



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-93412-H9Y7D4
(Legacy Reference: CEI-20-0008)**

Date of decision: 1 November 2022

Appellant: Ms X

Public Authority: ESB

Issue: Whether ESB was justified in refusing access to an insurance policy for the supply and installation of smart meters on the basis that the document is not “environmental information” within the meaning of the definition in article 3(1) of the AIE Regulations

Summary of Commissioner's Decision: The Commissioner found that the document at issue is “environmental information” within the meaning of paragraph (c) of the definition in article 3(1) of the AIE Regulations. He annulled ESB’s decision and directed it to undertake a fresh decision-making process in respect of the document.

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 12 December 2019, the appellant submitted a multi-part request to ESB. Specifically, she sought access to:
 - 1) “A copy of the Laois map for [s]martmeter [sic] installations.
 - 2) The details of all 2019 public consultations re. smartmeter installations in Laois.
 - 3) The smartmeter equipment documentation (e.g. datasheet) detailing the wireless technology used in the smartmeters.
 - 4) Please confirm the maximum distance over which a smartmeter can wirelessly transmit.
 - 5) Please provide a copy of ESB's insurance document (including exclusions) for the supply and installation of smartmeters. e.g. if harm is caused by the device to demonstrate that the ESB have adequate insurance to cover the particular harm.
 - 6) Please provide a copy of the letter issued to Laois customers advising them of smartmeter installations.
 - 7) [P]lease confirm if having a smartmeter means Customers can have their electricity cut off remotely.
 - 8) [P]lease explain why Laois has been selected as a starting point for smartmeter installations.”
2. ESB issued two decision letters to the appellant. On 9 January 2021, it issued a decision relating to parts 1-4 and 6-8 of her request, wherein it stated that having carried out searches for environmental information, no information that would satisfy those parts of her request is held by or for ESB. It proceeded to formally transfer those parts, under article 7(6)(a) of the AIE Regulations, to ESB Networks DAC (ESB Networks) for processing. On 10 January 2020, it issued a decision relating to part 5 of her request, wherein it granted access to one record in part, redacting certain information under article 8(a)(i) of the AIE Regulations on the ground that it was third party personal information.
3. On 16 January 2020, the appellant sought an internal review of ESB's decision dated 10 January 2020 relating to part 5 of her request. She suggested that while she had received a two-page “Client Information Letter” it was not sufficient for her to see the relationship between the supply and installation of smart meters and how the ESB is insured for same as she had not been provided with the full insurance document.
4. On 14 February 2020, ESB issued its internal review decision. It refused access to an insurance policy it had identified as relevant to the appellant's request on the ground that it is not “environmental information” within the meaning of the definition in article 3(1) of the AIE Regulations. It indicated, however, that if the insurance policy was found to be “environmental information” it would refuse access to the document under article 9(1)(c) of the AIE Regulations (commercial or industrial confidentiality).
5. The appellant's appeal to my Office was received on 11 March 2020.
6. During the course of the review, my Investigator notified ESB's insurer, as a relevant third party, of the review and invited it to make submissions. It commented that insurance policies contain confidential information and are generally regarded as confidential documents.



7. I have now completed my review under article 12(5) of the AIE Regulations. In carrying out my review, I have had regard to the submissions made by the appellant and ESB. I have also examined the contents of the document at issue. In addition, I have had regard to:
 - the Guidance document provided by the Minister for the Environment, Community and Local Government on the implementation of the AIE Regulations (the Minister’s Guidance);
 - 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’).
8. I have taken account of the judgments of the Superior Courts in *Minch v Commissioner for Environmental Information* [2017] IECA 223 (*Minch*), *Redmond & Another v Commissioner for Environmental Information & Another* [2020] IECA 83 (*Redmond*), *Electricity Supply Board v Commissioner for Environmental Information & Lar Mc Kenna* [2020] IEHC 190 (*ESB*) and *Right to Know CLG v. Commissioner for Environmental Information and Raidio Teilifís Éireann* [2021] IEHC 353 (*RTÉ*) and the decisions of the European Court of Justice in case *C-316/01 Glawischnig v Bundesminister für Sicherheit und Generationen (Glawischnig)* and case *C-321/96 Wilhelm Mecklenburg v Kreis Pinneberg - Der Landrat (Mecklenburg)*. I have also had regard to the judgment of the Court of Appeal of England and Wales that is referred to in the latter three Irish judgments, *Department for Business, Energy and Industrial Strategy v Information Commissioner* [2017] EWCA Civ 844 (*Henney*).
9. What follows does not comment or make findings on each and every argument advanced but all relevant points have been considered.

