



**THE COURT OF APPEAL  
CIVIL**

**Court of Appeal Record Number: 2021/103**

**High Court Record Number: 2019/87 MCA**

**Approved**

**Neutral Citation No [2022] IECA 210**

**No Redactions Needed**

**Costello J.  
Noonan J.  
Faherty J.**

**BETWEEN**

**RIGHT TO KNOW CLG**

**APPLICANT/RESPONDENT**

**- AND -**

**COMMISSIONER FOR ENVIRONMENTAL INFORMATION**

**RESPONDENT**

**- AND -**

**RAHEENLEAGH POWER DAC**

**NOTICE PARTY/APPELLANT**

**JUDGMENT of Ms. Justice Costello delivered on the 21<sup>st</sup> day of September 2022**

1. The issue for resolution in this appeal is a net one: whether Raheenleagh Power DAC (“RPD”) is a public authority within the meaning of the European Communities (Access to Information on the Environment) Regulations 2007-2008 (“the AIE Regulations”).

### **Background**

2. Right to Know CLG (“RTK”) is a company limited by guarantee whose objects are to improve, promote and advocate for increased rights of public access to information. It was incorporated on 24 July 2015. On 22 February 2017 RTK sought access to environmental information held by Coillte Teoranta (“Coillte”) in relation to a wind farm located at Raheenleagh Forest in County Wicklow. Coillte granted part of the request and refused access to some of the environmental information sought on the basis that it was not held for or on behalf of Coillte. The information was held by RPD.

3. RPD is a private limited company which owns and operates the Raheenleagh Wind Farm at Raheenleagh Forest, Ballinvalley, County Wicklow. This wind farm consists of 11 turbines and associated development. RPD’s business is to generate and sell electricity. RPD was originally established as a joint venture between ESB Wind Development Limited (“ESB Wind”), a subsidiary of the Electricity Supply Board and Coillte. RTK formed the view that RPD was a public authority within the meaning of the AIE Regulations and thus was required to furnish it with environmental information.

4. On 19 May 2017 RTK requested the following information from RPD at its e-mail address [Subcosecretarial@esb.ie](mailto:Subcosecretarial@esb.ie):

*“1. All noise data and associated wind speed/direction data in Excel format to include all noise descriptors captured for the Coillte/ESB development at Raheenleagh Wind Farm. Specifically, the detailed data, graphs and analysis which was used as input into the very brief set of information contained within*

*the EIS documentation submitted to Wicklow CC as part of the planning submission.*

2. *The full output from the Wind Pro S/W showing calculations for noise compliance.*

*This request covers inter alia Planning Permissions 10/2140, 12/6049 and any others associated with the site.”*

5. RPD did not reply to the e-mail. On 20 June 2017 RTK e-mailed RPD requesting an internal review of this “*deemed refusal*”. On 11 July 2017, RPD responded by an e-mail attaching a letter dated 7 July 2017 stating that it was not a public authority under the AIE Regulations.
6. RTK appealed this decision to the Commissioner for Environmental Information (“the commissioner”) on 14 July 2017. The commissioner invited RTK to make a submission which it did on 4 August 2017. On 28 March 2018 the commissioner held that RPD was not a public authority within the meaning of the AIE Regulations. RTK instituted judicial review proceedings in the High Court on 24 May 2018 seeking various declaratory reliefs against the commissioner. The proceedings were ultimately settled and struck out on consent on 22 October 2018. The issues that were the subject of the initial request were remitted back to the commissioner to be determined *de novo*.
7. On 26 October 2018 the commissioner e-mailed RTK and RPD and invited them to make submissions on the following issues in the context of RTK’s appeal:
  1. Case law regarding the definition of public authority,
  2. Recent decisions by the commissioner relating to the definition of public authority,
  3. Submissions in CEI/17/0030 (the original appeal by RTK to the commissioner),
  4. Reports regarding the sale of RPD, and

5. The commissioner's understanding of RPD's licence to generate electricity.
8. Point 4 arose because Coillte was proposing to sell its 50% shareholding in RPD to GR Wind Farms 1 Limited ("GR Wind"), a wholly owned subsidiary of Greencoat Renewables plc. Both GR Wind and Greencoat Renewables plc are private commercial companies incorporated under the Companies Act 2014. The sale of the 50% in the joint venture was completed on 21 December 2018. Thereafter the entire shareholding in RPD was held by ESB Wind and GR Wind as a joint venture.
9. On 9 January 2018 the commissioner issued his decision. He found that RPD was not a public authority for the purposes of the AIE Regulations as it did not meet the definition of a public authority contained in the AIE Regulations and Council Directive 2003/4/EC on public access to environmental information ("the Directive"). He held that:
  - (1) RPD, as a private company established under The Companies Act, 2014, was not a public authority within the meaning of Article 3(1)(a) of the AIE Regulations;
  - (2) RPD had not been vested with special powers and, therefore, did not perform public administrative functions within the meaning of Article 3(1)(b) of the AIE Regulations; and
  - (3) The generation of electricity is not a public service, nor does it involve the exercise of public responsibilities or functions and therefore RPD does not have responsibilities or functions or provide a public service within the meaning of Article 3(1)(c) of the AIE Regulations.
10. RTK appealed the decision to the High Court on a point of law pursuant to Article 13 of the AIE Regulations by a Notice of Motion dated 7 March 2019.

**The definition of a public authority**

**11.** In order to understand the arguments of the parties it is necessary to set out the definitions of a public authority in the Aarhus Convention, the Directive and the AIE Regulations.

**12.** The EU and the State are both parties to the Aarhus Convention. Article 2(2) of the Convention defines a public authority as:

- “(a) Government at national, regional and other level;
- (b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;
- (c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;
- (d) ....

This definition does not include bodies or institutions acting in a judicial or legislative capacity;”

**13.** The EU implemented the provisions of the Aarhus Convention by, *inter alia*, the Directive. Recital 11 states:

*“To take account of the principle in Article 6 of the Treaty, that environmental protection requirements should be integrated into the definition and implementation of Community policies and activities, the definition of public authorities should be expanded so as to encompass government or other public administration at national, regional or local level whether or not they have specific responsibilities for the environment. The definition should likewise be expanded to include other persons or bodies performing public administrative functions in relation to the environment under*

*national law, as well as other persons or bodies acting under their control and having public responsibilities or functions in relation to the environment.”*

**14.** Effect is given to Recital 11 in the definition of a public authority in Article 2(2) of the Directive. This defines a public authority as:

*“(a) government or other public administration, including public advisory bodies, at national, regional or local level;*

*(b) any natural or legal person performing public administrative functions under the national law, including specific duties, activities or services in relation to the environment; and*

*(c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within (a) or (b).*

*Member States may provide that this definition shall not include bodies or institutions when acting in a judicial or legislative capacity...”*

**15.** The definitions in Article 2(2)(b) and (c) are essentially identical to the equivalent articles in the Aarhus Convention (see Case C-279/12, *Fish Legal and Shirley v. Information Commissioner*, judgment of the Court (Grand Chamber) of 19 December 2013 (“*Fish Legal*”)).

**16.** The Directive was transposed into national law by the AIE Regulations. A public authority is defined in Article 3 as follows:

*““Public authority” means, subject to sub-article (2)—*

*(a) government or other public administration, including public advisory bodies, at national, regional or local level,*

*(b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment, and*

*(c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within paragraph (a) or (b),*

*and includes—*

- (i) a Minister of the Government,*
- (ii) the Commissioners of Public Works in Ireland,*
- (iii) a local authority for the purposes of the Local Government Act 2001 (No. 37 of 2001),*
- (iv) a harbour authority within the meaning of the Harbours Act 1946 (No. 9 of 1946),*
- (v) the Health Service Executive established under the Health Act 2004 (No. 42 of 2004),*
- (vi) a board or other body (but not including a company under the Companies Acts) established by or under statute,*
- (vii) a company under the Companies Acts, in which all the shares are held—*
  - (I) by or on behalf of a Minister of the Government,*
  - (II) by directors appointed by a Minister of the Government,*
  - (III) by a board or other body within the meaning of paragraph (vi), or*
  - (IV) by a company to which subparagraph (I) or (II) applies, having public administrative functions and responsibilities, and possessing environmental information;*

17. The definition of a public authority at sub paragraphs (a), (b) and (c) in the AIE Regulations is identical to the equivalent sub paragraphs in the Directive. In addition, the AIE Regulations specify entities which are or are not included within that definition.

