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# An Expanded Definition of Environmental Information?: *Minch v Commissioner for Environmental Information* [2016] IEHC 91

## Background

The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters<sup>1</sup> (commonly known as the Aarhus Convention) is part of a new approach to environmental regulation which tries to involve the public much more in environmental decision-making.<sup>2</sup> It codifies and extends the geographical area, amount, and clarity of what are known as ‘three pillars’ of access to environmental information, public participation, and access to justice.<sup>3</sup> These are claimed to enhance fairness, legitimacy, accountability, and the ability of the public to protect itself.<sup>4</sup> This approach has its roots in Principle 10 of the 1992 Rio Declaration on Environment and Development. In European law, the Aarhus Convention is implemented by Directive 2003/4/EC on access to environmental information<sup>5</sup> and Directive 2003/35/EC on public participation.<sup>6</sup> Regulation 1367/2006/EC extends the Convention to EU institutions and bodies.<sup>7</sup>

The development of the Aarhus Convention as a tool for ‘informational environmental regulation’ has been a significant force in environmental law over

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<sup>1</sup> UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (opened for signature 25 June 1998, entered into force 30 October 2001) 2161 United Nations Treaty Series 447

<sup>2</sup> For a recent summary of the Convention and its operation, see Peter Oliver, ‘Access to Information and to Justice in EU Environmental Law: The Aarhus Convention’ (2013) 36 Fordham International Law Journal 1423.

<sup>3</sup> Benjamin W Cramer, ‘The Human Right to Information, the Environment and Information about the Environment: From the Universal Declaration to the Aarhus Convention’ (2009) 14 Communication Law and Policy 73, 74.

<sup>4</sup> Vivek Ramkumar and Elena Petkova, ‘Transparency and Environmental Governance’ in Ann Florini (ed), *The Right to Know: Transparency for an Open World* (Columbia University Press 2007) 283.

<sup>5</sup> [2003] OJ L41/26.

<sup>6</sup> [2004] OJ L156/17.

<sup>7</sup> [2006] OJ L264/13.

the last 10 to 15 years, with some successes.<sup>8</sup> It has also yielded some results which are not obvious from the general outlines of the Convention. One of the key issues in the elaboration of legal understanding of the Convention's impact has been the contested boundaries of what constitutes 'environmental information'. A recent decision of the High Court of Ireland sheds some light on this question, although not enough to answer it definitively.

In *Minch v Commissioner for Environmental Information*,<sup>9</sup> Baker J overturned a decision of the Commissioner for Environmental Information (CEI) refusing access to a report entitled 'Analysis of Options for Potential State Intervention in the Roll Out of NextGeneration Broadband' ('the report'). The CEI had held that information must fall within one of the categories in Article 3(1) of the European Communities (Access to Information on the Environment) Regulations 2007–2014 (AEI Regulations) in order to constitute environmental information, not simply relate to one of them. The High Court held that this 'remoteness' approach was not the correct test as it failed to take into account that Article 3(1)(c) includes measures, programmes, and policies which are likely to affect elements of the environment, not just those which have affected those elements, but did not provide an alternative test. This case note summarises the decision, outlines the reasons for the judge's decision, and provides some brief commentary.

## Facts of the Case

The appellant, Mr Minch, had originally sought a copy of the report from the Department of Communications, Energy and Natural Resources in May 2013. (Given how long it has taken for the request to work its way through the AEI system, the courts, and will now return to the CEI, there is a certain irony in the Aarhus Convention's requirement that procedures for access to justice should be 'timely'.<sup>10</sup>) This was refused in July of that year on the grounds that the information sought was not 'environmental information' as defined in the AEI Regulations.<sup>11</sup> This decision was appealed to the CEI, who similarly refused access on the same grounds.<sup>12</sup> The appellant filed an application for judicial review against the CEI (with the Department of Communications as a notice party) in February 2015.<sup>13</sup>

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<sup>8</sup> Marianne Dellinger, 'Ten Years of the Aarhus Convention: How Procedural Democracy Is Paving the Way for Substantive Change in National and International Environmental Law' (2012) 23 Colorado Journal of International Law and Policy 309.