Scope of Review

10. In accordance with article 12(5) of the AIE Regulations, my role is to review the public authority’s internal review decision and to affirm, annul or vary it. Where appropriate in the circumstances of an appeal, I will require the public authority to make available environmental information to the appellant.
11. My powers as Commissioner for Environmental Information apply only in respect of environmental information held by or for a public authority. In accordance with my Office’s Procedures Manual, available at www.ocei.ie, my general practice in cases such as this, concerning a threshold jurisdictional question, is to limit my review to the preliminary matter of whether the information at issue is "environmental information" such that it falls within the remit of the AIE Regulations.
12. Accordingly, I am satisfied that the scope of this review concerns whether ESB was justified in refusing access to the insurance policy for the supply and installation of smart meters on the basis that it is not “environmental information” within the meaning of the definition in article 3(1) of the AIE Regulations.



Preliminary Matters

13. A review by my Office considered to be de novo, which means that it is based on the circumstances and the law at the time of my decision.
14. It is also clear from the comments of the Court of Appeal in *Redmond*, at paragraph 51, that the nature of a review by my Office is inquisitorial rather than adversarial in nature. The extent of the inquiry is determined by me and not the parties to the appeal.

Definition of “environmental information”

15. Article 3(1) of the AIE Regulations is the relevant provision to consider where the issue is whether information is “environmental information”. In line with Article 2(1) of the AIE Directive, article 3(1) of the AIE Regulations provides that “environmental information” means:

“any information in written, visual, aural, electronic or any other 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. 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 so that an informed public can participate more effectively in environmental decision-making. It replaced Council Directive 90/313/EEC, the previous AIE Directive. The right of access under the AIE Regulations is to information “on” one or more of the six categories at (a) to (f) of the definition. According to national and EU case law on the definition of “environmental information”, 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 the CJEU.

Position of the Parties

17. The appellant is of the view that the insurance policy at issue is “environmental information”. She made submissions to this Office in support of her position, which highlighted, among other things, the non-ionising radiation / electromagnetic fields (EMFs) emitted by smart meters, related health concerns, the risk of fire from smart meters, risks associated with installation, and the need to have appropriate insurance cover.
18. It is ESB’s position that the insurance policy at issue is not “environmental information” within the meaning of any of the paragraphs of the definition in article 3(1) of the AIE Regulations. The focus of its submissions to my Office concerned paragraph (c).
19. In its submissions to my Office, ESB explained that the Commission for the Regulation of Utilities (the CRU) tasked ESB Networks¹ with delivery of the Rollout Programme of the National Smart Metering Programme, which involves upgrading all of Ireland’s electricity meters to smart meters (i.e. the supply and installation of smart meters).
20. Although not conceding that the Rollout Programme is in fact a measure or activity likely to affect the environment within the meaning of paragraph (c), ESB stated its position that the insurance policy at issue, which is a combined liability policy, is not information “on” the Rollout Programme.
21. ESB referred to *Glawischnig*, where the CJEU, in considering the previous AIE Directive, stated:

“Directive 90/313 is not intended, however, to give a general and unlimited right of access to all information held by public authorities which has a connection, however minimal, with one of the environmental factors mentioned in Article 2(a). To be covered by the right of access it establishes, such information must fall within one or more of the three categories set out in that provision.” (*Glawischnig* at paragraph 25).

ESB submitted that it is not permissible to take an approach of assessing whether information is “on” a measure by reference to whether it relates to or has a connection to one of the environmental factors mentioned in the definition, however minimal. It noted that such an approach is what the CJEU in *Glawischnig* stated is not permissible because, contrary to the intention of the Directive, it would lead

¹ ESB Networks DAC, a ring fenced subsidiary within ESB, is the licensed operator of the electricity distribution system. Staff in the ESB Networks business unit carry out the licensed functions of the Transmission Asset Owner, Distribution Asset Owner and Distribution System Operator, under the management of ESB Networks DAC (see <https://www.esbnetworks.ie/acting-responsibly/freedom-of-information/publication-scheme/information-about-the-dso>)



to a general and unlimited right of access to all such information. I note that ESB's comments are reflective of those of the Court of Appeal of England and Wales in *Henney* at paragraph 35.

