Notes for the Oct TF presentation

Opening remarks

- Note re the apparent assumption in the very interesting discussions of the important tools for the dissemination of EI that the concept of EI is well understood.
- Also refer to the European Environmental Agency’s Report on Open Data & the talk by the representative from DG Environment, European Commission, re the EPA’s excellent website/portal.
- But . . .

My colleague, LU & I, are here on behalf of the Office of the Commissioner for Environmental Information (OCEI) in Ireland to discuss the difficulties that our Office has experienced in interpreting the definition of “environmental information” in response to access to information requests.

The OCEI: Who we are & what we do

The OCEI is an independent review body established in 2007 under the Access to Information on the Environment (AIE) Regulations. The Commissioner makes decisions that are final and binding on the parties concerned, but subject to appeal to the High Court on a point of law

- with court proceedings being extremely expensive and lengthy for all parties in Ireland despite new special cost rules that apply to environmental cases.

The Commissioner has no other role under the AIE Regulations apart from reviewing decisions of public authorities on access to information requests.

It is in article 5 of the Regulations that one finds the active dissemination requirements as well as the obligations on public authorities relating to the general collection and dissemination of environmental information on a proactive basis (as opposed to access upon request).

But though the Commissioner has no oversight role in relation to article 5, the OCEI has acknowledged in its Annual Reports that the “significant obligations” that it imposes are “crucial to the effective administration of the AIE regime”.
Moreover, our binding decisions on the definition of “environmental information” have implications of course for the scope of the article 5 obligations.

So, what is the scope of these obligations? What is “environmental information”?  

- With respect, it seems to me that to discuss the obligations under AIE, such as collection and dissemination, without a clear understanding of what “environmental information” actually is, is a bit like putting the “cart before the horse”.
- As indicated by the charts illustrating the issues arising in our decisions and the appeals of our decisions made to the courts, this is a question that has proven to be very challenging for us, with over one-fifth of our decisions having been appealed to the High Court this year, and no less than 2/3 of these appeals involving the basic definitions outlining the scope of the AIE regime.
  - The 2nd edition of the Aarhus Guide states that “it is important to define as precisely as possible the terms that are at the heart of the Convention”, but it is apparent that this in fact has not been done to a sufficient extent for the purposes of the Irish legal system.

“Historic” approach, i.e. before Minch  

- Historically, the Commissioner applied the ‘minimal connection’ or remoteness test [Glawischnig (Case 316/01)] to the EI definition in a fairly straightforward manner.
  - Having regard to the Recitals to the AIE Directive, the Commissioner took the view that AIE is about promoting openness and transparency in relation to environmental decision-making, or, as some commentators put it, it was about equipping the public to act as “environmental watchdogs”.
  - Our first Commissioner, Emily O’Reilly, the current European Ombudsman, explained: “it is vital to the integrity of the AIE regime that its focus remains on environmental matters; as a general matter, it would not be appropriate to extend AIE to information that it is more readily understood to be about the general business functions of public authorities rather than about the environment.”
  - Thus, e.g.,
    - Mileage expense claims made by individual staff members were not environmental information (CEI/11/0001)
    - An Asset Purchase Agreement providing for the transfer of a local authority’s waste collection service to a private operator was environmental information, but other related information, such as the
list of other prospective bidders for the purchase, emails dealing with administrative arrangements, and other records relating to the negotiations over the commercial terms of the agreement, was not (CEI/12/0004)

**Minch**

- But as the Commissioner has also noted, it is a judgment call, and a case in which we evidently got it wrong was the *Minch* case in 2014 involving a cost-benefit analysis report relating to the National Broadband Plan.
  - The Commissioner considered whether the Report qualified as a cost-benefit analysis used within the framework of the measures and activities referred to in the definition. The only possibly relevant “measure” at the time, however, was the National Broadband Plan itself. At that time, the National Broadband Plan was merely a high level strategy setting targets for the delivery of high speed broadband throughout Ireland in order to meet the requirements set out by the European Commission (EC) in the Digital Agenda for Europe (DAE). The Commissioner found that the Plan itself was not a measure affecting or likely to affect environmental elements or factors, because in his view the “link between the plan and any effect on the environment [was] simply too remote, unlike the measures and activities that may be adopted to implement the plan”.
  - The Commissioner noted, however, that the applicant was entitled to seek access to the Report under the Freedom of Information (FOI) Act. Instead, the applicant appealed the decision to the High Court.

