

**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/14/0016

Date of decision: 22 January 2016

Appellant: Sandra Cusack

Public Authority: EirGrid plc

Issue: Whether EirGrid was justified in refusing part of the appellant's request for information relating to a plan to construct a new high voltage power line linking Leinster with Munster

Summary of Commissioner's Decision: In accordance with article 12(5) of the AIE Regulations, the Commissioner reviewed EirGrid's decision and found that refusal to provide access to the information requested was not justified on the grounds of commercial or industrial confidentiality by article 9(1)(c). Accordingly, the Commissioner annulled EirGrid's decision and, citing article 12(5)(c), required EirGrid to make the requested information available to the appellant.

Right of Appeal: A party to this appeal or any other person affected by this decision may appeal this decision 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

In 2014 EirGrid managed a project called the Grid Link Project. The project consisted of a plan to design and construct a new high voltage power line linking Leinster with Munster, in order “to ensure future electrical power needs are met in the south and east of Ireland”.

The project considered six route options and two technical options. The technical options were 1. the use of overhead lines and 2. the use of underground cables. All options were evaluated against set technical, economic and strategic criteria. Against the background of a strong public interest in the "overhead or underground" question, EirGrid chose the overhead option. In recognition of the strong public interest in the matter, in January 2014 the Minister for Communications, Energy and Natural Resources, acting on foot of a Government decision, appointed an Independent Expert Panel to conduct a review of the "overhead versus underground" options.

The appellant submitted a request for environmental information to EirGrid on 9 July 2014. She quoted from EirGrid's Stage 1 Report for the Grid Link Project which said: "it is EirGrid's policy that for technical and operational reasons underground cables shall not be installed at intermediate points along an overhead line". The request was posed as follows: "In light of the foregoing, I would like to receive a copy of any reports completed for or by EirGrid which were prepared to support the technological solution proposed and routing for the Grid Link project in the Stage 1 report, such reports to include financial cost benefit analysis of possible solutions assessed where they exist”.

EirGrid notified the appellant of its decision to part-refuse the request on 8 August 2014. It provided access to information contained in a number of reports and in a redacted capital approval document. The latter document was entitled "CP0732 Cork-Dublin Project- Phase 2 EirGrid plc Board papers - June 2011". This was a report prepared for submission to the Board of EirGrid, seeking approval for capital expenditure for phase 2 of the project, which would involve the development of a new electricity transmission line running for over 200 km. The report identified six alternative options, including one employing underground-cabling rather than overhead lines. It contained data on the expected "economic performance" of each option, used in the process of selecting a preferred option for the project. This economic analysis considered capital costs, operating and maintenance costs, and production costs. In the copy of the report given by EirGrid to the appellant, only figures relating to the underground-cabling option were redacted, and redaction was said to be for the protection of commercial confidentiality.

The appellant requested an internal review of EirGrid's decision, claiming that the redaction of figures on pages 15 and 19 of the capital approval document was unjustified. EirGrid reviewed the decision and affirmed the original decision.

On 23 October 2014 the appellant appealed to this Office seeking access to the redacted financial information specified above.

I regret the delay that arose in conducting this review. The delay was due to a shortage of resources in my Office, which has now been addressed.

In conducting my review, I took account of the submissions made by the appellant and by EirGrid. I had regard to: the Guidance document provided by the Minister for the Environment, Community and Local Government on the implementation of the AIE Regulations; Directive 2003/4/EC, 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).

Developments since the acceptance of this appeal by OCEI

On 28 September 2015 EirGrid submitted a report to the Expert Panel which announced EirGrid's preference for a new technical option for the project, which it called "the Regional Option". The Regional Option proposed a way in which the existing grid infrastructure could be strengthened without the need for any new overhead lines or underground cables. In light of this development, the Expert Panel issued a statement on 8 October 2015 saying that "the Panel's work in respect of Grid Link had been "overtaken by the emergence of the Regional Option" and noting that such an option was outside of its terms of reference. The statement also recorded the Panel's "expectation" that neither the underground cable option nor any overhead line options would "be progressed in the short to medium term", and expressed its conclusion that it should not undertake any further analysis regarding the completeness, comparability and objectivity of EirGrid's reports (i.e. on the overhead and underground options).

Scope of Review

Under article 12(5) of the AIE Regulations, my role is to review EirGrid's internal review decision and to affirm, vary or annul it. The issue before me is whether EirGrid's decision to refuse access to the redacted information was justified.

Statutory provisions

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);

Article 9(1)(c) provides that refusal is discretionary (subject to article 10(1)) where disclosure would adversely affect commercial or industrial confidentiality, where such confidentiality is provided for in national or Community law to protect a legitimate economic interest.