22. ESB argued that the insurance policy at issue is, in all respects, a general and generic policy that applies across all ESB Group entities, units, and activities, and one that it is in no way associated specifically, or indeed at all, with the Rollout Programme. ESB explained that the insurance policy provides blanket cover for all statutory and other activities of ESB and subsidiary/associated companies such as ESB Networks, including the supply and installation of smart meters. ESB explained that it has sought to insure against certain risks associated with its activities generally and noted that the policy “was not originally taken out, or even later considered for amendment, or amended, or extended, to cover any risks that might be considered to arise from the [Rollout Programme].” ESB contended that while the insurance policy covers insured events arising in connection with the work of the ESB Networks business unit in carrying out the full range of its activities regarding the transmission and distribution electricity networks, the policy does not explicitly mention the National Smart Metering Programme or the Rollout Programme, or distinguish in any way between the work done by ESB Networks in relation to that programme and other work done by that business unit. ESB noted that, in the context of insurance, it does not regard activities in relation to the Rollout Programme as being any different to the activities that ESB Networks carries out generally in relation to the metering obligations imposed on it under its distribution system operator licence granted by the CRU. ESB argued that had the appellant not requested access to an insurance document for the supply and installation of smart meters, it would not have occurred to anyone to associate the policy with the Rollout Programme. ESB stated that having been tasked by the CRU with the Rollout Programme of the National Smart Metering Programme and having regard to obligations contained in its distribution system operator licence, ESB Networks was under a legal obligation to implement the Rollout Programme whether with or without insurance cover in respect of risks that might be considered as associated with the Rollout Programme. It noted that the CRU's “Decision on the National Rollout of Electricity and Gas Meters” (Reference: CER12008) makes no mention of insurance, nor has the CRU otherwise ever imposed any obligations on ESB Networks regarding insurance in relation to the Rollout Programme undertaken by ESB Networks.
23. ESB acknowledged that information does not have to be intrinsically environmental to fall within the scope of the definition. However, it contended that this does not mean that a document, such as the insurance policy at issue, should readily or indiscriminately be regarded as being information “on” a measure or activity within the meaning of paragraph (c). It noted that in *Henney*, the Court stated:

“A literal reading of [article 3(1)(c)] would mean that any information about a relevant “measure” would be environmental information, even if the information itself could not be characterised as having, even potentially, an environmental impact as defined. However, ... ‘simply because a project has some environmental impact’, it does not follow that ‘all information concerned with that project must necessarily be environmental information’. Interpreting the provision in that way would be inconsistent with the decision in *Glawischnig's case*....” (*Henney* at paragraph 45).

ESB submitted that it is arguable that the insurance policy is neither information concerned with the Rollout Programme nor information concerning the Rollout Programme that is also “on” it. It referred to *Henney* where the Court found that the Upper Tribunal was entitled to find that a Project Assessment Review focused on the communications and data component of the UK Smart Metering Programme was information “on” the UK Smart Metering Programme because the communications



and data component was integral to the programme as a whole and critical to its success. ESB stated that, in contrast, the insurance policy at issue is not a component part of the Rollout Programme or, in any way, integral or critical to or a key element in the success of the Rollout Programme and the fact that the insurance policy may (or may not) cover events arising in connection with work undertaken by ESB Networks in furtherance of the Rollout Programme does not make it so. It contended that the insurance policy at issue cannot be considered to be information regarding a key element or component part of the Rollout Programme (or the National Smart Metering Programme) and cannot therefore be information “on” a measure or activity within the meaning of paragraph (c).

24. ESB also noted in *Henney* the Court, in reference to determining whether information is “on” a measure or activity, commented:

“...the way the line will be drawn 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 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 [article 3(1)(c)] because it is not consistent with or does not advance the purpose of those instruments.” (*Henney*, at paragraph 47).

ESB submitted that in this case, the insurance policy would not better inform the public, or better enable the public to contribute to environmental decision-making in relation to the Rollout Programme or the National Smart Metering Programme if they were able to have access to it – whether they be persons with no particular experience of the electricity industry, or persons with such experience. It contended that the insurance policy should not, on a purposive construction, be deemed to be “on” the Rollout Programme, because that is not consistent with, nor does it advance the purpose of, the AIE Directive and the Aarhus Convention.

Analysis and Findings

25. In my view, paragraph (c) of the definition, which provides that “environmental information” means any 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 the most relevant to this review. Accordingly, I will proceed to consider it first.

Identification of a measure or activity

26. Paragraph (c) requires the identification of a relevant measure or activity, which the information at issue is “on”. Information may be “on” more than one measure or activity (*Henney* at paragraph 42). In identifying the relevant measure or activity, one may consider the wider context and is not strictly limited to the precise issue with which the information is concerned (*ESB* at paragraph 43). The list of examples of measures and activities given at paragraph (c) is not exhaustive, but it contains illustrative examples (*Redmond* at paragraph 55). The CJEU stated in *Mecklenburg* that the term ‘measure’ serves “merely to make it clear that the acts governed by the directive included all forms of administrative



activity” (*Mecklenburg* at paragraph 20, emphasis added), and a similarly expansive approach should be taken to the term ‘activity’ (*RTÉ*, at paragraph 19).

27. The “About ESB” section of ESB’s 2021 Annual Report² states:

“ESB was established in 1927 as a statutory body under the Electricity (Supply) Act, 1927. With a holding of 96.5%, ESB is majority owned by the Irish Government. The remaining 3.5% is held by the trustees of an Employee Share Ownership Plan. As a strong, diversified utility, ESB operates across the electricity market, from generation through transmission and distribution, to supply of customers in addition to using our networks to carry fibre for telecommunications. ESB is a leading Irish utility with a regulated asset base of approximately €10.9 billion (comprising ESB Networks €8.8 billion and NIE Networks €2.1 billion), a 33% share of generation in the all-island market and supply businesses supplying electricity and gas to over 1.9 million customer accounts throughout the islands of Ireland and Great Britain. As at 31 December 2021, ESB Group employed over 7,800 people.”