<sup>9</sup> *Minch v Commissioner for Environmental Information* [2016] IEHC 91.

<sup>10</sup> Article 9(4) of the Convention.

<sup>11</sup> *Minch* (n 9) 1.

<sup>12</sup> *ibid* 2; see Áine Ryall, 'Access to Information on the Environment: The Evolving EU and National Jurisprudence' (2016) 23 Irish Planning and Environmental Law Journal 3, 4 for a discussion of the CEI decision.

<sup>13</sup> *Minch* (n 9) 3.

The report which the appellant sought was prepared for the Department by external consultants (Analysys Mason) and is ‘an economic analysis of the various options available to Government to achieve generalised rollout of highspeed broadband services within the State’, with a focus on whether the objectives of the National Broadband Plan should be achieved by wireless or wired networking.<sup>14</sup>

## The Judgment

The judgment explores, but does not completely or definitively answer, the question of whether the definition of ‘environmental information’ in the AEI Regulations includes information indirectly connected to environmental decision-making. The legislation at issue in this case is the Irish implementation of Directive 2003/4/EC on public access to environmental information, which is itself the European implementation of what was then the European Community’s accession to the Aarhus Convention. Procedurally, the Regulations grant individuals the right to request environmental information from a public authority,<sup>15</sup> with an appeal to the Commissioner for Environmental Information,<sup>16</sup> and finally an appeal on a point of law to the High Court.<sup>17</sup> Article 3(1) of the regulations define ‘environmental information’ as:

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

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<sup>14</sup> *ibid* 4.

<sup>15</sup> Access to Environmental Information Regulations 2007–14, art 6.

<sup>16</sup> Access to Environmental Information Regulations, art 12.

<sup>17</sup> Access to Environmental Information Regulations, art 13.

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).<sup>18</sup>

The appellant's case relied initially on paragraph (b) of this definition (particularly emissions into the environment),<sup>19</sup> but later developed to include arguments based around paragraphs (c) and (e), discarding the argument based on emissions.<sup>20</sup> The respondent (the CEI) and the notice party (the Department) sought to argue that there was a lack of clarity in the original affidavit of the appellant and an attempt in his second affidavit to introduce new matters, but while the judge felt that the notice of motion did not 'state concisely the point of law on which the appeal is made' as is required by Order 84C of the Rules of the Superior Courts,<sup>21</sup> the issues to be raised were clear from the submissions and supplemental affidavit of the applicant, and there was therefore no prejudice to the other parties.<sup>22</sup>

The first question for the judge to consider was the role of the High Court in dealing with an appeal on a point of law such as this — is it nearer to a *de novo* appeal (with original and full jurisdiction) or a judicial review action (with relatively limited jurisdiction)? The appellant argued for the first and the respondent and notice party for the second. The judge ruled that the answer was somewhat of a hybrid between these but more like a full appeal than a limited hearing. She was informed in this ruling by previously decided cases, particularly *Sheedy v Information Commissioner*<sup>23</sup> and *NAMA v Commissioner for Environmental Information*.<sup>24</sup> In *Sheedy*, Kearns J had stated that

it would be obviously incorrect to apply exclusively judicial review principles to matters of statutory interpretation in the way that might be appropriate to issues of fact. A legal interpretation of a statute is either correct or incorrect and the essence of this case is to determine whether the interpretation giving first by the respondent and later by the High Court ... was correct or otherwise.<sup>25</sup>

She relied particularly on a statement by O'Neill J in *An Taoiseach v Commissioner of Environmental Information*<sup>26</sup> that such an appeal should be a 'full rehearing on all

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<sup>18</sup> Access to Environmental Information Regulations, art 3(1).

<sup>19</sup> *Minch* (n 9) 10.

<sup>20</sup> *ibid* 11.

<sup>21</sup> *ibid* 10.

<sup>22</sup> *ibid* 14.

<sup>23</sup> *Sheedy v Information Commissioner* [2005] 2 IR 272 (IEHC).