- The High Court essentially threw out the remoteness test altogether. The Commissioner appealed to the Court of Appeal, not because of concern about the outcome per se but rather because we felt that we were left without any meaningful test whatsoever to apply in relation to the definition.

- The Court of Appeal reinstated the minimal connection or remoteness test to some degree. However, the Court interpreted “likely” to mean “capable” and seemed to accept that once something has “graduated from simply being an academic thought experiment into something more definite, such as a plan, policy or programme - however tentative, aspirational, or conditional, it could qualify as environmental information. Thus, it found that the National Broadband Plan was in fact a “measure” that was “likely” to affect the environment.

**Since Minch**

- Since *Minch*, we have struggled with where to draw the line, if any, because virtually everything is literally “capable” of affecting the environment somewhere down the line.
I note with interest that in 2016 the representative from Poland referred to the challenges of distinguishing EI from other types of information at the 5th Task Force meeting, so it seems that we are not necessarily alone in this.

- We have listed some examples of the cases we have struggled with, most of which have been appealed to the courts by one party or the other, including one that involved a list of agenda items for a meeting that was actually released outside of AIE.
  - For a number of reasons, including perhaps because Ireland is already so open in relation to the “core” EI that is available on the EPA’s website, we see many cases that seek to test the boundaries of the EI and also the PA definitions.
- But the case I want to draw particular attention to is the last one listed, R2K v. Department of Defence.

Examples

- **Redmond v Commissioner for Environmental Information & Anor [2017] IEHC 827**
  - In this case, the request was for information about the sale of land by the State-owned forestry company, Coillte.\(^1\) The sale was open to anyone for any purpose, and though it was not a relevant consideration in the case, the requesters were in fact property developers who were unhappy that their bid for the land had been unsuccessful. So, in fact, this case had nothing to do with any perceived threat to the forests on the land.
  - The Commissioner found that the change of forest-ownership, in itself and without more, did not constitute a measure or an activity affecting or likely to affect the elements and factors of the environment or a measure or activity designed to protect those elements.
  - The Commissioner therefore found that the information sought about the sale, including the names of the purchasers, was not environmental information.
  - The decision was affirmed by the High Court, but the High Court’s judgment has been appealed to the Court of Appeal and is listed for hearing in January 2020.

- **Coillte v Commissioner for Environmental Information 2018/453 MCA**
  - However, in another case involving the sale of land by Coillte, the Commissioner found that the names of purchasers of land did qualify as

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\(^1\) A state-owned company established under the Forestry Act 1988 to operate forestry and forestry-related businesses commercially, i.e. a state-owned forestry business.
environmental information, because there was evidence before Coillte and
the Commissioner that the purchasers of the land had plans or intended uses
for the land which were likely to affect the elements and factors of the
environment.
  o The purchasers were in fact big companies with plans for the land, such as
the building of a large data centre.
  o But this decision has also been appealed to the High Court; the case is listed
• Right to Know v Commissioner for Environmental Information and Minister for
Transport, Tourism and Sport 2018/119 MCA
  o In Case CEI/17/0021 (Right to Know CLG and Department of Transport,
Tourism and Sport), the Commissioner found that a letter and submission
sent by a business lobbying group (Ibec) trying to arrange a meeting with the
incoming Minister of a Department of State was not environmental
information.
  o The submission was a list of agenda items, and while it referred to transport
measures affecting or likely to affect the elements and factors of the
environment, the Commissioner found that the connection between the
submission and those measures was too minimal to be information “on”
those measures within the meaning of the definition of environmental
information.
  o The requester appealed the Commissioner’s decision to the High Court; the
case is listed for hearing in March 2020. This is the third time it has been
listed for hearing by the High Court despite the fact that the information has
already been released outside of AIE.
• ESB v. Commissioner for Environmental Information 2019/47 MCA
  o In Case CEI/18/0003 (Lar McKenna and Electricity Supply Board), the
Commissioner found that a transcript of a hearing of the property arbitrator
was environmental information.
  o He found that the transcript of a property arbitration hearing relating to the
compensation payable for the compulsory acquisition of land was
information “on” the development of electricity infrastructure which is a
measure or activity affecting or likely to affect the elements and factors of
the environment.
  o He went on to find that the ESB was justified in refusing access to a copy of
the transcript under article 9(1)(d) of the AIE Regulations (intellectual
property rights) as providing a “copy” of the transcript to the requester
would adversely affect intellectual property rights of the company which
created the transcript.
However, in the circumstances of the case, the Commissioner required the public authority to grant access to the transcript by way of inspection *in situ* at its office.