28. I understand that ESB operates through a number of different business units and subsidiary/ associated companies (see ESB’s 2021 Annual Report). I do not intend to refer to them all here. However, I would note that some are referred to on ESB’s website <https://esb.ie/> within the “What We Do” section and under “Discover Our Businesses”, including: Generation and Trading; ESB Networks; Electric Ireland; Smart Energy Services; Ecars; and ESB International. In my view the information provided in ESB’s 2021 Annual Report in respect of those areas provides an indication of some of the operations with which ESB and its subsidiary/associated companies are engaged – I have outlined some of this information below.

- Generation and Trading (GT) – “The GT business develops and operates ESB’s portfolio of wholly and jointly owned electricity generation assets. It also has a significant owned asset and 3rd party asset energy trading portfolio. The generation fleet consists of 5,404 MW of generation assets across Single Electricity Market (SEM) and Great Britain (GB) including 983 MW of renewable assets, with a further 438 MW under construction in renewables and storage capacity.” (see ESB Annual Report 2021, page 64 and <https://esb.ie/what-we-do/generation-and-trading>)
- ESB Networks – “ESB Networks is the licensed Distribution System Operator (DSO) of the electricity distribution system in the Republic of Ireland, with responsibility for building, operating, maintaining and developing the network and serving all electricity customers across the country. ESB Networks also owns the transmission network in the Republic of Ireland, working closely with the Transmission System Operator, EirGrid.” (see ESB Annual Report 2021, page 60, <https://esb.ie/what-we-do> “Our Businesses” and the link to <https://www.esbnetworks.ie/>)
- Electric Ireland – “Electric Ireland is the energy retail arm of ESB in ROI and Northern Ireland (NI), supplying electricity and energy services across the island, as well as gas in ROI. With over 1.4 million customers and an electricity all-island market share of 40%, Electric Ireland serves all market segments, from domestic households to large industrial and commercial businesses, in both ROI and NI. It also has 22% of the residential gas market share in ROI.” (see ESB Annual

² https://esb.ie/docs/default-source/investor-relations-documents/esb-annual-results-2021.pdf?sfvrsn=6e3d00f0_2



Report 2021, page 66, <https://esb.ie/what-we-do> “Our Businesses” and the link to <https://www.electricireland.ie/>

- Smart Energy Services – “ESB Smart Energy Services (SES) designs, develops and delivers integrated management solutions for large energy users in the UK and Ireland. Working in partnership with customers, SES delivers tailored energy efficiency solutions, on site generation and demand management technologies.” (see ESB Annual Report 2021, page 66 and <https://esb.ie/what-we-do/smart-energy-services>)
- eCars – “ESB eCars builds, owns and operates electric vehicles (EV) charging networks for public use across ROI, NI and GB. This network contains over 1,350 charger points on the island of Ireland, as well as over 350 charger points in GB.” (see ESB Annual Report 2021, page 66 and <https://esb.ie/what-we-do/ecars>)
- ESB International and Engineering and Major Projects (EMP) - “ESB International, a global provider of engineering consultancy services, is currently working in the Middle East, Africa and Asia. It also continues to work across Europe including Ireland and the UK. During 2021, ESB International continued to deliver for its clients, providing a range of services that are based on ESB’s core capabilities of engineering, management and project delivery across the electricity sector.” (see ESB Annual Report 2021, page 68, <https://esb.ie/what-we-do> “Our Businesses” and the link to <https://www.esbinternational.ie/>). ESB International forms part of Engineering and Major Projects (EMP). “The EMP business provides a centre of engineering for ESB, delivers large projects across the ESB Group, is responsible for ESB's Group Property and Security portfolio, and provides engineering and other services to external clients through ESB International. The business has over 800 people who work in partnership with other business areas in ESB and deliver engineering services to external clients both at home and internationally.” (see ESB Annual Report 2021, page 68)

29. As noted, ESB Networks is the DSO. In its submissions to my Office, ESB stated that the DSO licence granted by the CRU to ESB Networks contains a number of legal obligations, including the provision of metering and data services (Condition 9). ESB explained that the CRU tasked ESB Networks with delivery of the Rollout Programme of the National Smart Metering Programme (the Rollout Programme), which involves upgrading all of Ireland’s electricity meters to smart meters (i.e. the supply and installation of smart meters). According to ESB Networks’ website,³ the Rollout Programme will involve the replacement of 2.4 million electricity meters in homes, farms, and businesses across Ireland with next generation meters. Meters can be located both indoors and outdoors. It is necessary for the electricity supply to be turned off in order to carry out the work. The replacement work is being carried out by either ESB Networks technicians or electrical contractors working on behalf of ESB Networks. To-date over 900,000 smart meters have been installed. The rollout is being progressed on an area by area basis.