<sup>24</sup> *National Assets Management Agency v Commissioner for Environmental Information* [2013] IESC 86.

<sup>25</sup> *Sheedy v Information Commissioner* (n 23) 294. MacEochaidh J approved of this statement in the *NAMA* case; see *NAMA v CEI* (n 24) [62].

<sup>26</sup> *An Taoiseach v Commissioner of Environmental Information* [2013] 2 IR 510 (IEHC).

legal issues which arose in the case',<sup>27</sup> a sentiment which echoes McKechnie J's often-quoted summary of the remit of a court dealing with an appeal on point of law in *Deely*.<sup>28</sup> This confines the court in the following manner:

- a. it cannot set aside findings of primary fact unless there is no evidence to support such findings,
- b. it ought not set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw,
- c. it can however, reverse such inferences, if the same were based on the interpretation of documents and should do so if incorrect, and finally,
- d. if the conclusion reached by such bodies shows that they have taken an erroneous view of the law, then that also is a ground for setting aside the resulting decision.<sup>29</sup>

The judge therefore concluded that the correct approach to take was quite close to a full re-hearing:

[t]he appeal does engage the full jurisdiction of the court, but not as argued by the appellant, in that I cannot substitute findings of fact, and I cannot reverse the inferences drawn by the Commissioner with regard to the nature of the Report.<sup>30</sup>

What, then, was the nature of the report? The CEI relied on the Department's description, which the judge thought was worth quoting in full:

This Report is a financial and technical analysis of options for potential State intervention in the roll out of next generation broadband and was commissioned by the Department in the context of the National Broadband Plan for Ireland. The purpose of the Report was to develop a financial model to calculate the likely capital expenditure associated with deploying next generation broadband under a number of different scenarios.

The department's description contained the following assertion:-

It contains no environmental content.<sup>31</sup>

The CEI concluded that the report was 'about the cost implications for the state of deploying various types of NGB [next generation broadband] infrastructure to areas underserved by the private sector.'<sup>32</sup> It did not deal with issues that might be seen as directly environmental, such as radio spectrum, installation of masts or underground cables, or the impact of various technologies on the environment.<sup>33</sup> He therefore decided that the report did not contain information on factors such as

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<sup>27</sup> *ibid* 542.

<sup>28</sup> *Deely v Information Commissioner* [2001] 3 IR 439 (IEHC).

<sup>29</sup> *ibid* 452.

<sup>30</sup> *Minch* (n 9) 21.

<sup>31</sup> *ibid* 23.

<sup>32</sup> *ibid* 24.

<sup>33</sup> *ibid* 25.

energy, radiation, or emissions affecting or likely to affect the elements of the environment.<sup>34</sup> This, for the Commissioner, disposed of any claimed right of access under paragraphs 3 (1) (a), (b), or (c) of the Regulations.

The CEI also considered paragraph 3 (1) (e), under which ‘cost-benefit and other economic analyses and assumptions’ which affected measures falling into paragraph 3 (1) (c) could be subject to AEI. He decided that as the NBP was a high level strategy which did not deal directly with the environment, it was not environmental information — ‘[t]he link between the plan and any effect on the environment is simply too remote, unlike the measures and activities that may be adopted to implement the plan.’ This meant that the report, in turn, was not environmental information either.<sup>35</sup>

This question of ‘remoteness’ is key to understanding the Commissioner’s decision<sup>36</sup> and the High Court’s ruling in this case. According to Butler J, the legal questions to be answered were:

- a. Whether the link between the N.B.P. and an effect on the environment was “simply too remote” to enable the N.B.P. to be characterised as environmental information and
- b. Whether the Report could not therefore be environmental information.<sup>37</sup>

The arguments on both sides were briefly summarised by the judge: for the appellant, that ‘radio wave emissions from wireless transmitters were emissions into the environment’<sup>38</sup> and that any technology used would require electrical power. Choices with regard to these would have environmental consequences. For the notice party, that these were ‘general or high level documents containing no concrete choices or proposals’.<sup>39</sup>

The appellant further relied on a European Court of Justice (ECJ) claim that the definition of environmental information included any statement ‘capable of adversely affecting or protecting the state of one of the sectors of the environment covered by the Directive’,<sup>40</sup> and on the Aarhus Convention Implementation Guide,<sup>41</sup>

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<sup>34</sup> *ibid* 27.