18. The three categories of public authorities will, for ease of reference, be referred to as (a), (b) and (c).

### **The provision of electricity in the State**

19. The Electricity (Supply) Act, 1927 (“the Act of 1927”) established the Electricity Supply Board (“ESB”). For many years it operated as a vertically integrated State-owned utility company with a monopoly on generation, transmission, distribution and supply of electricity. In more recent times, the electricity market has been “unbundled” throughout the European Union. Since 2000 the *generation* of electricity in the State has been fully liberalised and is fully open to competition. Any body may apply for an authorisation to construct a generating station or a licence to generate electricity from the Commission for the Regulation of Utilities (“CRU”) (previously the Commission for Energy Regulation). 349 entities have been authorised to construct generating stations and 380 bodies are licensed to generate electricity. RPD is one of the bodies both authorised to construct a generation station and licensed to generate electricity.

20. The integrated single electricity market permits electricity generators to sell power generated by their assets into a centralised market which trades in specific time frames (i.e. the day ahead market, the intraday market and the ex post balancing market). The power sold by the electricity *generators* is purchased by the electricity *suppliers* who subsequently provide it to their customers. Just as there is competition between generators of electricity, there is competition between the suppliers of electricity to end users (the customers).

21. The ownership and operation of the distribution and transmission systems in the State is governed by the Electricity Regulation Act, 1999 and the relevant licences granted by the



CRU. The systems are operated by ESB Networks DAC (distribution) and Eirgrid plc (transmission) and are strictly regulated by the CRU. There is no competition in the distribution or transmission system and private companies are not involved in their operation or management.

**22.** The Renewable Energy Feed-in Tariff (“REFIT”) is a system of subsidisation designed to encourage the generation of renewable energy through the availability of certain minimum prices for units of generated electricity. Consumers of electricity are levied with a public service obligation levy (“PSO levy”). This is designed to support energy generation, *inter alia*, through renewable means. The levies are calculated by the CRU in accordance with the Electricity Regulation Act, 1999 (Public Service Obligations) Order 2002 (S.I. 217 of 2002) as amended.

**23.** An individual generator of electricity is required to enter a commercially negotiated REFIT power purchase agreement (“PPA”) with a licensed supplier. The generator will be entitled to a unit price from the supplier. Suppliers of electricity are subject to a public service obligation. In exchange for undertaking the public service obligation, suppliers of electricity receive support payments which top up the price they pay for electricity in the integrated single electricity market to the levels specified in the REFIT rules. Generators of electricity, such as RPD, are not subject to public service obligations and do not receive support payments. They can benefit indirectly from REFIT support as the purchase of renewable energy by suppliers under the PPA can be on more favourable terms as a result of REFIT. The higher price paid for a generator’s output under the PPA as a consequence of REFIT is a form of indirect subsidy. However, the supplier of the electricity receives the payments, not the generator of electricity. The actual obligation arising under REFIT is on the supplier. The benefit to the generator is the fact that the supplier is able to purchase renewables with the benefit of the subvention offered by REFIT, but a generator does not

thereby undertake and has no obligation to deliver any public services as a consequence of REFIT.

**The evidence in relation to RPD**

24. Mr. Mark Fogarty, a director of RPD, swore the replying affidavit on behalf of RPD. He addressed the legal status of the company. At the time of the original request for access to environmental information in February 2017, RPD was a joint venture vehicle set up by Coillte and ESB Wind for the purpose of developing, operating, maintaining, owning and managing the Raheenleagh wind farm. They each owned 50% of the share capital of RPD. He says that it was usual for wind farms to be held in companies which are special purpose vehicles for a number of reasons, including the requirement to obtain non-recourse project finance from lending institutions. At para. 15 he avers:

*“The joint venture between [ESB Wind] and Coillte was governed, inter alia, by a subscription and shareholders’ agreement entered into by [RPD, ESB Wind] and Coillte. While Coillte was a shareholder, the Board of Directors comprised two nominees each from Coillte and [ESB Wind] (“The Coillte ESBWDL Board”) and was responsible for the supervision and management of the company. The Coillte ESBWDL Board acted independently of [RPD]’s shareholders in their actions, functions and duties under the Companies Act 2014 and all decisions taken by The Coillte ESBWDL Board were based on determining of what was in the best interests of [RPD]. I am advised that The Coillte ESBWDL Board met in person every two to four months and made all strategic decisions for the company. I can confirm that the role and functions of [RPD]’s Board of Directors did not change when Coillte’s shareholding in [RPD] was transferred to GR Wind.”*

25. Mr. Fogarty explained that Coillte entered into a Share Purchase Agreement with Greencoat Renewables plc pursuant to which it sold its 50% shareholding in RPD to GR

Wind, a wholly owned subsidiary of Greencoat Renewables plc. The sale completed on 21 December 2018. He confirmed that GR Wind and Greencoat Renewables plc are private companies, and that Green Coat Renewables plc is listed on the Irish Stock Exchange. On 21 December 2019, GR Wind executed a Deed of Adherence in relation to its shareholding in RPD.

**26.** At para. 18-20 he avers as follows;

*“18. The current Board of Directors comprise two nominees each from GR Wind and [ESB Wind]. The two members nominated by GR Wind are Paul O’Donnell and Bertram Gautier. I was nominated by [ESB Wind] to the Board on 1 May 2017 while Coillte was still a shareholder in [RPD] and David Farrell joined the board more recently on 1 February 2019, also nominated by [ESB Wind]. John Healy is the Company Secretary...*

*19. [RPD] enjoys precisely the same powers and functions now as it did when Coillte was a 50% shareholder and the Board of Directors operates in the same way in which it did while Coillte was a shareholder. [RPD] did not lose any powers as a result of 50% of its ownership transferring from a public to a private entity, nor indeed would it lose any of its powers if [ESB Wind] were to also decide to sell its 50% ownership to a private company. I am advised and understand that when [RPD] was owned by [ESB Wind] and Coillte, this did not confer on it any special status or power over and above the normal powers that may be enjoyed by a similar undertaking in private ownership. None of ESB or Coillte’s licences to function were carried out through [RPD] and it did not acquire any rights or special powers from ESB through [ESB Wind] or Coillte.”*

20. *[RPD] contracts the day-to-day operations of the wind farm to [ESB Wind] pursuant to a Management and Operations Agreement dated 17 June 2015 (the “M & O” Agreement”). Details of the services provided by [ESB Wind] to [RPD] are listed in Schedule 1 of that Agreement. Schedule 1A lists the “operation and wind farm management” services [ESB Wind] provides to [RPD]. Schedule 1B lists the “asset and general management services” [ESB Wind] provides to [RPD]...For this reason, [RPD] does not have any employees and does not require staff. Instead, the management of the wind farm is undertaken on foot of the M & O Agreement.”*

27. These averments were not contested by RTK.

### **RTK’s submissions to the High Court**

28. RTK argued that RPD was essentially a special purpose vehicle established to facilitate the performance of the statutory functions of the ESB and Coillte. It said Coillte and the ESB were both semi-State bodies and were emanations of the State and public authorities. RPD constructed a generating station and was licensed to supply electricity and therefore it was exercising a public administrative function under national law. It was thus a public authority within category (a).