The public authority appealed the Commissioner’s decision to the High Court; we await the setting of a hearing date for this appeal.

**Department of An Taoiseach V Commissioner for Environmental Information and Aine Ryall (Notice Party) 2019/48 MCA**

In Case CEI/18/0010 (Aíne Ryall and the Department of the Taoiseach) the Commissioner held that a memorandum prepared for discussion by Government Minister at Cabinet concerning proposals to limit the time frame for seeking the judicial review of planning consents for strategic infrastructure developments was a ‘measure’ that was both intended to and likely to lead to the construction of developments that might not otherwise be undertaken and therefore was environmental information.

**Right to Know CLG and Department of Defence (2019)**

This was a particularly challenging case involving the Irish President’s constitutional status and immunity from suit.

Although the Commissioner accepts that the President is excluded from the public authority definition because of his constitutional status and the separation of powers doctrine, he found that environmental information relating to the President that was held by the Department fell within the scope of the AIE Regulations.

In this case, the request was for details about the President’s use of “the Government Jet”. The Commissioner took a fairly literal approach to the term “activity” and found that information on the dates of travel, departure point and destination, flying time and the number of passengers relating to flights undertaken by the President was environmental information as it was information “on” an activity affecting the elements of the environment, that activity being aircraft usage.

The decision was not appealed, but it is relevant to note that the commentary on Twitter was fairly negative, with for instance one

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2 More specifically, he accepted that the President’s immunity for the exercise and performance of the powers and functions of his office or for any act done or purporting to be done by him in the exercise and performance of these powers and functions under Article 13.8.1 of the Constitution excludes the Present from the definition of public authority in article 3(1) of the AIE Regulations, as clarified by the amendment to the AIE Regulations by the 2018 Regulations. He also accepted that the exclusion of the President from the definition is consistent with the AIE Directive, specifically the third provision of Article 2(2), which permits the exclusion of bodies from the definition of public authority where a Member State’s constitutional provisions precluded the body from the review procedure prescribed in Article 6 of the AIE Directive at the time the Directive was adopted. However, the Commissioner was not satisfied that the President’s immunity under Article 13.8.1° of the Constitution extends to exclude from the scope of the AIE Regulations all information relating to the President.
commentator appearing to ask sarcastically if AIE can be used to find out if the President puts his recycling out on a Thursday or Friday night and what he does with his grass cuttings and compost.

Conflicts between AIE & other rights/privileges

- But given the constant challenges that we face in determining the scope of the environmental information definition, the question has arisen: why not just take a simple approach and find that virtually everything is environmental information since virtually everything is capable of affecting the environment? I note that the Decision on promoting effective access to information that is included in the background materials urges the Parties to ensure that the scope of EI is interpreted broadly, and so would a virtually unlimited scope to the definition support the aims of the Convention and the Directive by facilitating access to information without getting bogged down by the question of whether it fits within one of the six categories set out in the definition?

- Well, I certainly understand the question, but in my view, it must be considered that the broader the scope of environmental information, the more likely it is that the right of access will conflict with other important rights and privileges (with the relevant restrictions in Ireland being set out in articles 8 & 9 of the AIE Regulations). E.g.,
  - Emissions case & right to privacy and data protection:
    - As you know, under AIE, confidentiality is not meant to extend to “information on emissions”.
    - However, we had a case involving Wexford County Council’s efforts to monitor noise emissions from wind turbines by asking private individuals residing near windfarms to record relevant information in what were called “noise logs”. The noise logs contained information on noise emissions but also personal information about the households, their habits, sleep patterns, etc. The Commissioner found that the noise logs qualified as information on emissions but also that disclosure would adversely affect the confidentiality of personal information.
    - The Commissioner found that applying the emissions override in this case would lead to a disproportionate interference with the privacy rights of the third parties and the protection of their personal information. He did not accept that the "emissions rule" was intended to set aside rights to the protection of personal data as enshrined in European Law.
    - But was this type of conflict between the “emissions rule” and the confidentiality of personal information even foreseen at the time the Convention or the Directive was adopted?
• Intellectual property rights – this (i.e. copyright law) was an issue in the ESB case involving the transcript of the property arbitration hearing

• Legal professional privilege
  • We have also had a number of cases involving the potential conflict between access rights under AIE and legal professional privilege, which is regarded in Ireland as a cornerstone of the administration of justice.