<sup>35</sup> *ibid* 28–31.

<sup>36</sup> *ibid* 32.

<sup>37</sup> *ibid* 34.

<sup>38</sup> *ibid* 35.

<sup>39</sup> *ibid* 36.

<sup>40</sup> *Mecklenburg v Kreis Pinneberg* [1998] ECR I-3809, I-3833.

<sup>41</sup> Jonas Ebbesson and others, *The Aarhus Convention: An Implementation Guide* (United Nations 2014).

which called for a broad definition of EI and made it clear that economic analyses should be included.<sup>42</sup>

The respondent further relied on ECJ cases which have held that the Convention does not give 'a general and unlimited right of access to all information held by public authorities which has a connection, however, minimal, with an environmental factor'<sup>43</sup> and specifically that information on the name of the manufacturer of genetically modified foodstuffs, product descriptions, and administrative penalties did not constitute EI.<sup>44</sup>

In resolving this, Butler J relied on the ECJ judgment in *Mecklenburg* that information could be EI if 'the statement of views put forward by an authority ... [is] an act capable of adversely affecting or protecting the state of one of the sectors of the environment covered by the directive.'<sup>45</sup> She also had regard to O'Donnell J's recent statement that the interpretation of the directive should be teleological,<sup>46</sup> and to the aim and recitals of the Convention. She therefore concluded that a broad approach to the interpretation of EI was the correct one.

On that basis, she suggested that paragraph 3 (1) (e)<sup>47</sup> should capture 'economic analysis or models which informed or were capable of informing either a programme or plan or administrative measure, not merely information which did as a matter of fact actually inform the decision maker', that the word 'use' in that paragraph does not limit these analyses to those available when a particular report is written, and that the phrase 'likely to affect' includes those which are capable of informing the thinking in a plan, programme or policy'.<sup>48</sup> The Commissioner's approach was therefore 'overly narrow' and remoteness was not the correct test.<sup>49</sup> She explained that '[t]he Report, as an economic model, could inform the choice that policy makers will make. It is, to use the language of Aarhus, part of the "thinking" that might go into such policy choices, and could impact on them.'<sup>50</sup>

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<sup>42</sup> *Minch* (n 9) 37–39.

<sup>43</sup> *Ville de Lyon v Caisse des dépôts et consignations* [2010] ECR I-14115, 14128.

<sup>44</sup> *Eva Glawischnig v Bundesminister für soziale Sicherheit und Generationen* [2003] ECR I-05995. For a full recent discussion of the ECJ jurisprudence on 'environmental information', see James Maurici, 'The Influence of the Aarhus Convention on EU Environmental Law: Part 2' [2014] *Journal of Planning & Environment Law* 181.

<sup>45</sup> *Minch* (n 9) 21.

<sup>46</sup> *NAMA v CEI* (n 24) 10.

<sup>47</sup> The text of the judgment refers to 13 (1) (e) but there is no such paragraph in the regulations.

<sup>48</sup> *Minch* (n 9) 56.

<sup>49</sup> *ibid* 58.

<sup>50</sup> *ibid* 60.



It would seem to follow from this that the report should be produced to the appellant. However, the judge did not make such an order, despite arguments from the winning side.<sup>51</sup> She relied on the decision of MacEochaidh J in *NAMA v Commissioner for Environmental Information*<sup>52</sup> and held that she did not have sufficient jurisdiction to substitute her decision for that of the Commissioner, nor a procedural basis to hear evidence with regard to the report.<sup>53</sup> She therefore granted an order setting aside the determination of the Commissioner and remitting the matter to him for further determination.<sup>54</sup>

## Commentary

As Cordini says, ‘praxis can deprive of meaning many guarantees acknowledged by norms, making their exercise difficult and costly.’<sup>55</sup> So it is proving in Irish environmental law. The Irish state has not been enthusiastic about the Aarhus Convention. It was late in transposing Directive 2003/4;<sup>56</sup> in addition, both on paper and in practice, its implementation does not always live up to the lofty ideals of the Convention.