29. Secondly, RTK submitted that RPD was a public authority within the meaning of category (b) as it was entrusted with the performance of services of public interests as set out in the decision of the CJEU in *Fish Legal*. It holds an authorisation to construct an electricity generating station and it is licensed to generate electricity. It has been accepted into the state aided REFIT scheme which applies public service levies payable by electricity consumers to subsidise the purchase of renewable energy to help Ireland meet EU renewable energy targets. RTK said that RPD is vested with special powers beyond those which result from the normal rules applicable between persons governed by private law for the purpose of performing services in the public interest. The special powers were those given originally to

the ESB under the Electricity Supply Act, 1927 which, by virtue of the Electricity Supply Act, 1999 (“the Act of 1999”), have been conferred on authorisation holders such as RPD and include power to:

1. Cut trees, scrubs or hedges under s.98 of the Act of 1927 (as amended),
2. Exercise the functions of the ESB in relation to Compulsory Purchase Order (CPO) pursuant to s.45 of the Act of 1927 and s.47 of the Act of 1999,
3. Exercise the ESB’s powers to lay electric lines under ss. 51 and 52(1) of the Act of 1927 pursuant to s.47 of the Act of 1999,
4. Exercise the ESB’s powers under sub-sections (1) to (5) and (9) of s.53 of the Act of 1927 as applied by s.49 of the Act of 1999 in relation to way leaves across land for electric lines (including the power to enter on land or buildings for specific purposes), and
5. Be considered a “public authority” for the purposes of the Acquisition of Land (Assessment of Compensation) Act 1919 pursuant to s.45(5) of the Act of 1999.

**30.** It also argued that RPD was conferred with certain powers under both the Planning and Development Act, 2000 and the Planning and Development Regulations, 2001-2019 as it is entitled by law to the benefit of certain exempted development provisions solely because it holds certain licenses from the CRU.

**31.** In relation to the third category of public authorities, category (c), RTK submitted that RPD was established as a company for the purposes of generating electricity which, it said, is a public responsibility or function or service. Second, while it noted that the commissioner made no findings on either the ownership or the control of RPD, RTK submitted that at the date of its request on 19 May 2017, RPD was owned equally by ESB and Coillte. The Board of Directors comprised of two nominees from each of ESB Wind and Coillte who were responsible for the management and supervision of RPD. It contracted its daily operations to

ESB Wind pursuant to a Management and Operations Agreement dated 17 June 2015. In the circumstances RTK submitted that RPD could only operate with the consent of ESB Wind, given its joint venture SPV status. It argued that RPD did not determine its affairs in a genuinely autonomous manner because the ESB “*could at the material time...exert decisive influence over it.*”

32. RTK also asserted that RPD was an emanation of the State within the meaning of the relevant jurisprudence and that this was relevant to the assessment as to whether or not RPD was under the control of a public authority.

33. For these reasons it asserted that RPD was a public authority within the meaning of each of paragraphs (a), (b) and (c) of Article 2 of the Directive.

#### **The decision of the High Court**

34. The appeal to the High Court is an appeal on a point of law. Thus, the starting point for the High Court must be to identify the relevant law and then ascertain whether the commissioner had erred in law in his decision. In his judgment delivered on 25 January 2021 (*Right to Know CLG v. Commissioner for Environmental Information* [2021] IEHC 46) Owens J considered the decision of the CJEU in *Fish Legal*. The trial judge cited paras. 51-56 of the judgment which addressed the first two categories of public authorities defined in Art. 2(2) of the Directive.

*“51 Entities which, organically, are administrative authorities, namely those which form part of the public administration or the executive of the State at whatever level, are public authorities for the purposes of Article 2(2)(a) of Directive 2003/4. This first category includes all legal persons governed by public law which have been set up by the State and which it alone can decide to dissolve.*

52 *The second category of public authorities, defined in Article 2(2)(b) of Directive 2003/4, concerns administrative authorities defined in functional terms, namely entities, be they legal persons governed by public law or by private law, which are entrusted, under the legal regime which is applicable to them, with the performance of services of public interest, inter alia in the environmental field, and which are, for this purpose, vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.*

53 *In the present instance, it is not in dispute that the water companies concerned are entrusted, under the applicable national law, in particular the WIA 1991, with services of public interest, namely the maintenance and development of water and sewerage infrastructure as well as water supply and sewage treatment, activities in relation to which, as the European Commission has observed, a number of environmental directives relating to water protection must indeed be complied with.*

54 *It is also clear from the information provided by the referring tribunal that, in order to perform those functions and provide those services, the water companies concerned have certain powers under the applicable national law, such as the power of compulsory purchase, the power to make byelaws relating to waterways and land in their ownership, the power to discharge water in certain circumstances, including into private watercourses, the right to impose temporary hosepipe bans and the power to decide, in relation to certain customers and subject to strict conditions, to cut off the supply of water.*

55 *It is for the referring tribunal to determine whether, having regard to the specific rules attaching to them in the applicable national legislation, these rights and powers accorded to the water companies concerned can be classified as special powers.*

56 *In the light of the foregoing, the answer to the first two questions referred is that, in order to determine whether entities such as the water companies concerned can be classified as legal persons which perform ‘public administrative functions’ under national law, within the meaning of Article 2(2)(b) of Directive 2003/4, it should be examined whether those entities are vested, under the national law which is applicable to them, with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.”*

35. The trial judge noted that the concept of public administrative authorities is defined in functional terms and that it was therefore necessary to examine the functions of the entity and to determine whether those functions are public in nature. He held that the legal regime applicable to RPD is the Act of 1999 as amended. He first considered whether this regime “entrusted” RPD “with the performance of services of public interest”. In paras. 41-44 he set out the basis for his conclusion that RPD was entrusted with the performance of services of public interest:

*“41. Sections 9BA, 18, 39 and 40A of the 1999 Act and the Electricity Regulation Act 1999 (Criteria for Determination of Authorisations) Order 1999 (S.I. 309/1999) (the 1999 Regulations) are relevant. The purposes for which public service obligations may be imposed under s.39 include security and regularity of supply, environmental protection, climate protection and electricity produced using renewable, sustainable or alternative forms of energy.*



*42. The levy imposed by regulations made under s.39(5) is designed to cover the costs of complying with public service obligations and to enable holders of licences or authorisations under the Act to get a reasonable rate of return on the capital costs of complying with an order under s.39. This is the basis for the “REFIT” scheme.*

*43. Commercial generators of electricity may be private in the sense that they are responsible only to shareholders in the private sector or they may be directly or indirectly under the control of semi-State companies. The focus of the examination mandated by the European Court of Justice is on entrustment and on “services of public interest” by reference to the national rules as set out in the statute rather than monopoly or number of entities carrying on an activity or ownership or control of the provider of the service.*

*44. The provisions of the 1999 Act make clear beyond argument that RP[D] has been “entrusted” by Irish law with “the performance of services of public interest”. While RP[D] is excluded from the ambit of Part IX of the 1999 Act relating to administrative sanctions, the other provisions which I have referred to bring it within the test set out in para. 52.”*

**36.** In paras. 45-53 of his judgment he considered the powers conferred on RPD under the Act of 1999. He noted that where exercised, these powers affect private landowners who are forced to give rights to RPD and that the powers are a vital part of the legislation. He observed that without the advantages given by Part XIII of the Act of 1999 many of the authorisations to construct generating stations and licenses to generate electricity for supply to the National Grid would be useless as:

*“The promoters of these projects would be faced with the perhaps impossible task of persuading private landowners to part with land and wayleaves necessary for infrastructure required to connect to the grid on reasonable terms.”*

37. He concluded that RPD was endowed with special powers. At para. 48 he held:

*“Entities governed by private law and outside the statutory regime have no right of access to valuable State infrastructure or to supply electricity. They have no right of compulsory acquisition for private or commercial purposes. Holders of authorisations under the 1999 Act are entrusted by public law with rights and responsibilities and they are given “special powers” in that context.”*

38. The trial judge held that the role of the regulator in controlling the exercise of the powers under Part XIII did not alter their character as *“special powers beyond those which result from the normal rules applicable in relations between persons governed by private law”*. He held that there are similar provisions to those in Part VIII of the Act of 1999 in many other acts of the Oireachtas which give compulsory acquisition powers:

*“Their purpose is to provide independent regulatory supervision. These provisions require that proposed schemes for works involving compulsory acquisition of land or interference with property rights must be confirmed or approved by a body which is independent of the acquiring authority. The presence of this type of limitation on powers of compulsion is not decisive when considering whether an entity is conferred with “special powers” for the purposes of the test set out in paragraph 52 [of Fish Legal].”*

39. The trial judge concluded that the commissioner erred in law in deciding that RPD was not a public authority within Article 2(2)(b) of the Directive.