Article 10(1) provides that: “notwithstanding articles 8 and 9(1)(c), a request for environmental information shall not be refused where the request relates to information on emissions into the environment”.

Article 10(3) provides that “the public authority shall consider each request on an individual basis and weigh the public interest served by disclosure against the interest served by refusal”.

EirGrid’s position

EirGrid submitted that its decision was justified by article 9(1)(c) because the redacted information concerned the cost of High Voltage Direct Current underground cable provided by a single cable manufacturing company based in Switzerland. EirGrid argued that disclosure of the information would amount to a breach of commercial confidentiality where such confidentiality is provided for in national or Community law to protect a legitimate economic interest. EirGrid submitted that the supplier’s confidential costings “would be evident” from the information.

EirGrid submitted a detailed argument in support of its position. I do not intend to reproduce that argument in its entirety, but I have given it careful consideration. What follows is a summary of the key points of the argument.

Confidentiality is provided for by the European Communities (Internal Market in Electricity) Regulations, 2000 (Statutory Instrument Number 445 of 2000). These regulations impose a statutory obligation on EirGrid, as Transmission System Operator, to preserve the confidentiality of commercially sensitive information. Regulation 12 of S.I. No. 445 of 2000 (as amended by S.I. No. 60 of 2005) provides that:

- (1) The Transmission System Operator shall preserve the confidentiality of commercially sensitive information obtained by it in the discharge of its functions under these Regulations and the Electricity Regulation Act of 1999 (No. 23 of 1999) unless required to disclose such information in accordance with law.
- (2) The Transmission System Operator shall prevent information about its own activities which may be commercially advantageous being disclosed in a discriminatory manner.
- (3) A person who contravenes paragraph (1) or (2) shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding €3,000.

“Commercially sensitive information” is defined in S.I. No. 445 of 2000 as “any matter the disclosure of which would materially prejudice the interests of any person”.

EirGrid submitted that these confidentiality obligations need to be read together with, and in the context of, Directive 2009/72/EC (which concerns rules for the internal market in electricity) and, in particular, in light of the Directive's "overall requirement to establish an independent transmission system operator with a view to giving commercial entities such as cable manufacturers confidence that their commercially sensitive information would be protected from competitors". EirGrid submitted that it is also obliged to preserve the confidentiality of commercially sensitive information because of conditions in its Transmission System Operator Licence (issued by the Commission for Energy Regulation). In this regard, EirGrid cited condition 22, which includes the following wording: "the Licensee shall preserve the confidentiality of commercially sensitive information held by/or obtained by it in its discharge of its functions as transmission system operator". EirGrid also submitted that condition 12 of its Market Operator Licence (also issued by the Commission for Energy Regulation) stipulates that "the Licensee shall preserve the confidentiality of commercially sensitive information held by/or obtained by it in carrying out the Single Market Operation Business". EirGrid submitted that it exercised its discretion under article 9(1)(c) of the AIE Regulations because disclosure would have materially and adversely affected commercial or industrial confidentiality where such confidentiality is provided for in statute and in licensing conditions, to protect the economic interests of the cable manufacturer and after confirming with the manufacturer that the information is commercially sensitive.

EirGrid's position is that it correctly exercised its discretion to refuse access because the public interest would not be served by disclosure. EirGrid's first argument in this regard was that, because disclosure would harm the commercial position of the cable manufacturer, it would threaten the future provision of such information to EirGrid, and this would not be in the public interest as it would prevent EirGrid from carrying out its statutory function. EirGrid also argued that, since the Minister for Communications, Energy and Natural Resources had appointed an Expert Panel to conduct an independent review of overhead line versus underground cabling options for the transmission of electricity, the public interest in disclosure of the information did not outweigh the interest served by protecting commercial confidentiality.

Finally, EirGrid argued that, while regulation 12 of S.I. No. 445 of 2000 provides that confidentiality shall be maintained unless disclosure is required by law, such a requirement for disclosure could arise only under applicable competition or criminal law provisions.

The Appellant's position

The appellant's position is that EirGrid was not justified in refusing access to the redacted information because disclosure of the figures would not compromise the costings of the cable-manufacturer. The appellant argued that this is because any figures supplied by the cable-manufacturer are buried within aggregated costings in the subject records.

The appellant argues that disclosure is in the public interest because EirGrid's Chief Executive Officer has gone on public record citing costings for underground versus overhead options, and these figures have in turn been quoted by various Government Ministers: it is clear that the appellant considers that members of the public require access to the withheld information so that they can assess the underground/overhead options for themselves.

The appellant states that “from an environmental perspective it is recognised that direct current has less impact” than alternating current, and argues that disclosure is therefore a matter of significant public interest.