While there has been discussion of the need to reform Irish implementation of the Aarhus directives with regard to the costs rules,<sup>57</sup> there has been less debate as to the definition of EI.<sup>58</sup> It is nonetheless difficult to apply in practice.<sup>59</sup> The definition in the Convention is quite vague, perhaps deliberately so, as an effort by policymakers not to prevent information requests that they had not foreseen.<sup>60</sup>

As the first case in which an appellant has decided to appeal the Commissioner’s refusal to include particular information sought within the definition of EI, the

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<sup>51</sup> *ibid* 64.

<sup>52</sup> *NAMA v CEI* (n 24).

<sup>53</sup> *Minch* (n 9) 65.

<sup>54</sup> *ibid* 67.

<sup>55</sup> Giovanni Cordini, ‘The Society of Information and Constitutional Laws’ (2006) 30 *Southern Illinois University Law Journal* 429, 466.

<sup>56</sup> Áine Ryall, ‘Beyond Aarhus Ratification: What Lies Ahead for Irish Environmental Law?’ (2013) 20 *Irish Planning and Environmental Law Journal* 19, 20.

<sup>57</sup> David Browne, ‘Ireland’s Compliance with the Aarhus Convention—Some Suggestions for Reform’ (2015) 22 *Irish Planning and Environmental Law* 43.

<sup>58</sup> For an example, see Damien Welfare, ‘Are the EIRs Too Broad, and is It Time to Revisit the Concept Of “remoteness”?’ (2012) 8 *Freedom of Information* 5.

<sup>59</sup> Áine Ryall, ‘Environmental Information Rights in Ireland: An Assessment of Compliance with the Aarhus Convention & EU Law’ (2014) 22 *Environmental Liability* 182, 193.

<sup>60</sup> Muki Haklay, ‘Public Environmental Information Systems: Challenges and Perspectives’ (University of London 2002) 31–32.

*Minch* case is therefore important.<sup>61</sup> It is significant as it extends the scope of this definition. Access to 'background statistical information or purely factual material that informed the policy decision' is a common feature of freedom of information regimes,<sup>62</sup> and it therefore perhaps unsurprising that the judge ruled that this right could extend some distance, to documents that are not obviously environmental in character.

However, questions remain. If the definition is as broad as Butler J seems to say it is, is anything excluded, and is this to be welcomed? The Information Commissioner for England and Wales has defined remoteness in a way that seems to mean that in practice very little information will not be EI.<sup>63</sup> This may not be desirable as the wider the EIA regime, the narrower FOI becomes, leading to confusion and waste in practice.<sup>64</sup> Ireland may be following this lead with too much enthusiasm.

If remoteness is the wrong test, what is the correct one? The judge does not explicitly provide an alternative test for or definition of EI but does make it clear that remoteness is not the correct test. She hints strongly at what might be the correct test when she speaks of 'any information that might have informed or be capable of informing the thinking [of a decision-maker]'.<sup>65</sup> While we await the reconsideration of Mr Minch's request by the CEI, it is worth considering how some recent EI decisions of the Commissioner<sup>66</sup> might be changed by following this guidance from the High Court:

- *Sheridan and Central Bank of Ireland*:<sup>67</sup> A refusal of access to mileage claims by the Central Bank, affirmed by the Commissioner, on the basis that there was no connection between the cost of travel and its environmental impact. Unlikely to have a different outcome under an 'informing the thinking' test.
- *Sheridan and Dublin City Council*:<sup>68</sup> A granting of access to an Asset Purchase Agreement relating to the transfer of waste collection facilities, and a refusal of access relating to communications relating to that transfer. Unlikely to have a different outcome under an 'informing the thinking' test.