40. He also held that RPD is a *“public authority”* within the meaning of Article 2(2)(c) of the Directive because it is under the *“control”* of the ESB which itself is a public authority

within the meaning of Article 2(2)(b). The trial judge noted that the commissioner reasoned that the provision by RPD of electricity as a generator is not a “*public service*” and therefore does not involve having “*public responsibilities or functions*” as set out in Art. 2(2)(c) of the Directive because electricity is being provided by a number of producers in a commercial market. The commissioner had not, therefore, considered the issue of whether RPD was “*under the control of*” one or more “*public authorities*”.

41. The trial judge noted that the test as to whether an entity comes within Article 2(2)(c) was dealt with in para. 73 of the judgment in *Fish Legal* which provides as follows:

*“73. In the light of the foregoing, the answer to the third and fourth questions referred is that undertakings, such as the water companies concerned, which provide public services relating to the environment are under the control of a body or person falling within Article 2(2)(a) or (b) of Directive 2003/4, and should therefore be classified as ‘public authorities’ by virtue of Article 2(2)(c) of that directive, if they do not determine in a genuinely autonomous manner the way in which they provide those services since a public authority covered by Article 2(2)(a) or (b) of the directive is in a position to exert decisive influence on their action in the environmental field.”*

42. The trial judge noted that the test of control is a functional test which does not depend on the power of management of the directors as defined in the constitution of RPD. He concluded that at the time RTK sought the information from RPD, the joint venture partners were Coillte and ESB (a mistake on the part of the trial judge who intended to refer to ESB Wind). They were both public authorities within the meaning of Article 2(2)(a) or Article 2(2)(b) of the Directive. As they were both public authorities “*one of them could not exercise decisive influence over the other on activities of RPD having a bearing on the environment so as to bring RPD outside Article 2(2)(c).*”

43. As regards the situation where Coillte had been replaced by GR Wind he held as follows:

*“76. RP[D] is a venture under joint control. This puts each of the two controllers of the issued shares in a position to exert decisive influence on “action” of RP[D] “in the environmental field”. The ESB holds half of the issued shares through a subsidiary company and also provides day-to-day management for RP[D]. These facts lead inexorably to a legal conclusion that RP[D] is “under the control of” the ESB for the purposes of the test mandated by Article 2(2)(c). All of the day-to-day operational activities of RP[D] are operated through the ESB group.”*

44. He therefore determined the issue of control, which had not been determined by the commissioner, and concluded that RPD was a public authority within the meaning of Article 2(2)(c) of the Directive also.

### **The Appeal**

45. RPD appealed the decision of the High Court to this court. The commissioner did not participate in the appeal to this court, which was opposed by RTK. It was submitted that the appeal raised five issues for determining whether RPD was a public authority within the meaning of Article 2(2) of the Directive:

- (a) Was RPD entrusted with the provision of services of public interest?
- (b) Did RPD enjoy special powers?
- (c) Was RPD controlled by a public authority?
- (d) When is the question of control to be assessed?
- (e) Depending on the court’s conclusions on these issues, whether (i) it should remit any part of the case back to the commissioner for determination or (ii) refer any questions of law to the Court of Justice of the European Union.

### **Appeal on a point of law**

46. The appeal from the decision of the commissioner to the High Court under Article 13 of AIE Regulations is a limited appeal. It is an appeal on a point of law. The principles governing such appeals are well-known and not in dispute. It is not a de novo hearing. In *Deely v. Information Commissioner* [2001] 3 I.R. 439, McKechnie J. held as follows:

*“There is no doubt but that when a court is considering only a point of law, whether by way of a restricted appeal or via a case stated, the distinction in my view being irrelevant, it is, in accordance with established principles, confined as to its remit, in the manner following:-*

*(a) it cannot set aside findings of primary fact unless there is no evidence to support such findings;*

*(b) it ought not to 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 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 ground for setting aside the resulting decision...”*

These principles were endorsed in *Sheedy v. Information Commissioner* [2005] 2 I.R. 272 and *Fitzgibbon v. Law Society* [2015] 1 I.R. 516. A central element of an appeal on a point of law is that the decisionmaker whose decision is appealed should be the factfinder. As the appeal is not a rehearing, the High Court is not a finder of fact on such an appeal. This means that the High Court may not decide issues of fact which were not decided by the commissioner. If it is necessary for the proper determination of the proceedings, the court should remit any disputed critical factual matters to the commissioner for further hearing and determination.

**Access to information on the environment**

47. Before considering the specific arguments in detail, it is perhaps helpful to put them in context, first the public right of access to information about the environment held by public authorities and secondly the relevant caselaw on the question of a public authority within the meaning of the Directive.

48. A public right of access to environmental information held by public authorities was first introduced by Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment. This was superseded by the Aarhus Convention. Directive 90/313/EEC was repealed by the Directive. Under the Directive, the public has a right to information about the environment held by public authorities within the meaning of the Article 2(2) of the Directive. For ease of reference, I repeat them here:

- (a) *government or other public administration, including public advisory bodies, at national, regional or local level;*
- (b) *any natural or legal person performing public administrative functions under the national law, including specific duties, activities or services in relation to the environment; and*
- (c) *any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within (a) or (b).*

49. For the purposes of interpreting the Directive account has to be taken of the wording and aim of the Aarhus Convention (*Fish Legal; Flachglas Torgau* (Case C-204/09 [2012] ECR para. 40)). The provisions of the Directive and, in particular, the concepts of “*public administrative functions*” and of “*control*” as employed in Article 2(2)(b) and (c) of the Directive, must be given autonomous and uniform interpretation throughout the Union (*Fish Legal* paras. 42, 45; *Flachglas Torgau*, para. 37). In addition, the Aarhus Convention Implementation Guide may be taken into consideration, if appropriate, though the

observations in the guide have no binding force and do not have a nominative effect on the provisions of the Aarhus Convention (Case C-182/10 *Solvay & Ors.* [2012] ECR, para. 27; *Fish legal*: para. 38).

**The test of a public authority in *Fish Legal***

**50.** Article 2 establishes three categories of public authority to which the Directive applies. In *Fish Legal* the CJEU held that “*only entities which, by virtue of a legal basis specifically defined in the national legislation which is applicable to them, are empowered to perform public administrative functions are capable of falling within*” para. (b) (para. 48). The entity must be empowered to perform public administrative functions and the source of that power must be legislative and is determined by national law. The test is a functional test. The court held that the question of whether the functions vested under national law in such entities constitute ‘public administrative functions’ within the meaning of Article 2(2)(b) is a separate question of EU law. The concept must therefore be given an autonomous and uniform definition throughout the EU. In making that assessment, the court observed that the authors of the Aarhus Convention and the Directive when they referred to “public authorities” intended to refer to administrative authorities, since within States it is those authorities which are usually required to hold environmental information in the performance of their function.

**51.** At para. 52 the court established the test to be applied to determine whether an entity came within category (b) of the definition. It stated as follows:

*“The second category of public authorities, defined in Article 2(2)(b) of Directive 2003/4, concerns administrative authorities defined in functional terms, namely entities, be they legal persons governed by public law or by private law, which are entrusted under the legal regime which is applicable to them, with the performance of services of public interest, inter alia in the environmental field, and which are, for this*

*purpose, vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.”*

52. The category (b) type public authorities are defined in functional terms. The court has established a dual test, each part of which must be met:

- The entity must be entrusted with the performance of services of public interest, *inter alia*, in the environmental field under the applicable legal regime and,
- For the purpose of performing those public services, the entity must be vested with special powers: that is, powers beyond those which result from the normal rules applicable in relations between persons governed by private law.

