



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-99030-Q7T4G0

Date of decision: 30 April 2021

Appellant: Right to Know CLG c/o Mr. Ken Foxe

Public Authority: the Defence Forces

Issue: Whether the information requested by the appellant in relation to Naval Service involvement in the provision of assistance to a vessel which had lost power is “environmental information” within the meaning of article 3(1) of the AIE Regulations

Summary of Commissioner's Decision: The Commissioner found that the information was “environmental information” and remitted the matter to the Defence Forces for further consideration

Right of Appeal: A party to this appeal or any other person affected by this decision may appeal to the High Court on a point of law from the decision, as set out in article 13 of the AIE Regulations. Such an appeal must be initiated not later than two months after notice of the decision was given to the person bringing the appeal.



Background

1. On 27 August 2020, the appellant requested “copies of all records held referring or relating to Naval Service involvement in averting an environmental accident on the west coast of Ireland as referenced in the following newspaper article: <https://www.irishexaminer.com/news/arid-40027865.html>.” The newspaper article referred to by the appellant concerned Naval Service involvement in the provision of assistance to a merchant vessel off the coast of Co Galway on 3 August 2020.
2. On 30 September 2020, the Defence Forces refused the request on the basis that the information requested “does not fall under the auspices of the Regulations”. On 1 October 2020, the appellant sought an internal review of the Defence Force’s decision. In his emailing requesting such a review, he noted that “the information is clearly environmental in nature in that it was an operation intended to avoid a significant environmental accident” and submitted in particular that the information fell within the definition contained at article 3(1)(c) of the Regulations as it was information on a measure or activity affecting or likely to affect the elements and factors of the environment referred to at articles 3(1)(a) and 3(1)(b) of the Regulations or designed to protect such elements.
3. The Defence Forces provided the appellant with the outcome of the internal review on 29 October 2020 which affirmed the decision to refuse the request and noted that “a mere connection or a link to an environmental factor is not sufficient to bring information within the scope of the AIE regime, and as such this body maintains that it does not qualify as such for the purpose of article 3(1)(b) [sic] of the AIE Regulations”.
4. The appellant appealed to my Office on 2 November 2020.
5. I have now completed my review under article 12(5) of the Regulations. In carrying out my review, I have had regard to the submissions made by the appellant and the Defence Forces. I have also examined the contents of the records 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).
6. What follows does not comment or make findings on each and every argument advanced but all relevant points have been considered.



Scope of Review

7. The Defence Forces have refused release of the requested information on the basis that the information requested “does not fall under the auspices of the Regulations”. The appellant’s position is that the information is clearly environmental in nature as the Naval Service’s involvement was an operation intended to avoid a significant environmental accident. The information requested has been provided to my Office and consists of 4 records.
8. Accordingly, my review in this case is concerned with whether the information requested is “environmental information” within the meaning of the Regulations.

Definition of “environmental information”

9. Article 3(1) of the AIE Regulations is the relevant provision to consider where the issue is whether information is “environmental information”. 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)”.

Submissions of the Parties

10. As outlined in his request for an internal review, the appellant’s position is that the information requested is environmental information within the meaning of article 3(1)(c) of the Regulations, in other words that it is information on a measure or activity, affecting, likely to affect or designed to protect the state of the elements of the environment or affecting or likely to affect factors which themselves affect or are likely to affect the environment. This position was reiterated by the appellant in his appeal to my Office of 2 November 2020.



