

**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 2014
(the AIE Regulations)**

Case CEI/16/0017

Date of decision: 13 April 2017

Appellants: Philip Lee Solicitors

Public Authority: Commission for Energy Regulation (CER)

Issues:

1. Whether CER was justified in refusing the request on the basis of its finding that certain information is not environmental information within the meaning of article 3 of the AIE Regulations
2. If CER's decision was not justified in whole or in part, whether it would be appropriate for the Commissioner to require the CER to make information available to the appellants

Summary of Commissioner's Decision: The Commissioner found that CER's refusal decision was not justified, because CER had not properly considered whether the information which it held contained environmental information within the scope of the request. Accordingly, the Commissioner annulled CER's decision and expressed his expectation that CER would make a fresh decision in accordance with the AIE Regulations.

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

The Single Electricity Market (SEM)

CER is the body responsible for regulating the natural gas and electricity markets in Ireland. Section 4 of the Electricity Regulation (Amendment) (Single Electricity Market) Act 2007

established a committee to be known as the Single Electricity Market (SEM) Committee. Section 9 provides that the SEM Committee, in carrying out its functions under the Act, shall have regard to the effect on the environment in the State and Northern Ireland of the activities of authorised persons, and the need, where appropriate, to promote the use of energy from renewable energy sources. The same section provides that the SEM Committee shall carry out the functions mentioned in subsection (1) in the manner which it considers is best calculated to secure a diverse, viable and environmentally sustainable long-term energy supply in the State and Northern Ireland.

CER's website says that "The SEM has encouraged new efficient generators into the market (in both Ireland and Northern Ireland), helping to put downward pressure on customer prices and providing security of supply and environmental benefits".

The SEM Committee says that "market power", in the electricity-supply context, "can be thought of as the ability to profitably sustain prices above competitive levels or restrict output/quality below competitive levels" and "the exercise of market power is therefore harmful to electricity customer interests and to other market participants". The SEM Committee identified the need for a "market power mitigation workstream" to deal with this aspect of the single electricity market. With this in mind, the SEM Committee published a consultation paper entitled "I-SEM Market Power Mitigation Consultation Paper SEM-15-094 in November 2015". (The letter "I" stands for "integrated".)

The AIE Request

On 25 January 2016, the appellants submitted an AIE request to CER, as follows:

"We hereby request a copy of the environmental information set out below in accordance with Regulation 6 of the AIE Regulations.

Environmental Information Request in respect of I-SEM Market Power Mitigation Consultation Paper SEM-15-094 (hereinafter "the Consultation Paper")

Please furnish the following:

- (a) all publications in hardcopy or electronic form which form the basis of the CER and the SEM Committee's research in drafting the Consultation Paper and where such publications are publicly available, details of where they may be accessed;
- (b) all internal communications in the CER and the SEM Committee in respect of the Consultation Paper to include but not limited to, all letters, e-mails, memos, agendas, minutes, instructions, presentations, attendances, reports and/or directions in hardcopy and/or electronic form, including drafts of all such records;
- (c) confirmation of the names, qualifications and contact details of all third party contributors and advisers to the CER and the SEM Committee in respect of the Consultation Paper, including any working group, task force or liaison body, and including where any such contributions and advices were provided or procured on an informal, voluntary, and/or unsolicited basis;
- (d) all external communications between the CER, the SEM Committee and third parties in relation to the Consultation Paper, or any draft of or proposal for the Consultation Paper, including any early iterations thereof, to include but not limited to all letters,

emails, memos, agendas, minutes, instructions, advices, reports and/or directions or any other records in hardcopy and/or electronic form;

(e) all previous drafts of the Consultation Paper to include all marginal notes and comments thereon;

(f) confirmation of the names, qualifications and contact details of all members of the SEM Committee to include all independent and deputy members together with details of the position held by each such member on the SEM Committee and where such details are publicly available, details of where they may be accessed.

In respect of (a) – (f) above, we request such information which relates to or includes details of the following:

(i) elements of the environment e.g. air, water, soil, land, landscape, biological diversity;

(ii) factors affecting or likely to affect the elements of the environment e.g. energy, noise, radiation, waste, other releases into the environment;

(iii) measures designed to protect elements of the environment e.g. policies, legislation, plans, programmes, environmental agreements;

(iv) information, reviews or references to the implementation of environmental legislation;

(v) analyses and assumptions used within the framework of measures or within the publications designed to protect the environment;

(vi) the state of human health and safety, the food chain, cultural sites and built structures in as much as they may be affected by the elements of the environment.