53. The court also considered the criteria for determining whether entities should be classified as public authorities by virtue of Article 2(2)(c) of the Directive. The court considered the concept of control in category (c). At paras. 67 and 68 of the judgment the court held:

*“67. Thus, in defining three categories of public authorities, Article 2(2) of Directive 2003/4 is intended to cover a set of entities, whatever their legal form, that must be regarded as constituting public authority, be it the State itself, an entity empowered by the State to act on its behalf or an entity controlled by the State.*

*68. Those factors lead to the adoption of an interpretation of ‘control’, within the meaning of Article 2(2)(c) of Directive 2003/4, under which this third, residual, category of public authorities covers any entity which does not determine in a genuinely autonomous manner the way in which it performs the functions in the environmental field which are vested in it, since a public authority covered by Article 2(2)(a) or (b) of the directive is in a position to exert decisive influence on the entity’s action in that field.”*



54. The court emphasised that the manner in which a public authority may exercise decisive influence pursuant to the powers which have been allotted to it “*by the national legislature*” is irrelevant. At para. 69 it said that the control:

*“may take the form of, inter alia, a power to issue directions to the entities concerned, whether or not by exercising rights as a shareholder, the power to suspend, annul after the event or require prior authorisation for decisions taken by those entities, the power to appoint or remove from office the members of their management bodies or the majority of them, or the power wholly or partly to deny the entities financing to an extent that jeopardises their existence.”*

55. The fact that the entity in question is a commercial company does not mean that it cannot be the subject of control within the meaning of Article 2(2)(c) of the Directive. The crucial test is whether or not the entity acts in a genuinely autonomous manner when performing functions vested in it in the environmental field and whether a public authority within the meaning of Article 2(2) (a) or (b) is in a position to exert decisive influence upon its action in the environmental field.

#### **The Aarhus Convention Implementation Guide**

56. In para. 2 of the guide, the authors observe that the definition is intended to provide as broad coverage as possible. They refer to “recent developments in privatisation solutions to the provision of public services” and state “[t]he Convention tries to make it clear that such innovations cannot take public services or activities out of the realm of public information, participation or justice”. In relation to category (b), the function referred to is “a function normally performed by governmental authorities, as determined according to national law”. There needs to be a legal basis for the performance of the functions under category (b).

57. The guide identifies a key difference between categories (b) and (c) as the source of authority of the person performing public functions or providing public services. In contrast

to entities covered by category (b), those in category (c) are authorised indirectly through their control by those defined in either (a) or (b).

### **Decisions of the Supreme Court**

58. The Supreme Court considered the definition of a public authority and the right to environmental information in the case of *The National Asset Management Agency (NAMA) v. The Commissioner for Environmental Information* [2015] 4 IR 626. The issue for consideration was whether NAMA was a public authority within the meaning of the Regulations of 2007. The court emphasised that the Regulations were intended to implement Directive 2003/4/EC and emphasised the fact that the definition of “public authority” reproduced at sub-paragraphs (a) to (c) uses the precise language of the Directive. The court held that the Regulations must therefore be approached in this light and given a teleological interpretation. O’Donnell J., writing for the court, held that the decision in *Fish Legal* provided an authoritative interpretation of the Directive and it does so in the context of the common law system. Applying the test, he held that it was “clear” that NAMA was indeed a public authority exercising public administrative functions. While it was obliged to act commercially, he said:

*“...it is undoubtedly vested with special powers well beyond those which result from the normal rules applicable in relations between persons governed by private law...NAMA is established pursuant to a statute which confers upon it substantial powers of compulsory acquisition, of enforcement, to apply to the High Court to appoint a receiver and to set aside dispositions. The Act also restricts or excludes certain remedies against NAMA. The establishment and operation of NAMA is a significant part of the executive and legislative response to an unprecedented financial crisis. The scope and scale of the body created is exceptional. Indeed, if it were not so it*

*would not be in a position to carry out the important public functions assigned to it in the aftermath of the financial crisis.”*

59. After the conclusion of the appeal in this case the Supreme Court delivered a further judgment in the case *Right to Know v. Commissioner for Environmental Information* [2022] IESC 19 (“The President’s Case”) (Unreported: Baker J. 29 April 2022). Right to Know made an information request in relation to the President and the Council of State. From paras. 166 onwards Baker J. discussed the concept of public authority. She also emphasised that the concept of public authority is an autonomous concept of EU law, citing *NAMA* and *Fish Legal*. In adopting the Directive, the EU intended to ensure that its laws were consistent with the Aarhus Convention. Account is to be taken of the wording and aim of the Aarhus Convention and the Aarhus Convention Implementation Guide in interpreting the Directive, although the guide does not have binding or normative effect (*Fish Legal*). She emphasised that in *Flachglas Torgau GMBH v. Federal Republic of Germany* (Case C-204/09 [2012] ECR), the CJEU held that the context, purpose and aims of the Aarhus Convention was to permit access to information from public authorities only to the extent that they act as administrative authorities holding environmental information in the exercise of their functions (see paras. 40 and 48). Baker J. also quoted from the Opinion of Advocate General Bobek in *Friends of the Irish Environment v. Commissioner for Environmental Information* where he warned against an approach to the meaning of public authority that was over-broad or what he termed “*an interpretative creativity*”, notwithstanding that the overall aim of the Directive was to increase public participation and accountability in decision-making. She goes on to quote Advocate General Bobek that because of this aim, and in light of the Aarhus Convention, the bodies from which information may be sought should be those bodies or institutions “*before which decision-making effectively takes place*”. At para. 187 she held:

*“It follows that the decision-making power, the power to make decisions which affect or are capable of affecting the environment, or policy on the environment, is the key institutional and functional test. Institutionally the President does not have any decision-making functions in this sense, and functionally his powers are constitutionally defined and constrained to those ceremonial, symbolic and limited reserved or discretionary powers already explained in this judgment, none of which involve the President in any decision-making role, although his role is constitutionally essential in that some of his functions are exercised in order to complete the process such as the passing of legislation, the appointment of judges, or the commissioning of a member of the Defence Forces. In no case does the President exercise any role as decision maker in the realm of the environment or by which he or she impacts on policy or the rights of any individual.”*

60. In light of these decisions the court must assess the issues of entrustment, special powers and control which arise in this appeal. In particular, it must ensure that the scope of the Directive is not extended to natural and legal persons who do not come within the definition of public authorities in Article 2(2) of the Directive.

***Was RPD entrusted with the performance of services of public interest?***

61. The commissioner posed this question but failed to answer it. The High Court answered it emphatically in the affirmative. There are two elements to this question and both must be answered affirmatively before RPD can come within the scope of category (b). The first is whether it has been entrusted with a function in relation to the environment under national law and the second, separate question, is whether the function is the performance of a service of public interest.

62. National law determines what functions have been conferred upon the entity (*Fish Legal*: para. 48), in this case, RPD, and the source of the functions under consideration must

be national law if the entity is to come within the definition of a public authority in category (b). RPD has a licence to generate electricity and to sell it on the wholesale market to a supplier. It is authorised to construct an electricity generator. The licence and the authorisation were granted pursuant to the Act of 1999 as amended. It is regulated by the CRU. It operates in competition with hundreds of other licensed and authorised entities. The licence permits RPD to generate electricity, but it is not obliged or required by law to do so. It enters into a commercial agreement with a supplier of electricity to sell any electricity it generates to that supplier on the terms agreed between them. If it decides to cease business and to cease to supply electricity, it is free to do so. Other entities will generate electricity and sell it to the wholesale market. It has no *responsibility* for the generation of electricity; it has a permission to do so. Such a situation is inconsistent, in my view, with the performance of a public function or the provision of a service of public interest. I therefore do not accept that it has been *entrusted* by national legislation with the generation of electricity and its sale to the integrated single electricity market.

**63.** I agree with the submissions of counsel for RPD that the market has changed considerably since electricity was first introduced through vertical monopolies. The *generation* of electricity is no longer the provision of a service in the public interest. The fact that in the past it was a monopoly service provided in the public interest or that it remains an essential utility does not alter this. The nature of the service does not *by itself* determine whether it amounts to the performance of services of public interest. It was conceded by RTK that microgeneration and sale of electricity is not within the scope of the Directive. It follows therefore that the nature of the activity – the supply of electricity to the wholesale market – does not mean that the activity amounts to the performance of services of public interest.

**64.** If one is considering the function of generating electricity- as one must as the test in respect of category (b) is a functional test- the legal structure of the entity or body in question

is not a relevant consideration. Specifically, the identity of the shareholders of RPD is irrelevant to the consideration of whether it has been entrusted with the performance of services of public interest. This is because the analysis of the question applies to all generators of electricity regardless of their legal structure- which may vary considerably- yet the analysis remains the same. It is the activity which is relevant to this issue; the identity of the shareholders is relevant to the issue of control in respect of category (c). It is important to keep the distinction in mind and not to blur the arguments when considering whether RPD is a public authority under category (b).

