of Agreement with ESB (referred to above as the Deeds of Easement), which set out the conditions pursuant to which ESB was granted access to the lands for the purposes of the line placement, including the compensation to be paid by ESB in return for such access.

26. 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:

    (ii) 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.

(iii) 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.

27. Consent of the owner/occupier of the lands in question is not required but in some cases ESB enters 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".

28. 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".

29. 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". It submitted that payment of compensation relates to property rights, and is not for any environmental purpose.

30. As noted above, the monetary values of the consideration referred to in the Deeds of Easement will only fall within the meaning of "environmental information" if they are considered to be 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). 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).

31. In his decision in *RTÉ*, Barrett J expressly endorsed the approach set out by the Court of Appeal of England and Wales in *Henney* to determine the "information on" element of the definition (*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).

32. 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 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 the 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).

33. 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 public authorities, the term 'measures' serving merely to make it clear that the acts governed by the Directive included all forms of administrative activity".

34. 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…."

35. 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).

What measures or activities are at issue in this case?

36. 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 of relevance in this case.

37. In the first instance, I consider the construction of an electricity line (as opposed to a decision on its placement) to be a measure which has a "real and substantial possibility" of environmental impact. I note, for example, 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, Clarke J in 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 farm 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.

38. 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.

39. In addition, the decision to enter into Deeds of Easement with the landowners in question, and to agree conditions in exchange for the provision of their consent with respect to the placement of electricity infrastructure on land in accordance with the provisions of section 53(4) of the 1927 Act, is also a "measure" or "activity" which 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 Deeds of Easement with the landowners in this case. 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 Deeds of Easement, it is clear that they provide for entitlements on the part of ESB to have full and free right, liberty and licence to place and retain electricity lines and infrastructure on the lands and to maintain and inspect such infrastructure. The Deeds of Easement also provide for a covenant on the part of the landowner to refrain from certain building activities on the lands. It is clear that those entitlements and obligations have an environmental impact. I am therefore satisfied that the entry into the Deeds of Easement is a "measure" within the meaning of paragraph (c) of the definition.

40. As such, there are a number of measures at issue in this case: (i) the line placement project generally; (ii) the construction of the line; (iii) the service of the Wayleave Notice and (iv) the entry into the Deeds of Easement. The next question to be considered is whether the information within the scope of Q1 and Q2 is information "on" any or all of those measures.

Is the relevant information, information "on" those measures or activities?

41. Having identified the relevant measures or activities, it is 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 in 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".

42. *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, ultimately, 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). 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).

43. I should note at this juncture 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 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 referred to 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, not necessarily because it was integral to the programme but "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).

44. 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 para 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.

45. In addition, I consider ESB's focus on the line placement project to be narrow. As I have identified above, there are other measures and activities at issue in this case which I consider to come within article 3(1)(c). 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 "subject to the [owner/occupier]'s right to compensation". If the entitlement to proceed with line placement is subject to the entitlement to compensation, I do not see how compensation is not an integral part or a key element of the line placement project. This reasoning applies whether the amount of compensation is decided by a property arbitrator or on the basis of an agreement between the parties. 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.

46. 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 detailing the compensation amounts paid, the process by which such payments are awarded and decided and setting out how compensation fits into the overall framework of the line placement project, 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, when and how much compensation is 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.

47. Finally, I consider that the compensation amount is a "key element" of the Deeds of Easement. In the case of the first Deed, I consider that it is unlikely that this Deed would have been entered into without such compensation being agreed as part of it. The second Deed is somewhat unusual in that it appears to have been entered into in the context of a parallel transaction between the then landowner (with whom ESB negotiated the first Deed) and an entity which was purchasing lands impacted by the line placement. ESB described this as a "subset of the compensation settlement … tied up with the compensation agreement reached with [the original landowner]". As such, the monetary value of the consideration provided for in the second Deed, while not as significant a component of that Deed as the consideration provided for in the first, is nonetheless a key element of that Deed. It informs the land placement process as a whole and by providing a better understanding of that process, should be considered information "on" the Deed and on the project since it furthers the aims of the Convention, Directive and Regulations in accordance with the approach set out in *Henney*. 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.

48. I am satisfied therefore that the amount of compensation paid is information "on" the Deed of Easement, the construction of the line and the line placement project generally such that the monetary value of the consideration referred to in the Deed of Easement is "environmental information" within the meaning of the AIE Regulations.

Article 9(1)(c) – Commercial Confidentiality

49. 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 15 years ago.

50. 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. 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) of the AIE Regulations and by providing the appellant with sufficient reasoning for any decision reached in this respect.

Decision

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

Appeal to the High Court

52. 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

10 December 2021