Please note that the request at (a)- (f) are restricted to any records created, received, provided or obtained by the CER within the past 18 months i.e. from 1 July 2014 to the present day” [i.e. 25 January 2016].

CER acknowledged receipt of the request, but did not give notice of a decision within the timeframe required by the AIE Regulations. Therefore, a deemed refusal arose on 24 February 2016.

CER gave notice of a decision on 4 March 2016, refusing the request because:

1. “The requested information is not environmental information”, and because
2. “CER does not hold any records that are environmental information and fall within the bounds of the request.”

The appellants emailed CER on 22 March 2016, maintaining that CER’s purported decision on 4 March 2016 was invalid because it was given too late and a deemed refusal had arisen. The appellants requested an internal review of the deemed refusal decision.

On 18 April 2016 CER gave notice of its internal review of the deemed refusal decision, refusing the request because:

“Information relating to the Market Power Mitigation workstream does not fall under the definition of environmental information contained within the AIE Regulations”.

On 27 April 2016, the appellants appealed to my Office.

Scope of Review

Under article 12(5) of the AIE Regulations, my role is to review CER’s refusal decision and to annul, vary or affirm it. If I find that refusal was not justified for the reason given in that decision, my role is to decide whether it would be appropriate for me to require CER to make environmental information available to the appellants.

In conducting my review I took account of the submissions made by the appellants and CER. I also 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).

Relevant AIE provisions

Article 3(1) 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).

CER’s position

CER refused the request in full because, after considering the definition of environmental information contained in the AIE Regulations, it decided that: “information relating to the Market Power Mitigation workstream does not fall under the definition of environmental information contained within the AIE Regulations”.

The following is a synopsis of CER’s reasoning, taken from its submission to my Office:

- a) The Market Power Mitigation workstream deals with the potential level of market power in the I-SEM wholesale energy and financial markets and potential regulatory strategies and measures to mitigate any such market power. Economic measurements of market concentration and market power such as the Herfindahl-Hirschman Index and the Residual Supplier Index are used within the Consultation Paper to estimate the potential levels of market power in I-SEM. These are purely economic concepts and have no relation to elements of the environment listed in (a) [of the definition].
- b) ‘Energy’ in the context of (b) in the definition means energy factors which affect the elements of the environment listed in (a). This means physical energy factors such as electricity transmission lines, gas pipelines and oil refineries.... Therefore information relating to Market Power Mitigation does not fall under (b) [in the definition].
- c) As information relating to Market Power Mitigation does fall under (a) or (b) it follows that information relating to measures discussed in the Market Power Mitigation workstream does not fall under (c).
- d) As the Market Power Mitigation workstream does not deal with the implementation of environmental legislation or any reports thereon, it does not fall under (d).
- e) As information relating to Market Power Mitigation does not fall under (c), it follows that it does not fall under (e).
- f) The Market Power Mitigation workstream does not deal with the state of human health or safety. Information relating to the Market Power Mitigation workstream does not fall under (a), (b) or (c). Therefore it does not fall under (f).

The Appellants’ position

While I have had regard to every point which the appellants made in their submission, I will not repeat every point here.

They submitted that CER misapplied the AIE Regulations to the request and reached an incorrect decision. They submitted that CER’s conclusions on “energy” (in item b of CER’s position, above) applied a test that is too remote (and referred to the High Court’s decision in *Minch v. Commissioner for Environmental Information* [2016] IEHC 91).

The appellants submitted that “the manner in which the I-SEM operates and market power in the I-SEM will directly affect energy production in Ireland.... It is therefore impossible to say that the Consultation Paper and information informing same, which deals directly with I-SEM, does not relate to energy as described in paragraph (b) of” [the definition].

They submitted that the Consultation Paper includes cost-benefit and other economic analyses and assumptions in respect of the production of energy in Ireland under the I-SEM and accordingly falls under the scope of paragraph (e) [of the definition].

The appellants submitted that the Consultation Paper will inform rules of the I-SEM and will inform the thinking that will go into the policies and rules governing the electricity market in Ireland, and will accordingly affect the production of energy in Ireland. The appellants cited Baker J in her judgment on the *Minch* case, as follows:

“... any information which might have informed or be capable of informing the thinking of the Government in making decisions with regard to the national Broadband Plan, including economic models or cost-benefit analyses, is capable of being environmental information, and so is capable, notwithstanding that such models do not contain information on emissions or impact on the environment as such”.