**65.** During oral submissions, having conceded that the microgeneration and sale of electricity is not within the scope of the Directive, senior counsel for RTK argued that RPD was entrusted with the performance of services of public interest by a combination of its licence and the nature of the activity itself (generating electricity). There are two problems with this submission. First, this was not the case advanced before the commissioner or the High Court, as is clear from the submissions I have previously outlined. If RTK had wished to make the case that the terms of the licence - as opposed to the fact that it was a licensed activity – meant that RPD was entrusted with the performance of services of public interest, it was required to make that case to the commissioner in the first place. It is not entitled to raise an argument which was not before the commissioner for the first time on appeal to the High Court on a point of law. *A fortiori* it may not do so for the first time on appeal to the Court of Appeal.

**66.** Secondly, the point cannot be considered without regard being had to the terms of the licence. Had RTK wished to make this argument it could only do so by reference to the licence. This in turn means that the commissioner would not only have been required to consider the terms of the licence in reaching his decision, but he would also have been called upon to make findings in relation to the effect of the licence. On appeal to the High Court,

that court should have been afforded the opportunity to consider the terms of the licence and to make findings in relation to the licence relevant to the argument. As the licence was not in evidence before either the commissioner or the High Court this was not possible and did not occur. Given the nature of the statutory appeal, it is simply too late for RTK now to argue that the terms of the licence are essential to its argument and that, as this court cannot make any findings based upon the terms of the licence which is not in evidence and in respect of an argument raise for the first time in oral submissions to this court, that this court ought to remit the matter to the commissioner to enable the commissioner to reconsider the application in light of the terms of the licence held by RPD and the argument now advanced.

**67.** Alternatively, RTK says that this court can assess the matter for itself, applying the decision in *NAMA*. It submits that this is predominantly a question of law and it is not necessary to consider the terms of the licence at all. It says that RPD did not previously rely upon the details of the licence and therefore there is no factual issue to be resolved. This does not overcome the fact that this is a new argument which, as I have set out, was not raised before the commissioner or the High Court. Furthermore, the powers at issue in *NAMA* and the licence in this case are not comparable. The licence under which RPD operates was made available to the court. While it was not admitted in evidence (and not considered as such), nonetheless it is clear that it is a lengthy, complex, technical document. It is not possible to reach any decision as to its effect or meaning without considering it in detail, possibly receiving evidence from relevant witnesses as to its operation and hearing the submissions of the parties by reference to the terms of the licence. It follows, in my judgment, that the alternative argument advanced by RTK on this issue also must be rejected.

**68.** The question then remains whether the High Court was correct in concluding that RPD was entrusted with the performance of services of public interest by national law. The trial judge held that RPD had been entrusted with the performance of services of public interest by

Irish law. He specifically referred to ss.9BA, 18, 39 and 40A of the Act of 1999 and the Electricity Regulation Act 1999 (Criteria for Determination of Authorisations) Order 1999 S.I. 309/1999) as the basis for this conclusion.

**69.** The trial judge did not explain the relevance of s.9BA to his consideration of the question of entrustment. Under s.9BA of the Act of 1999 the CRU is required to establish and facilitate the operation of the single electricity market. The CRU is empowered to make regulations which may require every holder of a licence to generate electricity “to make available for trading under the Single Electricity Market such electricity as is generated by that person or available to that person for supply” and to provide that a licence holder who does not generate a specified quantity of electricity “may, but is not required to, make available for trading under the Single Electricity Market such electricity as is generated by that person”. In my judgment this section does not entrust RPD or any other holder of a licence to generate electricity with the obligation or requirement to generate electricity and therefore it cannot be entrusted with the performance of services of public interest within the meaning of the Directive by virtue of this provision.

**70.** The same observation applies to the trial judge’s reliance on s.18 which he likewise does not explain.

**71.** He does address s.39 which relates to public service obligations. The Minister may direct the CRU to impose public service obligations on the ESB and the holders of licences or authorisations in relation to security of supply and regularity, quality and price of supplies. Subs. (3) provides that an order by the Minister “may provide” for the imposition of a public service obligation on the ESB, the holder of a licence or an authorisation or a permit in respect of electricity which is produced *inter alia* using renewable forms of energy as their primary source of power. The balance of the section concerns the recovery of the additional costs incurred in complying with an order made under s.39.



72. The court was not informed of the details of any order made under the section or whether any order has been made which applied to RPD. The trial judge relied on the section in his analysis because “[t]he purposes for which a public service obligation may be imposed under s.39 include security and regularity of supply, environmental protection, climate protection and electricity produced using renewable, sustainable or alternative forms of energy”. In the absence of proof of the making of an order which applies to RPD it seems to me that s.39 is simply irrelevant to the issues for resolution in this appeal. The application of the section remains in the realm of the hypothetical. It does not establish that RPD has been entrusted with the performance of a service of public interest viz the generation of electricity and its sale to the wholesale market.

73. Secondly, the trial judge referred to the fact that s.39 (5), the subsection which permits the ESB, licence holders or holders of authorisations to recover the additional costs incurred in complying with the public service obligation, is the basis of the REFIT scheme. As I have already discussed, the actual obligation arising under REFIT is on the supplier, not the generator. The benefit to the generator is the fact that the supplier is able to purchase renewables with the benefit of the subsidy based on REFIT, but a generator does not thereby undertake and has no obligation to deliver any public services as a consequence of REFIT. The trial judge does not address this distinction and simply points to the existence of the scheme. He then concludes, in what amounts to a *non sequitur*, that the provisions of the Act of 1999 “make clear beyond argument” that RPD has been entrusted by Irish law with the performance of services of public interest.

74. In my judgment the trial judge failed to have regard to the changes brought about by the enactment of the integrated single market in electricity. The new regime, established by EU directives which have been carried into Irish law, unequivocally privatised the generation of electricity. It is in essence a voluntary or optional activity in a competitive market and the

fact that it is a regulated -indeed highly regulated- market does not detract from this crucial fact. This fact to my mind precludes the individual licence holders or holders of authorisations from satisfying the test in *Fish Legal*.

75. The position of RPD is not comparable to that of the water company in *Fish Legal*. The water companies were effective monopolies in their areas. Further, they not only “generate” water, in the sense of producing treated water, and provide water and sewerage services to end users, they are also entrusted with the maintenance and development of the water and sewerage infrastructure in their areas. They are thus far closer to the vertically integrated model of a utility which previously applied to the generation and provision of electricity. When the differences between the legal regimes governing the UK water companies and the generators of electricity in Ireland are considered it reinforces the conclusion that the latter have not in fact been entrusted by law with the performance of services of public interest.

76. In my opinion RPD has not been entrusted with a function, it has been granted a permission, in competition with hundreds of other licence holders. It follows that it has not been entrusted with the performance of services of public interest and accordingly, applying the principles in *Fish Legal*, cannot be a public authority within the meaning of Article 2(2)(b) of the Directive. For these reasons I would allow this ground of appeal.

***Has RPD been vested with special powers?***

77. The commissioner concluded that RPD had not been vested with special powers as the phrase was used in *Fish Legal* and the trial judge disagreed. In support of its argument that RPD was vested with special powers RTK said that RPD enjoyed the power to:

1. Cut trees, shrubs or hedges under s.98 of the Act of 1927 (as amended),
2. Exercise the functions of the ESB in relation to CPO pursuant to s.45 of the Act of 1927 and s.47 of the Act of 1999,

3. Exercise the ESB's powers to lay electric lines under ss. 51 and 52(1) of the Act of 1927 pursuant to s.47 of the Act of 1999,
4. Exercise the ESB's powers under sub-sections (1) to (5) and (9) of s.53 of the Act of 1927 as applied by s.49 of the Act of 1999 in relation to way leaves across land for electric lines (including the power to enter on land or buildings for specific purposes), and
5. To be considered a "public authority" for the purposes of the Acquisition of Land (Assessment of Compensation) Act 1919 pursuant to s.45(5) of the Act of 1999.