11. The Defence Forces' position is that there is not a sufficient connection between the information requested and the environment to bring that information within the definition of "environmental information" as set out in article 3(1).
12. My investigator wrote to both parties on 16 February 2021, inviting them to make further submissions on their respective positions.
13. The Defence Forces provided submissions on 12 March 2021. The essence of those submissions was that the reporting of the incident in the Irish Examiner article suggested that the vessel to which the Naval Service was providing assistance was in more difficulty than in fact was the case. The Defence Forces' position is that the vessel was not at any time in immediate danger of collision. As such, the Defence Forces categorised the measure as a routine operation for the Naval Service at sea and queried whether it could be said that that the involvement of the Naval Service was a "measure" or "activity" within the meaning of article 3(1)(c) of the Regulations.
14. My investigator provided the appellant with a summary of the Defence Forces' position on 16 March 2021.
15. The appellant then provided further submissions to my Office on 31 March 2021. He referred to a quote contained in the Irish Examiner article from the commander of the naval vessel which had been involved in the incident in respect of which he sought information. That quote noted the Commander as saying "if she [i.e. the vessel] had gone aground we could have been looking at a serious pollution incident on the Wild Atlantic Way". The appellant relied on that quote in support of his position that any assertion on the part of the Defence Forces that the operation in question did not involve dealing with a significant environmental risk, would directly contradict the views of one of their own senior officers. The appellant also pointed to an article referring to a radio interview given by the Commander which he understood also discussed the incident although he indicated that he could not be certain of that as the clip was not available online. My investigator discovered an audio clip of the radio interview by visiting the link provided by the appellant and provided both the appellant and the Defence Forces with a further opportunity to comment on the content of that interview.
16. The appellant responded to the request for comment on 16 April 2021. He noted that the Commander had stated in the course of the interview that "the wind was forecast ... to pick up ... she would have been drifting northeast ... potentially, there was serious potential for a pollution, a serious pollution incident if she was unable to be towed". He also noted that in response to a question from the interviewer as to whether the coast could have been ruined had the operation gone wrong, the Commander had responded: "She had about 32 tonnes of fuel on board so potentially if she went up on the rocks, if one of the fuel tanks had been breached, then you could have quite a nasty pollution incident in that area". Finally, the appellant submitted that the area referred to in the interview (a stretch of coast off Slyne Head near Ballyconneely and Clifden) is of



particular environmental significance given its location on the Wild Atlantic Way and also its importance in other respects to the local economy through activities such as fishing and tourism.

17. The Defence Forces provided its responses on 23 April 2021. Those responses outlined that the content of the interview supported its position that the vessel was not in any imminent danger of collision before and at the time of the Naval Service operation, allowing the Naval Service to arrive on scene, stand-off over night, make preparations for the evolution on Monday morning and carry-out the evolution in a slow, safe and controlled manner in favourable weather conditions. The Defence Forces noted that although the operation in question had the potential to be quite dangerous for the personnel involved, it was in effect a straightforward operation. It remarked on the use of phrases such as “what could have happened”, “had you been further away”, “potential”, “if”, “could potentially”, and “if it went wrong” throughout the interview and again queried whether it could be said that the operation was a “measure” or “activity” within the meaning of article 3(1)(c) of the Regulations in circumstances where the merchant vessel was in no immediate danger.

Analysis and Findings

18. 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.
19. According to national and EU case law on this matter, while the concept of “environmental information” as defined in the AIE Directive is broad (Case C-321/96 *Mecklenburg v Kreis Pinneberg* at paragraph 19), there must be more than a minimal connection with the environment (Case C-316/01 *Glawischnig v Bundesminister für Sicherheit und Generationen* at paragraph 25). Information does not have to be intrinsically environmental to fall within the scope of the definition (*Redmond v Commissioner for Environmental Information* [2020] IECA 83 at paragraph 58; see also *ESB v Commissioner for Environmental Information* [2020] IEHC 190 at paragraph 43). However, a mere connection or link to the environment is not sufficient to bring the 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 Superior Courts and the CJEU.
20. As noted by the appellant, the relevant aspect of the definition of “environmental information” in this case, is that contained at article 3(1)(c) of the AIE Regulations which provides that 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 [3(1)] (a) and (b) as well as measures or activities designed to protect those elements” is “environmental information”.
21. The information sought by the appellant in this case consists of “records ... referring or relating to Naval Service involvement in averting an environmental accident on the west coast of Ireland” as referenced in an article in the Irish Examiner dated 6 August 2020. That article in turn refers to the



provision of assistance by a Naval Service vessel to a merchant ship in difficulty off the coast of County Galway on 3 August 2020. As such, the appellant's request is for information relating to or referencing Naval Service involvement in the provision of assistance to a vessel in difficulty off the Galway coast on 3 August 2020.

22. There are therefore two questions which I must address in order to determine whether the information requested by the appellant is "environmental information" within the meaning of the AIE Regulations:
- (i) whether the provision of assistance by a Naval Service vessel to a merchant ship off the coast of County Galway on 3 August 2020 was a measure or activity "affecting or likely to affect the elements and factors referred to in paragraphs [3(1)] (a) and (b)" of the AIE Regulations or a measure or activity "designed to protect those elements"; and
 - (ii) if so, whether the information requested is information is "on" that measure or activity within the meaning of that word as it is used in article 3(1) of the Regulations.