30. ESB has identified the insurance policy at issue, a general combined liability policy, which provides cover for all statutory and other activities of ESB as the relevant insurance policy for the supply and

³ <https://www.esbnetworks.ie/existing-connections/meters-and-readings/smart-meter-upgrade/smart-meter-upgrade-faqs> (See “Why are all existing meters being replaced” and “what is involved in the meter replacement process”).



installation of smart meters. ESB is defined in the policy in very broad terms, including directors, executives, employees, servants and agents and its subsidiary/associated companies. I am satisfied that the Rollout Programme, which involves the replacement of 2.4 million electricity meters across Ireland with next generation meters by ESB Networks, is a measure or activity within the meaning of paragraph (c). I am also cognisant that, in identifying the relevant measure or activity for the purposes of this review, information may be “on” more than one measure or activity. As set out above, I note that ESB and its subsidiary/associated companies are involved in a wide range of operations, including, for example: electricity generation, transmission, distribution, and supply; engineering consultancy; the provision of smart energy services; and the operation and maintenance of public charging infrastructure for EV’s. Given that these are statutory or other activities of ESB, I have no reason to doubt that many of these operations are covered, at least to some extent, by the insurance policy at issue. I am satisfied that, many, if not all, of these operations are measures or activities within the meaning of paragraph (c).

Whether the measure or activity is affecting, likely to affect or designed to protect the environment

31. To meet the definition, the measure or activity must affect or be likely to affect the elements and factors referred to in paragraphs (a) and (b) (i.e. the environment) or designed to protect the environment (*Redmond* at paragraph 57). A measure or 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). It is also important to note that the actual outcome of a measure or activity is irrelevant. In this respect, I note the analysis of Hogan J in *Minch* at paragraph 40 of his judgment.
32. In my view, it is evident that there is a real and substantial possibility that many of the operations of ESB (as defined in the policy) covered by the insurance policy (including: electricity generation, transmission, distribution, and supply; engineering consultancy; the provision of smart energy services; and the operation and maintenance of public charging infrastructure for EVs) will affect the environment. Such operations will impact the environment, for example, due to their nature as components of the energy sector; the work, materials, emissions, pollution, waste, water, transport, fuel, and land-use changes involved in undertaking them; and/or their role in the low carbon transition.
33. I note that the “ESB Group Policy – Environment and Sustainability” (Version 4)⁴, which “applies to all ESB Group companies”, states “ESB recognises that our activities, including electricity generation, transmission, distribution and supply, have environmental impacts”. I also note that ESB’s Annual Report 2021 states that in December 2021, ESB’s 2040 Strategy – Driven to Make a Difference: Net Zero by 2040” (the 2040 Strategy)⁵ was approved and it outlines a commitment to achieve net zero by 2040. The Annual Report 2021 states that the 2040 Strategy “sets a clear direction for ESB that directly supports the achievement of the UN’s Sustainable Development Goals for ensuring access to

⁴ https://cdn.esb.ie/media/docs/default-source/sustainability/esb-group-policy---environment-and-sustainability.pdf?sfvrsn=835007f0_4

⁵ https://esb.ie/docs/default-source/document-download/esb-net-zero-strategy-2040.pdf?sfvrsn=33e8a62e_0



affordable, reliable, sustainable and modern energy for all (Goal 7), building resilient infrastructure (Goal 9) and taking urgent action to combat climate change and its impacts (Goal 13)". The ESB's Sustainability Report 2021⁶ explains:

"Net Zero means ambitious reductions in greenhouse gas emissions as close to zero as possible and balancing remaining residual emissions through credible carbon removal projects and offsets. The term net zero is important because – for CO₂ at least – this is the state at which global warming stops. Net Zero requires all available technologies to be used to reduce baseline emissions. Only truly 'hard-to-decarbonise' emissions may be compensated with offsets. For ESB, this means reducing emissions from electricity generation to zero, all other direct emissions (vehicle fleets and fugitive emissions) towards zero and working through our business activities and with strategic and supply chain partners to reduce our indirect emission to or towards zero. Remaining residual emissions would remain to be handled through a credible offset mechanism."