**78.** The test in para. 52 in *Fish Legal* is whether the entity is vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law. Mr. Kennedy, senior counsel for RPD, argued that the powers conferred upon RPD were conferred on all holders of licenses and authorisations. The powers were not specific to RPD and did not arise as a consequence of the identity of RPD's shareholders. He submitted that the powers were not special powers because they applied to all holders of licenses and authorisations. He submitted that some of the powers could not simply be exercised by RPD. It was required to apply to the CRU for consent in order to exercise a particular right or power. He therefore said that it was a conditional power and that the power seemed to rest at the level of the CRU rather than at the level of RPD. He contrasted the position with the ESB and noted that the broad powers which were given to the ESB under the Act of 1927 were not transferred across to the holders of licenses and authorisations. For these reasons he said RPD was not vested with special powers within the meaning of para. 52 of *Fish Legal*.

**79.** Despite the skilful arguments of counsel for RPD, I am not persuaded. In my judgment RPD was vested with special powers within the meaning of para. 52 in *Fish Legal*. A private enterprise could not enter upon the lands of another, cut trees, shrubs or hedges without the

permission of the landowner. Likewise, it would have no power to enter on the land or the buildings of the owner without the person's permission or to interfere with the land by laying wayleaves across the land for electric lines. The point becomes even more stark when one considers the power of CPO. To my mind it does not matter that RPD must obtain the consent of the CRU to exercise the power or that they may formally be exercised by the CRU for the benefit of RPD. It is common that entities empowered to acquire land by compulsory purchase must do so subject to oversight by an independent body to ensure that the powers are used properly for the intended purposes and not otherwise. That does not alter the exceptional or special nature of the powers at issue. The fallacy in RPD's argument lies in its comparator. The comparator is not other licensed holders or holders of authorisations or the ESB. The comparator is another hypothetical private enterprise who does not benefit from the statutory powers conferred on the holders of licences and authorisations by virtue of the fact that they hold a licence or authorisation. The essential issue posited by para 52 is whether there is a difference between the normal rules applicable between persons governed by private law and the entity in question. Looked at this way, it is clear beyond argument that RPD, as the holder of a licence and an authorisation, by operation of national law, is vested with special powers within the meaning of para. 52 of *Fish Legal*. The powers are given to all licence holders and holders of authorisations to enable them to perform their licensed/authorised functions. This is precisely analogous with NAMA which was conferred with special powers to enable it to carry out the functions conferred on it by the National Management Agency Act 2009. In my judgment, the trial judge correctly summarised the position succinctly in para. 50 as follows:

*“50. The role of the regulator in controlling the exercise of the powers under Part VIII does not alter their character as “special powers beyond those which result from the normal rules applicable in relations between persons governed by private law”. The*

*functional effect of Part VIII of the 1999 Act is that RP[D] can use public law compulsion to buy in or interfere with property rights of others. Those who operate exclusively within private law are not given rights to apply to any public body to permit compulsory acquisitions.”*

**80.** For these reasons I would reject this ground of appeal.

***Is RPD under the control of a body or person falling within Category (a) or (b)***

**81.** The commissioner made no findings on the factual question of whether RPD was under the control of a body or person falling with Category (a) or (b). The application before the High Court was a statutory appeal on a point of law. Absent the necessary findings of fact by the commissioner on the issue of control, it was not open to the High Court to decide this issue in the affirmative. In the absence of the High Court concluding that, as a matter of law, RPD could not be under the control of a public authority within the meaning of Article 2(2)(a) or (b), then this issue could only be resolved by remitting the matter to the commissioner for further consideration and, in particular, to make the findings of fact upon which a ruling could then be based.

**82.** It is clear from the decision in *Fish Legal* that “control” of an entity in Category (c) has an autonomous meaning. The manner in which control is achieved is irrelevant. The test of control for the purposes of the sub para. was set out in para. 68 of *Fish Legal*.

**83.** The trial judge noted that it was accepted that Coillte and the ESB are public authorities under either Categories (a) or (b). He held that the test of whether RPD is under the control of its two shareholders is a functional test i.e. one of substance rather than form. When RTK first requested information on the environment from RPD, its shareholders were Coillte and ESB Wind. The trial judge referred to ESB Wind as the ESB. While technically it is a subsidiary of the ESB, it is ultimately wholly owned and under the control of the ESB no real

issue was taken with the description of Coillte and ESB Wind as public authorities within Categories (a) and (b). At paras. 74 and 76 of his judgment the trial judge held:

*“74. ....each of these two entities either acting together or acting alone was in a position to exert decisive influence on the actions of RP[D] in the environmental field. As they were both “public authorities” one of them could not exercise decisive influence over the other on the activities of RP[D] having a bearing on the environment, so as to bring RP[D] outside Article 2(2)(c).*

....

*76. RP[D] is a venture under joint control. This puts each of the two controllers of the issued shares in a position to exert decisive influence on “action” of RP[D] “in the environmental field”. The ESB holds half of the issued shares through a subsidiary company and also provides day-to-day management for RP[D]. These facts lead inexorably to a legal conclusion that RP[D] is “under the control of” the ESB for the purposes of the test mandated by Article 2(2)(c). All of the day-to-day operational activities of RP[D] are operated through the ESB group.”*

**84.** The validity of these findings must be assessed having regard to the statements of the CJEU in *Fish Legal* in paras. 67 and 68:

*“67. Thus, in defining three categories of public authorities, Article 2(2) of Directive 2003/4 is intended to cover a set of entities, whatever their legal form, that must be regarded as constituting public authority, be it the State itself, an entity empowered by the State to act on its behalf or an entity controlled by the State.*

68. *Those factors lead to the adoption of an interpretation of ‘control’, within the meaning of Article 2(2)(c) of Directive 2003/4, under which this third, residual, category of public authorities covers any entity which does not determine in a genuinely autonomous manner the way in which it performs the functions in the environmental field which are vested in it, since a public authority covered by Article 2(2)(a) or (b) of the directive is in a position to exert decisive influence on the entity’s action in that field.”*

85. It is important to note that it is not sufficient to show that a public authority within the meaning of Article 2(2)(a) or (b) is in a position to exert decisive influence on the entity’s action in the environmental field in order to establish that an entity is under the control of such public authority and thus is within the scope of category (c). In addition, it must be shown that the entity does not determine in a genuinely autonomous manner the way in which it performs the functions in the environmental field which are vested in it. In my judgment the trial judge fell into error in failing to address the second of these requirements (the first in para. 68) in his assessment of the question of control of RPD. Precisely because it is necessary to ascertain whether the entity does or does not determine in a genuinely autonomous manner the way in which it performs the functions in the environmental field which are vested in it, it is not sufficient to merely show the potential for such influence. It is necessary to show that a public authority has had an actual impact on the entity’s decision-making. In *Fish Legal* (Upper Tribunal) [2015] UKUT 52, the Upper Tribunal considered the control test as set out in the judgment of the CJEU. The Tribunal held as follows:

*“133. The control test distinguishes between the functions that a body performs and the manner in which it performs them. It has to be applied to the manner of performance, not to the functions themselves. It is, therefore, irrelevant that the companies are by statute and their Licences required to perform specified functions... In applying the*

*control test, we are only concerned with the manner in which the companies perform those and other functions, although not at the lowest level of day-to-day management....”*

Having observed that it may be difficult to prove, the Upper Tribunal held that proof that influence is in fact operating is essential to this element of the test

*“135. ... It is not sufficient merely to show the potential for influence. It is necessary to show that it has had an actual impact on the companies’ decision-making. The test is only satisfied if they “do not determine in a genuinely autonomous manner” how they provide their services.*

*136. As we read the control test, we have to take an overall view of whether in practice the companies operate in a genuinely autonomous manner in the provision of the services that relate to the environment.”*

**86.** I agree with this analysis. In reaching his conclusion, in my opinion, the trial judge adopted a form rather than a substance test, contrary to his express statement that it was a functional test. The commissioner made no findings of fact in relation to the issue of control. Specifically, he did not address the question of whether RPD determined in a genuinely autonomous manner the way in which it performed the functions in the environmental field which are vested in it (assuming for the purposes of this argument that such functions are, in fact, vested in it). In those circumstances, the trial judge ought not to have positively determined that RPD was under the control of ESB Wind as there were no findings of fact to underpin the conclusion.