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<sup>61</sup> Ryall, 'Access to Information on the Environment: The Evolving EU and National Jurisprudence' (n 12) 5.

<sup>62</sup> Philip Coppel, 'Environmental Information: The New Regime' (2005) 2005 Journal of Planning & Environment Law 12, 17.

<sup>63</sup> Welfare (n 58) 7.

<sup>64</sup> *ibid* 8.

<sup>65</sup> *Minch* (n 9) 62.

<sup>66</sup> This list comes from Ryall, 'Access to Information on the Environment: The Evolving EU and National Jurisprudence' (n 12) 4.

<sup>67</sup> CEI/11/0001 (26 March 2012).

<sup>68</sup> CEI/12/0004 (20 December 2013).

- *Cassidy and Coillte*:<sup>69</sup> Refusal of access to locations of land held by a state agency, identified and agreed for use by a commercial entity for wind energy export projects. Held by the CEI to be environmental information, even where no final decision on leasing of the land had been taken. Unlikely to have a different outcome under an ‘informing the thinking’ test.
- *Redmond and Coillte*:<sup>70</sup> Refusal of access to information on the sale of forested land as not being environmental information. Upheld by the CEI on the basis that any felling of trees in this location would still require a felling notice be filed with An Garda Síochána. (Access to proposals for development of such land was held to be environmental information.) Unlikely to have a different outcome under an ‘informing the thinking’ test.
- *Sheridan and An Garda Síochána*:<sup>71</sup> Refusal of access to information on aircraft usage, contracts for fuel provision, and electricity bills for An Garda Síochána. Upheld by the CEI on the basis that the connection between such activities and any environmental impact was too minimal and remote for the information to be considered environmental information. This decision might have a different outcome under an ‘informing the thinking’ test.
- *Duncan and Sustainable Energy Authority of Ireland*:<sup>72</sup> Refusal of access to “Study on the Viability and Cost-Benefit Analysis for Ireland Exporting Renewable Electricity”. Likely to have different outcome under an ‘informing the thinking’ test as the information sought is very similar to that under discussion in *Minch*.
- *Cusack and Eirgrid*:<sup>73</sup> Refusal of access to information relating to a plan to construct a new high voltage power line running over 200 km. Overturned by the CEI on the basis that this was environmental information and was not protected by the confidentiality exception in Article 9 (1) (c).

Should the judge have simply granted the order sought? It is important to note that (as in all matters of European law), national courts have an important role to play in ensuring compliance with Aarhus. It is therefore disappointing that Butler J was not willing to simply grant access to the report but instead required the appellant to wait until the CEI (who is well-known to be short of resources) can re-consider the decision. However, this is not surprising and on examination of the relevant legislation, she had little choice. The AEI Regulations are clear in limiting the High Court to considering points of law only. This is a further gap in the Irish implementation of the Convention.

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<sup>69</sup> CEI/13/0008 (1 October 2015).

<sup>70</sup> CEI/14/0011 (2 November 2015).

<sup>71</sup> CEI/13/0013 (11 December 2015).

<sup>72</sup> CEI/13/0005 (11 December 2015).

<sup>73</sup> CEI/14/0016 (22 January 2016).

As Ryall points out, 'the law relating to the Aarhus Convention remains in a highly fluid state.'<sup>74</sup> The same author has also hoped that the *Minch* case would 'provide valuable guidance on the definition of "environmental information" that can be applied in future cases so as to provide a greater degree of certainty than exists at present.'<sup>75</sup> Unfortunately, while it is certainly useful, it does not go as far as she and other authors might want. For that, we will have to await at least the re-consideration by the CEI of the request which gave rise to this case, and possibly further High Court appeals.

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<sup>74</sup> Áine Ryall, 'Aarhus Convention and Access to Justice in Environmental Matters: Some Critical Reflections' (2013) 20 Irish Planning and Environmental Law Journal 165, 166.

<sup>75</sup> Ryall, 'Access to Information on the Environment: The Evolving EU and National Jurisprudence' (n 12) 5.