Is the Naval Service involvement a "measure" or "activity" within the meaning of article 3(1)(c) of the Regulations?

23. The Aarhus Guide notes that the Aarhus Convention expressly includes "administrative measures, environmental agreements, policies, legislation, plans and programmes" when referring to "measures" and "activities" likely to affect the environment in the context of its definition of "environmental information". Similar wording is used in article 2(1)(c) of the AIE Directive and article 3(1)(c) of the AIE Regulations. The Aarhus Guide notes that the use of these terms suggests that some degree of human action is required. The Guide also describes the terms "activities or measures", as referring to "decisions on specific activities, such as permits, licences, permissions that have or may have an effect on the environment". The Court of Appeal in *Minch* was of the view that the reference to "plans" and "policies" in article 3(1)(c) is significant, and suggests that the "measure" or "activity" in question must have "graduated from simply being an academic thought experiment into something more definite such as a plan, policy or programme – however tentative, aspirational or conditional such a plan or policy might be – which, either intermediately or mediately, is likely to affect the environment" (paragraph 39). Hogan J. went on to explain that this requirement for there to be a plan or something in the nature of a plan, curtails a potentially open-ended or indefinite right of access to documents (paragraph 41). If this were not the case, then virtually any information held by or for a public authority referring, either directly or indirectly, to environmental matters would be environmental information. This would run contrary to the CJEU's judgment in *Glawischnig* (paragraph 21; see also *Glawischnig* at paragraph 25).
24. The CJEU in *Mecklenberg* stated at paragraph 20 of its judgment that "the use in Article 2(a) of the Directive of the term 'including' indicates that 'administrative measures' is merely an example of the 'activities' or measures' covered by the directive. As the Advocate General pointed out in paragraph 15 of his Opinion, the Community legislature purposely avoided giving any definition of 'information relating to the environment' which could lead to the exclusion of any of the activities engaged in by the public authorities, the term 'measures' serving merely to make it clear that the acts governed by the directive included all forms of administrative activity."



25. The word “activity” itself is defined in the Oxford English Dictionary as the “state of being actively occupied”. It is my view that operationalising a naval vessel falls within this definition.
26. The essential question is whether this activity is one “affecting or likely to affect the environment” (*Redmond* at paragraph 57). An activity is “likely to affect” the elements and factors of the environment if there is a real and substantial possibility that it will affect the environment, whether directly or indirectly. While it is not necessary to establish the probability of a relevant environmental impact, something more than a remote or theoretical possibility is required (*Redmond* at paragraph 63).
27. I note in this regard that the Defence Force’s position is that the information requested is not environmental information as “a mere connection or a link to an environmental factor is not sufficient to bring information within the scope of the AIE regime”. Although the Defence Forces did not refer specifically to any case law on this point, this position echoes in some respects the concerns raised by the CJEU in *Glawischnig* in which the CJEU noted that the predecessor of the AIE Directive was not intended 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 the definition of “environmental information”. However, the Naval Service involvement in this case was a completed activity and as such, it is sufficiently definitive to avoid creating any suggestion of the type of open-ended or indefinite right of access referred to by Hogan J. in *Minch* which, as he noted, the CJEU in *Glawischnig* was seeking to avoid. Accordingly, I find that the involvement of the Naval Service in this operation was an activity within the meaning of article 3(1)(c) of the AIE Regulations.
28. The next question to be addressed is whether such involvement affected or was likely to affect the environment in a manner which can be classified as something more than remote or theoretical.
29. In that regard, I am satisfied that the Naval Service’s involvement in providing assistance to the vessel in difficulty on 3 August 2020 was an activity which affected, or at the very least was likely to affect, the environment in the sense that it minimised the risk of a collision occurring which may have resulted in the discharge of fuel onto a coastal and marine area.
30. I accept the position of the Defence Forces as set out in its submissions of 12 March 2021 that at the time of the operation, the weather conditions were such that the vessel in difficulty was not in fact in any imminent danger of collision. However, I note that during the radio interview on Galway Bay FM to which the appellant referred in his submissions, the Commander of the Naval vessel involved in the operation noted that the tow of the vessel to safe anchorage took place on Monday morning and that the weather conditions were due to deteriorate that evening. The Commander also stated that the vessel lost power just south of Slyne Head and that “the wind was forecast then to pick up, to come from the south westerly direction so she would have been drifting north east and ... there was serious potential for a ... serious pollution incident, if she was unable to be towed”. She also noted that the vessel had “about 32 tonnes of fuel on board so potentially if she went up on the rocks and if one of those fuel tanks had been breached then you could have had