Analysis and Findings

I am satisfied that the withheld information is within the scope of the request. I approached this review by considering the following questions:

Question 1: Is the withheld financial information "environmental information" within the meaning of the AIE Regulations? If it is not, refusal to provide access would be justified.

Question 2: If it is environmental information, does the request relate to information on emissions into the environment? If the answer is “yes”, refusal could not be justified under article 9(1)(c).

Question 3: If the request does not relate to information on emissions into the environment, is EirGrid’s refusal justified under article 9(1)(c)?

Question 4: If refusal is justified under article 9(1)(c), does the public interest served by disclosure outweigh the interest served by refusal?

Question 1: Is the withheld financial information "environmental information" within the meaning of the Regulations?

I am satisfied that, regardless of whether underground cables or overhead lines would be used, the Grid Link project was a measure likely to affect elements of the environment within the meaning of the AIE Regulations. The withheld information is information on an economic analysis which informed the identification of preferred options for the Grid Link project. This economic analysis was itself an integral part of the project. I am therefore satisfied that the withheld information is information on an economic analysis used within the framework of a measure likely to affect elements of the environment.

Conclusion on Question 1

I find the withheld financial information to be environmental information within the meaning of paragraph (e) of the definition set out in article 3(1) of the AIE Regulations. In reaching this conclusion, I distinguish this case from the case of Andrew Duncan and the Sustainable Energy Authority of Ireland (reference number CEI/13/0005). In that case I was unable to establish that information in an economic "viability study" had been "used within the framework of" a measure likely to affect elements of the environment because I could not identify the adoption of any associated measure of the required type. In contrast, I would characterise the Grid-Link project (as it was prior to the emergence of the Regional Option) as a firm plan (i.e. a measure) likely to affect elements of the environment (by virtue of requiring significant works to be carried out in the physical landscape), albeit that it included stages dealing with the economic and technical evaluation of available options.

Question 2: Does the request relate to information on emissions into the environment?

An important aspect of planning for the Grid Link project involved considering whether the project should employ direct or alternating electrical current. I noted that the appellant made no reference, directly or otherwise, to "emissions" in her original request. I noted also that, in her request for internal review, she said that "from an environmental perspective, it is recognised that direct current has less impact". Since both direct current and alternating current lines/cables can be used either above or below ground, I concluded that when the appellant referred to "impacts" she was referring to electromagnetic radiation "impacts", and not to impacts on land or landscape. As I understand it, the transmission of electricity necessarily involves the generation of electromagnetic fields and, depending on the technical details, this often results in the emission of electromagnetic radiation into the environment (i.e. "emission" beyond the confines of the line or cable itself). I therefore regarded this request as relating to information on a measure likely to lead to emissions into the environment. However, I had to consider if this meant that the request "related to information on emissions into the environment" within the meaning of the AIE Regulations.

The Court of Justice of the European Union interpreted the relevant provision of the Directive in Case T-545/11 (*Stichting Greenpeace Nederland-v-Pesticide Action Network Europe*). The Court held that, in order for environmental information to constitute information "on" emissions, "it suffices that the information requested relates in a sufficiently direct manner to emissions into the environment". The withheld information in this case is financial information which says nothing about emissions. At the same time, I recognise that there is a relationship between the cost of various electricity transmission options and the selection of a preferred technical option for the Grid Link Project. However, having applied the *Stichting Greenpeace* test, I considered that the withheld information did not constitute information on emissions within the meaning of the AIE Regulations, because it does not relate in a sufficiently direct manner to emissions into the environment.

Conclusion on Question 2

I find that the request does not relate to information on emissions into the environment within the meaning of the AIE Regulations.

Question 3: Was EirGrid's refusal justified under article 9(1)(c)?

I accept EirGrid's submission that the law provides for the protection of commercial or industrial confidentiality in the context of certain information held by the company, in order to protect legitimate economic interests, including those of the cable-manufacturer in this case. I also accept the appellant's claim that there is a significant public interest in access to information concerning the financial pros and cons of overhead lines versus underground cables as options for use in Irish electrical transmission systems.

The withheld information includes five figures displayed in a table entitled " Net Present Values of solution options in € millions" for Option 5. The redacted values relate to: initial capital costs; initial capital costs (present value); operating and maintenance costs; production costs (savings); and net present value.

I find that the argument that the disclosure of information on "operating and maintenance costs" and "production costs" would adversely affect the confidentiality of commercially sensitive

information supplied by the cable-manufacturer is not sustainable. This is because the EirGrid Board Papers indicate (on page 14) that these data were not supplied by the cable-manufacturer.