The appellants asked that I consider their submission and in particular the *Minch* judgment together with the objectives of the Aarhus Convention in applying the AIE Regulations and interpreting same so far as possible, teleologically, in order to achieve the purpose of the legislation.

Analysis of the justification of the internal review decision

In my experience, public authorities set about determining whether documents contain environmental information in one of three ways:

1. By considering the wording of the request and its subject matter.
2. By relying on familiarity with the contents of relevant documents, i.e. without gathering and re-examining those records, or
3. By examining the contents of the relevant documents.

It is rarely the case that the first approach is upheld at appeal. To be successfully applied, the second approach requires a very high level of familiarity with the relevant records, and those records would eventually have to be gathered and copied in the event of an appeal being made to my Office. The third approach is usually the most appropriate approach. However, all three approaches are sometimes found to be flawed on appeal because decision-makers fail to appreciate that “environmental information” is a technical expression with a legal meaning that cannot be equated to “information on the environment” or “information relating to the environment”. The approach of my Office to the question of whether certain information is or contains environmental information (unless it is very obvious in rare cases from the wording of the AIE request that the requested information could not constitute or contain environmental information) is to examine the contents of the relevant records.

In response to a query from my investigator, CER confirmed that its decision-maker did not search for, assemble and examine the contents of all relevant records before making its decision “due to the large number of records involved” (which CER said extended to approximately 3000). The AIE Regulations provide options for public authorities which consider the burden imposed by a request to be unreasonable (articles 7 and 9 refer). Nothing in CER’s decision suggests that its decision-maker claimed to be so familiar with the contents of the 3000 or more relevant records that examining them was not necessary. In any case, it is doubtful that such a claim could credibly be made in relation to thousands of non-homogenous records. I am satisfied that CER’s decision was based on the wording of the request along with a degree of familiarity with the I-SEM Market Power Mitigation workstream.

The wording used in CER's decision is telling: the decision-maker did not purport to find that the requested information is not environmental information, but instead found that "information relating to the Market Power Mitigation workstream" is not environmental information. In effect, the decision-maker: treated the request as if it had expressly asked for "information relating to the Market Power Mitigation workstream"; then chose not to search for, assemble and carefully consider the contents of any relevant records; and proceeded to consider "information on the Market Power Mitigation workstream" as if it was a stand-alone class of information. There is no indication that the decision-maker considered whether any of the requested information might be information on I-SEM itself and constitute environmental information on that basis. The Market Power Mitigation workstream has to be understood in context as one aspect of a range of measures adopted on the island of Ireland to provide for electricity supply. It is clear to me that I-SEM is a measure which is likely to affect elements of the environment. The fact that the legislature saw fit to include provisions in the 2007 Act which oblige the SEM Committee and CER, when carrying out their functions under that Act, to have regard to environmental effects, promote the use of renewable energy sources and aim to secure an environmentally sustainable energy supply, supports that conclusion.

Part of the request sought "confirmation" of the names, qualifications and contact details of all members of the SEM Committee, along with details of the position held by each member. Although the overall heading with the appellants gave to their request was "Environmental Information Request in respect of I-SEM Market Power Mitigation Consultation Paper SEM-15-094", I do not accept that CER could properly refuse this part of the request on the basis of its finding that "information relating to the Market Power Mitigation workstream" is not environmental information.

I find that CER's approach, in treating a detailed request as asking for a single class of information (i.e. "information relating to the Market Power Mitigation workstream"), and then considering that workstream in isolation without regard to its relationship with SEM measures, was a flawed approach which led to an unjustified decision.

Whether it would be appropriate for me to require CER to provide the appellant with access to withheld information

My power to require public authorities to provide appellants with information applies to environmental information only. I am satisfied that records held by CER which are captured by the AIE request could contain environmental information. For example, they could contain information on economic analyses and assumptions used within the framework of I-SEM measures. However, determining if they actually contain such information would require the careful examination of CER's relevant records, which I am told number over 3000.

It would be a completely inappropriate use of my Office's resources to undertake to search over 3000 records for environmental information, especially when CER has not done so at first instance.

Decision

Having reviewed CER's internal review decision, I find that its refusal was not justified by the reason given. Under the power given to me by article 12(5), I annul CER's decision and expect CER to make a completely fresh decision in accordance with the AIE Regulations.

Appeal to the High Court

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.

Peter Tyndall
Commissioner for Environmental Information
13 April 2017