• Cabinet confidentiality - *An Taoiseach v Commissioner for Environmental Information* [2010] IEHC 241
  
  ▪ In Ireland, Cabinet confidentiality is protected by the Constitution, so how does this reconcile with AIE when the Cabinet discusses environmental information?
  
  ▪ Well, in response to a decision of the Commissioner directing the release of a Cabinet record, the High Court adopted what the OCEI would have regarded to be an expansive approach to the “internal communications” restriction in order to find that Cabinet discussions are protected under AIE even when the Cabinet discusses emissions into the environment.

• Commercial confidentiality
  
  ▪ Follow up to *Minch*: CEI/17/0045 (2018)
  
  ▪ This time around, the Department agreed to release parts of the Report, but these parts (if not more) would have been released under FOI had the appellant chosen to follow the suggestion made by the Commissioner in his decision back in 2014.
  
  ▪ The remaining parts of the Report were found to be commercially confidential and were refused on that basis.\(^3\)

• Confidentiality generally
  
  ▪ CEI/18/0034 (2019) – information relating to acquired bank assets, i.e. land, that is held as security by the National Asset Management Agency (NAMA)\(^4\) for the loans of certain debtors. The Commissioner accepted that the requested information was environmental information because of its connection to plans to develop the land concerned for residential purposes. However, he also accepted that the National Asset Management Agency Act protects the confidentiality of NAMA’s proceedings in relation to debtors and their assets and that such proceedings qualify for protection under article 8(a)(iv) of the Regulations.

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\(^3\) As noted in the decision, the withheld information concerns the likely costs of various models for the NBP.

\(^4\) Established under the National Asset Management Agency Act 2009, in response to the financial crisis, for the purpose of acquiring eligible bank assets from participating institutions and managing them with the aim of obtaining the best achievable financial return for the State.
Presidential immunity

- I have referred above to the President’s constitutional immunity, but the Commissioner has actually dealt with three appeals involving the potential conflict between AIE and Ireland’s constitutional order in relation to its separation of powers. Two of these cases have now been appealed to the High Court.

- And it is relevant to ask: what about FOI? What role is domestic legislation on freedom of information that is based on the policy considerations of the elected representatives meant to play if the definition of “environmental information” is given a very broad interpretation?

- As the Commissioner stated in the APA case [CEI/12/0004]: “[G]iven the obligations on public authorities that AIE imposes, it is vital to the integrity of AIE that it not be seen by the public as merely an alternative access mechanism for information that is more readily understood as falling within the ambit of the FOI Act.”

- The Court of Justice has itself referred to this conundrum in Case C-673/13 P involving the question of the definition of “information relating to emissions into the environment”. It suggested that an overly broad interpretation of the concept would jeopardise the balance which the EU legislature intended to maintain between the objective of transparency and the protection of commercial interests reflected in the relevant refusal ground under the general public access Regulation [No 1049/2001] relating to European institutions. It also observed that it would “constitute a disproportionate interference with the protection of business secrecy ensured by Article 339 TFEU.”

It’s the environment, . . .

- In conclusion, we are familiar with the phrase “It’s the economy, stupid” (Bill Clinton’s campaign against George H.W. Bush in 1992). Well, for AIE, shouldn’t it be about “the environment” and the critical need to improve actual environmental decision-making?

- So, my own view is that the focus should be on whatever approach will best achieve this goal.

- While we in Ireland are devoting a lot of resources to grappling with the definition, it seems to me that an overly simplistic approach holds many risks that could ultimately undermine the right of access to environmental information

  - It would divert limited resources away from what would commonly be understood as “environmental matters”;

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5 Treaty of the Functioning of the European Union.
• It would increase conflicts between AIE rights and other important rights and privileges (& thus our own resources would be diverted regardless because of the special cost rules and very high rate of court appeals under AIE);
• And, if the Commissioner in the pre-Minch days was correct, it could undermine the integrity of the regime, meaning that its very important, but resource-intensive, obligations on public authorities might not given the attention they deserve. As the reaction to the case involving the President’s use of the Government jet service suggests, it could even bring the regime into disrepute rather being taken seriously as something that focuses on important environmental matters.

In any event, it seems to me that more clarity is required on the proper interpretation of the definition having regard to the true purpose of AIE and the need to ensure that the significant obligations designed to facilitate public access to environmental information are taken seriously by public authorities (other than the EPA, which of course already takes its obligations very seriously) and the public and are therefore complied with in a manner that actually contributes to a better environment. Thank you.