34. The Sustainability Report 2021 contains ESB's environmental disclosures. It outlines that ESB reports emissions using the Greenhouse Gas Protocol methodology, which uses three "scopes" to help delineate direct and indirect emission sources. In respect of ESB, Scope 1 (direct) emissions concern thermal generation emissions, vehicle fleet emissions, buildings emissions, and fugitive emissions. Scope 2 (indirect) emissions concern emissions associated with electricity networks transmission and distribution losses and electricity consumption. Scope 3 (indirect) emissions concern emissions associated with 8 categories (purchased goods and services, capital goods, fuel and energy, transport and distribution, waste, business travel, employee commuting, and use of sold products). ESB's 2021 totals for calculated Scope 1, 2, and 3 emissions were 7,875,496 tonnes CO₂e, 506,380 tonnes CO₂e, and 3,327,845 tonnes CO₂e respectively, with a combined total of 11,709,721 tonnes CO₂e.
35. In addition to disclosures regarding emissions, the Sustainability Report 2021 sets out detail in respect of ESB's environmental management systems, management of operational impacts on biodiversity, energy management systems, water consumption, conservation and monitoring, and effluent and waste management. It also contains examples of how the different ESB businesses identified in the previous section more generally impact the environment – I have outlined some of this information below:
- Generation and Trading (GT) – (see Sustainability Report 2021 pages 29 and 35)
 - "GT operates its business with a focus on minimising environmental impact, aiming to significantly increase renewable generation and reduce the overall carbon intensity of electricity generation. ESB is committed to leading a secure and affordable transition away from the use of coal and peat for power generation with the closure of its peat plants in 2020. CO₂ output from GT's generation plants is lower than 2005 (reference date) by approximately 46%, and the carbon intensity of generation reduced by 34% to 440 g/kWh."
 - ESB's commitment to supporting the societal goal of achieving Net Zero emissions through the generation of renewable electricity is lead out by the [GT] business, with the aim of delivering a fivefold increase in our renewable generation portfolio to 5,000MW by 2030."
 - "GT will continue to increase the number of opportunities for investment in low carbon generation, including, solar, storage and offshore wind...Building on the significant progress

⁶ https://cdn.esb.ie/media/docs/default-source/ask/esb-sustainability-annual-report-2021.pdf?sfvrsn=b2916ba8_1



made in 2021, 2022 will continue to focus on; onshore wind projects... as well as the development of four battery projects...”.

- ESB Networks – (see Sustainability Report 2021 pages 7, 29 and 35)
 - “The key strategic objectives for the ESB Networks business under the revised ESB Group strategy is to connect renewables to decarbonise the electricity system by 2040 and provide resilient infrastructure for a reliable low carbon electricity system.”
 - “ESB Networks is committed to supporting the Irish Government’s target to reduce CO2 from the sector by 30% and improve the energy efficiency of ESB buildings by 50% by 2030
 - During 2021, ESB Networks continued to operate revised notification protocols in relation to fluid filled cables with the relevant statutory authorities and continued investigations on some historic leak sites.”
 - “ESB Networks, in common with most electrical utilities, uses sulphur hexafluoride (SF6) as a safe insulator in switchgear. During 2021, ESB Networks reduced the SF6 leakage amount and continues to work to contain, reduce and minimise the use of SF6.”
 - “[ESB Networks] are investing in smart reliable infrastructure to increase resilience and reliability, enable widespread electrification and meet the changing needs of our customers. To date 750,000 (March 2022) smart meters have been rolled out in the Republic of Ireland, improving the efficiency of the network and giving customers access to smart technologies that will enable them to manage their energy use more sustainably.”

- Electric Ireland – (see Sustainability Report 2021 pages 29 and 35)
 - “Electric Ireland actively works with customers to assist them in improving the sustainability of their homes and businesses through the efficient use of the energy provided to them.”
 - “Electric Ireland’s smart tariffs help customers to use energy when it is most beneficial to them and to the system, and green tariffs provide customers with a guarantee that their energy comes exclusively from renewable sources.”
 - Electric Ireland installs “solar panels, batteries, EV chargers, and smart controllers to further help customers with their energy needs”.
 - “Electric Ireland Superhomes JV provides a one-stop-shop to project manage deep energy retrofits in customer homes”.

- Smart Energy Services – (see Sustainability Report 2021 pages 35 and 41)
 - “For business customers, Smart Energy Services provides expert advice on Solar PV, process optimisation and low-carbon heating and cooling technologies.”
 - “ESB’s Smart Energy Services (SES) works with large energy users providing them with advice and expertise in energy efficiency and energy management through longterm partnership arrangements.” For example: “ESB’s Smart Energy Services are undertaking an energy savings agreement with MSD (Merck Sharp & Dohme) Ireland under the EEOS (Energy Efficiency Obligation Scheme)...Under the energy savings agreement, any kWh energy savings MSD generates from their energy efficiency projects, ESB Smart Energy Services will use these kWh energy savings and set them off against the annual obligation arrangement ESB Smart Energy Services have with the Irish Government. In return for the energy savings credits ESB Smart Energy Services has entered into an agreement with MSD to make an on-site energy engineer available for a period of 1 year in order to help MSD identify opportunities to further reduce their carbon footprint... ESB Smart Energy Services anticipates it will deliver 27.5 GWh Primary Energy Equivalent (PEE) worth of energy saving



credits from MSD during this project, which is the equivalent energy required to power 2,000 homes for one year.”