quite a nasty pollution incident”. I am therefore satisfied that, notwithstanding that the weather conditions did not in fact place the vessel in imminent danger of collision before or at the time of the Naval Service operation to tow the vessel, there was more than a remote or theoretical possibility that those conditions could have changed such that a collision might have resulted. As such, I am of the view that the Naval Service involvement in the provision of assistance to the vessel in difficulty on 3 August 2020 was an “activity” within the meaning of article 3(1)(c) of the Regulations.

Is the information requested information “on” the relevant activity?

31. The next question to be addressed is whether the information requested is information is “on” the relevant activity within the meaning of that word as it is used in article 3(1) of the definition. As “any information ... on” a measure or activity affecting or likely to affect the environment is *prima facie* environmental information (*Redmond* at paragraph 57), the information at issue does not, in itself, have to affect or be likely to affect the environment in order to constitute information “on” such a measure (*Redmond* at paragraphs 57 and 59).
32. In this case, the appellant has requested “copies of all records held referring or relating to Naval Service involvement in averting an environmental accident on the west coast of Ireland” as referenced in the Irish Examiner. It is important to note that not all records referring or relating to such involvement will necessarily be information “on” that involvement. As the High Court outlined in its decision in the *ESB* case, information that is integral to the relevant measure or activity is information “on” it, while information that is too remote from the relevant measure or activity does not qualify as environmental information (see paragraphs 38, 40, 41 and 43). The Court of Appeal in *Redmond* noted that the Court of Appeal of England and Wales in *Department for Business, Energy and Industrial Strategy v Information Commissioner* [2017] EWCA Civ 844 suggests that, in determining whether information is “on” the relevant measure or activity, it may be relevant to consider the purpose of the information such as why it was produced, how important it is to that purpose, how it is to be used, and whether access to it advances the purposes of the Aarhus Convention and AIE Directive (see *Redmond* at paragraph 99). Information that does not advance the purposes of the Aarhus Convention and AIE Directive may not be “on” the relevant measure or activity (*Redmond* at paragraph 99).
33. As noted above, my Office has been provided with the information held by the Defence Forces within the scope of the appellant’s request. Having examined the records provided and having considered the content and purpose of the information contained in those records, as well as the purposes of the Aarhus Convention, the AIE Directive and the Regulations, I am satisfied that the information contained in those records is sufficiently connected to the Naval Service involvement in the provision of assistance to the vessel in difficulty on 3 August 2020. It should be noted that, while I am required by article 12(5)(b) of the AIE Regulations to specify reasons for my decision, I must also be careful not to disclose withheld information in my decisions. I am also mindful that my decision in this case relates only to a threshold jurisdictional issue and that a finding that the information in question is “environmental information” will not result in automatic disclosure of the information rather the matter will need to be remitted to the Defence Forces for further



consideration. This means that the detail that I can give about the content of the records and the extent to which I can describe certain matters in my analysis is limited. However, I am satisfied that the information I have examined (as set out in paragraph 7 above) is directly related to the Naval Service operation of 3 August 2020 and that it is not at such a remove from that operation to render it too remote. I am also satisfied that it is information which would contribute to a greater understanding of that operation in line with the purpose of the AIE Directive as set out in Recital 1 which is, *inter alia*, to contribute to a greater awareness of environmental matters. As such, I am satisfied that the information (as set out in paragraph 7 above) is information “on” an “activity” within the meaning of article 3(1)(c) of the Regulations and should be considered “environmental information” within the scope of the AIE Regulations.

Decision

34. Having carried out a review under article 12(5) of the AIE Regulations, I annul the Defence Force’s decision that the information requested did not constitute “environmental information” within the meaning of article 3(1) of the AIE Regulations. This matter is now remitted to the Defence Forces who should process the appellant’s request in accordance with the AIE Regulations.

Appeal to the High Court

35. 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

30 April 2021