The remaining argument (that disclosure of the remaining figures would adversely affect the confidentiality of commercially sensitive information supplied by the cable-manufacturer) required careful consideration. The appellant claims that these figures are aggregate figures comprising three elements from which the cost of the cable is not evident. It is not entirely clear what is covered by the redacted costings, but I am satisfied that they are aggregate figures. EirGrid told the appellant (in an email dated 13 October 2014) that the redacted costings related to underground cable and convertor stations. I noted that the appellant did not claim that, following disclosure, it would be "impossible" for a reader to discover the actual cost of the cable-component of the figures, but merely stated that it would be "difficult" to know that figure. I was mindful that my Office has no expertise on the subject of the electricity supply industry. I considered that, in order for the supplier's confidential costings to be evident from the figures, it would be necessary to know the length of cable and the number of convertor stations involved. The approximate length of cable which the underground option would require is potentially calculable from information in the released records. However, the number of convertor stations including in the costings is not evident to me from the records. For this reason, even if it were to be confirmed that the redacted figures cover just those two categories of product (i.e. cable and convertor stations) I cannot see how disclosure could reveal the cost of either the cable or of a single convertor station. Notwithstanding this, it is clear that what matters in these circumstances is not whether a lay person could, following disclosure, ascertain the sensitive information at issue, but whether an electricity industry competitor could. With this in mind, my investigator invited EirGrid to explain how disclosure could reveal the cable manufacturer's sensitive information when that information appeared to be buried within aggregated costs. EirGrid acknowledged receipt of the invitation, and I understand that EirGrid was in communication with the cable-manufacturer on this matter. However, no explanation was forthcoming. In light of this opportunity to correct my lay-person's assessment having been given and not taken-up, I am satisfied that the argument that disclosure would adversely affect the confidentiality of commercial or industrial confidentiality, by materially prejudicing the interests of the cable-manufacturer, does not stand up. This is even more the case in light of the passage of almost five years since the gathering of the relevant costs data.

EirGrid argued that, while it is obliged to preserve the confidentiality of commercially sensitive information obtained by it in the discharge of its statutory functions except where disclosure is required by law, such a requirement could only arise under applicable competition or criminal law provisions. While I have found that disclosure in this instance would not cause the loss of confidentiality of such information, I do not accept that EirGrid's argument represents a correct statement of the law. The AIE Regulations require the disclosure of environmental information subject only to the exceptions specified in the Regulations. Notably, these exceptions include provisions intended to protect commercial or industrial confidentiality in certain circumstances. In the current circumstances, I consider that EirGrid is required by law (i.e. by the AIE Regulations) to disclose the withheld information and that, in so doing, EirGrid would therefore not be in breach of its licensing or other confidentiality obligations.

EirGrid subjected its conclusion to a public interest test and gave weight to the appointment of the Expert Panel to review the case for overhead lines compared with underground cables. Since

I find that refusal was not justified by article 9(1)(c), there is no requirement for me, in reaching a decision, to consider the public interest in favour of disclosure under article 10(3). However, I noted the appointment of the Expert Panel and took it into consideration. I noted that EirGrid did not explain why its public interest argument should be applied only to information relating to underground-cables and not to information relating to overhead lines. I also noted that EirGrid did not argue that disclosure would have adversely affected the ability of the Expert Panel to do its work. I am satisfied that disclosure of EirGrid's figures would not have undermined the Expert Panel's ability to independently provide an opinion "on the completeness, objectivity and comparability (underground with overhead) of the studies/reports undertaken and/or commissioned by EirGrid", as required by its terms of reference. While EirGrid seemed to suggest that the public interest in favour of disclosure was weakened as a result of the appointment of the Expert Panel (on the basis, perhaps, that the public would, in due course, be likely to receive information which would facilitate an assessment of the relative merits of each technical option), one could also argue that the appointment of the Expert Panel was a clear indication that the Minister recognised a strong public interest in access to information of this kind, and that this Ministerial initiative therefore strengthened rather than weakened the public interest argument in favour of disclosure. In any case, circumstances have changed with the passage of time. Following EirGrid's abandonment of plans for any new overhead lines or underground cables as part of the Grid Link project, there is now no potential for conflict between disclosure of the withheld information and the Expert Panel's work.

Conclusion on Question 3

I find that EirGrid's refusal to disclose the withheld information was not justified under article 9(1)(c) because some of the withheld information was not supplied by the third-party whose interests were said to be at risk, and the remainder was aggregated information which did not disclose sensitive commercial or industrial information. Accordingly, there was no requirement for me to consider question 4.

Decision

In accordance with article 12(5) of the AIE Regulations, I have reviewed EirGrid's decision. I find that refusal to provide access to the withheld information was not justified for the reason given. Accordingly, I annul EirGrid's decision and, by the power given to me by article 12(5)(c) of the AIE Regulations, require EirGrid to make the requested information available to the appellant.

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 is given to the person bringing the appeal.

Peter Tyndall
Commissioner for Environmental Information

22 January 2016