**87.** Secondly, it was accepted that this was a joint venture and that there was no majority shareholder. As a matter of law neither shareholder can exert a decisive influence on RPD’s action in the environmental field. The Joint Venture Agreement was not in evidence and the



commissioner made no findings of fact regarding the position of the parties under the Joint Venture Agreement.

**88.** In addition, not only were there were no findings which would support the conclusion that RPD did not act in a genuinely autonomous manner, in fact, such a conclusion was contrary to the uncontroverted evidence led on behalf of RPD quoted at paras. 24-27 above. The only evidence before the court actually supported the contrary conclusion.

**89.** The provision of management services by ESB companies through the Management and Operations Agreement does not alter this fact. The Management and Operations Agreement does not relate to the control of the company. There was no evidence at all as to how the agreement operated in fact. In the circumstances it simply was not open to the trial judge to conclude that the shareholding of ESB Wind in combination with the Management and Operations Agreement meant that ESB Wind was in a position to exert decisive influence on RPD's action in the environmental field and that RPD did not determine in a genuinely autonomous manner the way in which it performed the functions vested in it in that field.

**90.** As this is a joint venture, it should make no difference whether the assessment of the issue of control is made before the sale by Coillte of its shares to GR Wind or after, though the evidence was that there was no change in the functioning of the company when GR Wind became the 50% shareholder, which tends to support the view that RPD in fact operated in a genuinely autonomous manner. Furthermore, it is worth observing, that there would be no reason for GR Wind to invest in RPD if it did not so operate but, instead, was in fact, under the control of ESB Wind.

**91.** It is difficult to understand the trial judge's reasoning that RPD did not come within category (c) when the joint venture was between Coillte and ESB Wind but did once Coillte sold its shares to GR Wind. RPD submitted that the judgment did not contain any explanation as to how RPD was not subject to any control by a public authority prior to the

purchase of the shareholding by GR Wind but that such control existed following the sale. I agree. Furthermore, there was no evidence before the High Court to support such a conclusion. On the contrary, the evidence suggested the opposite.

**92.** Finally, RTK placed considerable reliance on case law concerning emanations of the State and sought to apply them by analogy to the test of control in category (c). In my opinion, this is wholly misconceived. As was pointed out in *NAMA*, in *Fish Legal* the CJEU established an authoritative test. The test in relation to the meaning of control in Article 2(2)(c) is set out in para. 68 of the judgment in *Fish Legal*. It does not involve any emanation of the State test or analysis. It has simply no role to play in the issues before the court.

**93.** For these reasons in my judgment the trial judge erred when he positively determined that RPD was under the control of a public authority within the meaning of Article 2(2)(a) or (b) and therefore came within category (c) of the definition of a public authority. The issue was one of fact and the factual issues had not been determined by the commissioner. It was of course open to the trial judge, as it is to this court, to determine the matter negatively, i.e. that RPD could not be under the control of a public authority in the manner set out in para. 68 of the judgment in *Fish Legal* but he chose not to do so. Failing this he ought to have remitted the matter to the commissioner for further consideration or else refrained from deciding the issues and confined himself to determining the appeal on the basis of category (b).

**94.** RPD argued that it was not vested with the performance of functions in the environmental field as referred to in para. 68 of *Fish Legal* and that the trial judge erred in concluding that it was. Notwithstanding the fact that a resolution of this issue is not required in order to determine this issue in the appeal, in view of the fact that the trial judge held that the commissioner had erred in the manner in which he had interpreted the concept of public responsibility or functions, it may nonetheless be appropriate for this court also to address this issue.

**95.** The trial judge correctly noted that category (c) is limited to any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment which is under the control of a body or persons falling within paras. (a) or (b). Thus, the obligations imposed under the Directive and therefore the AIE Regulations, only applies to the extent that the public responsibilities for functions or the provision of public services relate to the environment. The trial judge agreed with the submission of RTK that generator construction and electricity generation for the national grid under the regime provided for in the Act of 1999 involved RPD performing public responsibilities, functions or services relating to the environment and that the subvention given to suppliers to assist renewable energy projects is relevant. He identified this as:

*“70. ...the public law regime which secures the supply of electricity which is “a public service relating to” aspects of the environment. I have already referred to the relevant provisions of the 1999 Act and in some subordinate legislation.”*

**96.** At para. 68 the trial judge linked the concept of responsibilities to compliance with consent such as public permissions or public licenses:

*“68. Examples could be legal responsibilities to provide information to public authorities relating to the environment in connection with applications for planning permissions or public licences or to comply with terms contained in public licences or permissions authorising activities which may touch on environmental matters listed in Article 2 of the Directive. The public responsibilities functions or services might arise from applicability of some public environmental regulation or from a licence to provide a public service or from an agreement with or delegation from a public body which results in assumption of responsibility for some public service which relates to the environment. Where activities of an entity have an impact on the environment this will*

*often bring about an engagement with public regulation and public responsibilities or functions may flow from this.”*

97. As was pointed out by RPD in its written submissions, the High Court thereby linked the concept of a public responsibility or function to the grant of some form of statutory consent with information compliance obligations. The implication from the judgment is that where an entity is granted such a consent it will be engaged in public responsibilities or be deemed to have a public function or to provide a public service. Insofar as this is indeed the implication of the judgment, I would disagree with same. The question is whether there has been any vesting of functions by law in RPD, not whether RPD or any other licence holder has public functions or responsibilities by reason of the fact that it has received statutory consent.

98. For the reasons already explained, I do not agree with the trial judge’s conclusion that the holder of a licence and an authorisation, such as RPD, thereby acquires public responsibilities or functions or provides public services. It follows that it is not vested with public responsibilities or functions or the provision of public services relating to the environment within the meaning of category (c).

99. For these reasons I would allow the appeal against the finding that RPD is a public authority within the meaning of Art. 2(2)(c) of the Directive.

***When is the question of control to be assessed?***

100. This issue arises if RPD may be said to be controlled by a public authority within category (a) or (b) when it was owned by Coillte and ESB Wind and that this changed once Coillte sold its shares to GR Wind or *vice versa*. As explained in my judgment, on the facts in this case, the question of when the control of the entity is to be assessed does not arise as there is no difference in this case and accordingly it is not necessary to address this question.

***Remaining issues***

**101.** Finally, the court is asked to consider whether it should remit any part of the case back to the commissioner for determination or refer any questions of law to the Court of Justice of the European Union. I am quite satisfied in view of the decision of the CJEU in *Fish Legal* and the Supreme Court in *NAMA* that it is not necessary to refer any question of law to the CJEU in this case. The resolution of the issues in this case has been based upon the application of the judgment in *Fish Legal* and, in my judgment, it is not necessary to refer any question to the Court to enable this Court to deliver its judgment.

**102.** The commissioner failed to determine a number of issues in his determination and potentially therefore it may have been necessary to remit part of the case back to the commissioner for determination. But for the reasons I have sought to explain, I do not, in fact, believe that it is necessary to remit any part of the case back to the commissioner for further determination, notwithstanding the absence of any findings of fact made in respect of relevant issues.

### **Conclusions**

**103.** RPD is not a public authority within the meaning of Art. 2(2)(b) of the Directive as it has not been entrusted with the provision of services of public interest by reason of the fact that it has an authorisation to construct a generator and is licensed to generate electricity in the State. RPD is vested with special powers under national law but that is not sufficient to bring it within the scope of Art.2(2)(b) of the Directive.

**104.** RPD is not and was not controlled by a public authority within the meaning of Article 2(2)(a) or (b) as it has not been shown that it did not perform its function in a genuinely autonomous manner. It is therefore not a public authority within the meaning of Article 2(2)(c) of the Directive.

**105.** For these reasons I would allow the appeal and hold that RPD is not a public authority within the meaning of the Directive and accordingly is not required to provide RTK with the information sought.

**106.** It is not necessary to remit any part of the case back to the commissioner for determination or to refer any question of law to the Court of Justice of the European Union.

**107.** Noonan and Faherty JJ have read this judgment in draft and have authorised me to indicate their agreement with same.

**108.** The matter will be listed for a short hearing in October 2022 on the issue of costs.