- eCars – (see Sustainability Report 2021 page 35 and <https://esb.ie/what-we-do/ecars/faqs>)
 - “Through our eCars business, we are also pivotal to the decarbonisation of transport by providing a national, public EV infrastructure in ROI and NI, and working with a number of organisations and Borough Councils in GB to install charging networks.”
 - “[Electric Vehicles] EVs offer two direct benefits to the environment when used as replacements for diesel or petrol vehicles. Firstly, every kilometre driven by an EV versus a petrol or diesel vehicle means significantly less greenhouse gases emitted. EVs also eliminate ‘tailpipe emissions’ - taking particulates, carbon dioxide, carbon monoxide, sulphur and other pollutants out of dense urban areas improves air quality. It’s worth noting that noise pollution per vehicle is much lower in an electric vehicle”
- ESB International and Engineering and Major Projects EMP – (see Annual Report 2021 page 68 and Sustainability Report 2021 page 38)
 - “ [EMP’s] purpose is to deliver the major projects and engineering solutions required by ESB and its customers to lead the transition to reliable, affordable and low-carbon energy.”
 - “Whether it is new wind farms, electricity transmission or distribution projects, or technologies such as battery storage or flexible power generation, a commercial engineering capability is a core requirement for ESB. This capability also supports the ongoing maintenance of existing infrastructure, ensuring that these generation and network assets perform efficiently throughout their lives to meet customer and market needs.”
 - “ESB Group employs a number of specialist environmental staff including professional ecologists, as well as operating a consultant framework relating to terrestrial, freshwater and marine ecology. ESB’s ecology staff, based in Engineering and Major Projects, are involved throughout all stages of projects from feasibility/due diligence/site selection stage, through design stage, construction and operation of a development.”
 - ESB International’s website outlines “We strive to achieve excellence in all our endeavours, and we recognise that our business activities interact with and may impact the environment. Our objectives are to adhere to the principles set out in ESB group environment policy in our operational businesses and deliver “best practice” solutions to customers while minimising our effects on the environment”.

36. I am satisfied , that many of the operations of ESB and its subsidiary/associated companies covered by the insurance policy are measures and/or activities likely to affect the environment.

Whether the information is on the measure or activity

37. Where the relevant measure or activity has the requisite environmental effect, one must consider whether the requested information is “on” that measure or activity within the meaning of article 3(1) of the AIE Regulations.
38. Information is “on” a measure or activity if it is about, relates to or concerns the measure or activity in question. It is not sufficient for information to be merely connected to the measure or activity, but the information need not be specifically, directly or immediately about the measure or activity. It is



permissible to consider the wider context in determining whether information is “on” a measure or activity, which may not be apparent on the face of the information itself (*Henney* at paragraphs 37-44, referred to in *Redmond* at paragraph 99, *ESB* at paragraphs 36-45, and *RTÉ* at paragraph 52). Information that is integral to the relevant measure or activity is information “on” it (*ESB* at 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). Information that is not consistent with or does not advance the purpose of the AIE Directive may not be “on” the relevant measure or activity (*ESB* at paragraph 44 and *Henney* at paragraph 47). As “any information ... on” a measure affecting or likely to affect the environment is prima facie environmental information, the information at issue does not, in itself, have to affect or be likely to affect the environment (*Redmond* at paragraphs 57 and 59). However, consideration of whether information is “on” the measure does require examination of the content of the information (*ESB* at paragraph 50).

39. In this case, the measures and/or activities identified are the many operations of ESB and its subsidiary/associated companies covered by the insurance policy likely to affect the environment.
40. Having examined ESB’s submissions and the content of the insurance policy at issue, which is dated from 31 March 2019 to 30 March 2020, I note that it covers “all statutory and other activities” of ESB and its subsidiary/associated companies. I accept that the insurance policy is a general (combined liability) policy which does not explicitly refer to each and every operation engaged in by ESB and its subsidiary/associated companies and that it may not have been taken out, amended and/or extended to cover risks considered to arise from specific operations. I also acknowledge ESB’s comment that ESB Networks was under a legal obligation to implement the Rollout Programme whether with or without insurance cover.
41. However, I do not accept the Rollout Programme or, indeed, many of the other activities of ESB and its subsidiary/associated companies which carry a high risk stemming from either the probability or impact of a claim, would be undertaken without some form of insurance. At the very least, given the level of claim that could be made against ESB, it would require self-insurance by means of acceptance of risk on the part of ESB. The latter would usually be provided for by the company in the form of reserves, or another funding mechanism. In its Report on the Cost of Employer and Public Liability Insurance, the Cost of Insurance Working Group⁷ (to which ESB is a contributor as part of the Self Insurance Task Force) noted the rise of self-insurance for some risks for what were deemed to be somewhat more controllable risks, but the majority of companies retain insurance cover for major risks, particularly regarding public liability cover.
42. In any event, it is my view that the whether or not ESB is required to hold insurance is a red herring. The fact remains that the insurance policy exists and it does insure against certain risks associated with the activities generally of ESB and its subsidiary/associated companies, providing some form insurance cover for “all statutory and other activities”, including operations likely to affect the environment.
43. As noted above, information may not be “on” a relevant activity or measure if it is not consistent with or does not advance the purpose of the Aarhus Convention and the AIE Directive. ESB and its subsidiary/associated companies clearly have an environmental remit. The insurance policy at issue provides cover in respect of all activities of ESB and its subsidiary/associated companies, including

⁷ <https://assets.gov.ie/6256/060219173306-502d0dda6b644e7db5d019dd44ac49b6.pdf>



activities likely to affect the environment. Many of those activities require interaction with the public and benefit from public support. The insurance policy, among other things, sets out the limits of indemnity for public liability, products liability, professional indemnity, and financial loss. It also sets out the self-insured retention for public products and financial loss liability and professional indemnity. It further includes relevant extensions, conditions, and exceptions.

44. For example, the smart meter programme involves representatives of the ESB accessing almost every residential property in the state and carrying out small but significant work. If this was not done correctly, there could be major consequences for the homeowner, such as damage to property or injury to the occupiers. The fact that the ESB has significant insurance cover can only serve to encourage public support for the programme and ultimately to improve participation in the programme.
45. In my view, public access to the insurance policy, even where it is a general (combined liability) policy, would also contribute to the accountability and transparency of the activities engaged in by ESB and its subsidiary/associated companies that have an impact on the environment. I further consider that it would strengthen public trust in and support of their implementation. Accordingly, it would be in line with the purpose of the Aarhus Convention, as set out at paragraphs 9 and 10 of the Preamble, and the AIE Directive, as set out in Recital 1.
46. In all the circumstances, I find that the insurance policy at issue amounts to information “on” the many operations of ESB and its subsidiary/associated companies covered by the insurance policy likely to affect the environment.

Conclusion

47. In conclusion, I find that the insurance policy at issue is environmental information within the meaning of paragraph (c) of the definition in article 3(1) of the AIE Regulations. In light of this finding, it is not necessary for me to consider whether the document also falls within other paragraphs of the definition.
48. I consider that the most appropriate course of action to take in this case is for me to annul ESB’s decision to refuse access to the insurance policy on the basis that it is not “environmental information” within the meaning of the definition in article 3(1) of the AIE Regulations and direct it to undertake a fresh decision-making process in respect of the document. In doing so, I wish to make a number of comments.
49. I note ESB’s position that the exception in article 9(1)(c) of the AIE Regulations would apply to the document if it was found to be environmental information. If ESB considers that refusal under article 9(1)(c) of the AIE Regulations (or indeed any other provision under articles 8 or 9) is appropriate, it must set out its reasons for reaching this conclusion, having particular regard to article 10 of the AIE Regulations.
50. ESB identified the insurance policy, as the relevant policy for the supply and installation of smart meters and withheld it in full on the basis that it was not environmental information. I note that my Investigator, during the course of the review, informed the appellant that the insurance policy is a general combined liability policy, which provides blanket cover for all statutory and other activities of



ESB and its subsidiary/associated companies. She explained that it is high-level and does not specifically refer to smart meters or to their rollout/supply/installation. In response to my Investigator's correspondence, the appellant indicated that she would be willing to confine the scope of the information sought by her to the parts of the insurance document which are relevant to emissions/damages/harms related to smart meters and referred to specific types of information. As I have found the insurance policy, in its entirety, to be "on" the many operations of ESB and its subsidiary/associated companies covered by the insurance policy likely to affect the environment and, consequently, environmental information within the meaning of paragraph (c), I do not consider it appropriate to examine the document in any further detail at this stage. However, it seems to me, that a first step in processing the request afresh, it would be beneficial for both parties to agree, in the first instance, on the precise nature of the information sought by the appellant. It may be the case that certain information within the insurance document simply falls outside the scope of the specific information required. If relevant, ESB should indicate which information is being withheld on that basis.

51. Separately, it may be the case that certain information sought by the appellant is simply not contained within the insurance document. It is important to note that, in accordance with article 7(1) of the AIE Regulations, the AIE Regulations only require public authorities to make available environmental information held by or for them. As ESB ought to be aware, article 7(5) is the relevant provision to consider when the question arises as to whether requested environmental information is held by or for the public authority concerned and may be a relevant consideration in this matter. If ESB wishes to rely on article 7(5) of the AIE Regulations, it must set out its reasons for doing so.

Decision

52. Having carried out a review under article 12(5) of the AIE Regulations, I hereby annul ESB's decision to refuse access to the insurance policy at issue on the basis that it is not "environmental information" within the meaning of the definition in article 3(1) of the AIE Regulations. I direct ESB to conduct a new decision-making process in respect of the document in accordance with the provisions of the AIE Regulations.

Appeal to the High Court

53. 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.

Ger Deering
Commissioner for Environmental Information
1 November 2022