

EUROPEAN COMMUNITIES (ACCESS TO INFORMATION ON THE ENVIRONMENT) REGULATIONS  
2007

BEFORE

THE COMMISSIONER FOR ENVIRONMENTAL INFORMATION

BETWEEN

APPLICANT

GAVIN SHERIDAN

and

PUBLIC AUTHORITY

ANGLO IRISH BANK CORPORATION LIMITED

**Introduction**

1. The Applicant makes this submission in reply to a submission dated [26 April 2010] to the Commissioner for Environmental Information (the **Commissioner**) by Anglo Irish Bank Corporation Limited (**Anglo**) which sets out Anglo's interpretation of the European Communities (Access to Information on the Environment) Regulations 2007 (the **Regulations**) and the reasons why Anglo believes that it is not a public authority for the purposes of the Regulations.
2. The Applicant notes that Anglo has not addressed the issue of how the various categories of information that have been requested should be treated under the Regulations and in particular whether or not it would be relying on any of the exemptions as a basis for refusing access to the information sought. Anglo's sole argument at this point is that it is not a public authority and therefore the regulations do not apply at all to information held by it or on its behalf. Should the Commissioner decide that Anglo is subject to the Regulations and Anglo makes further submissions in relation to the information requested the Applicant wishes to be offered the opportunity to make further submissions before a decision is made by the Commissioner.

**Anglo**

3. Anglo was established on 21 January 2009 pursuant to the Anglo Irish Bank Corporation Act 2009 (the **Act**) in which Anglo Irish Bank Corporation plc was nationalised. The Minister for Finance or his nominee is the owner of all the shares in Anglo and therefore Anglo is entirely owned by the State. The nationalisation of Anglo came about because the government considered that Anglo was systemic to the financial system and economy of the State, that it was in imminent danger of collapsing and therefore it was in

the public interest for the bank to be nationalised in order to prevent its collapse and the perceived harm that this would do to the financial system in Ireland. The long title of the Act makes this clear:



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*Number 1 of 2009*

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**ANGLO IRISH BANK CORPORATION ACT 2009**

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AN ACT TO PROVIDE, IN THE PUBLIC INTEREST, FOR  
MAINTAINING THE STABILITY OF THE FINANCIAL  
SYSTEM IN THE STATE, AND FOR THAT PURPOSE—

(A) TO PROVIDE FOR THE TRANSFER TO THE MINISTER  
FOR FINANCE OR THE MINISTER'S NOMINEE OF ALL  
THE SHARES IN ANGLO IRISH BANK CORPORATION  
PUBLIC LIMITED COMPANY,

4. Anglo in its present form exists to serve the public interest by preserving the stability of the financial system. No other purpose is expressed in the Act. Anglo was nationalised because it was not viable as a commercial entity due to poor governance resulting in a significant number of under-performing loans and a damaged reputation which precipitated a major withdrawal of deposits and closed access to funding and capital<sup>1</sup>. Except for the public interest that is served by the continuing existence of Anglo as a nationalised bank it would have been wound up.
5. The facts do not support the proposition that Anglo is no different than any other commercial bank and that a key objective of the nationalisation of Anglo "*is to re-establish and maintain its capacity to operate as an independent commercial entity*"<sup>2</sup>. Anglo would not exist except for a massive injection of billions of Euro of state funds and a state guarantee. In fact the Governor of the Central Bank and the Taoiseach have stated publicly that Anglo will be wound down as quickly as possible<sup>3</sup>.
6. The point in relation to Anglo's public duties will be dealt with in more detail below.

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<sup>1</sup>[http://www.angloirishbank.com/Your\\_Questions\\_Answered/General\\_Information\\_on\\_the\\_Nationalisation.html](http://www.angloirishbank.com/Your_Questions_Answered/General_Information_on_the_Nationalisation.html)

<sup>2</sup>Anglo's submission page 12

<sup>3</sup><http://www.irishtimes.com/newspaper/ireland/2010/1130/1224284430926.html>

However the Applicant wishes to emphasise that the notion that except for the question of ownership of its shares, Anglo is no different from any other bank is unsupportable. For a Bank that was nationalised to protect the public interest and that has received in the region of €35 billion in recapitalisation funds from the government, to say it has no public responsibilities or functions is clearly and plainly mistaken. The Applicant wonders why Anglo thinks the government would nationalise a bank and spend €35 billion on recapitalisation if no public purpose was to be served. It is fanciful to think that such a massive injection of funds has been committed from the public purse simply to ensure that Anglo may survive as a commercial entity and generate private profits in the future.

### Anglo's Submission

7. Anglo's makes the following points in its submission:
  - i. The definition of public authority in article 3 of the Regulations must be interpreted in a way that is consistent with constitutional and European law and therefore sub articles 3(1)(i) to (vii) have no significance; and
  - ii. Anglo is not a public authority under sub articles 3(1)(a) to (c) since it has no public functions, is a purely commercial operation and has no specific duties, activities or services in relation to the environment.

### Jurisdiction of the Commissioner

8. Anglo submits that the Commissioner must interpret the Regulations in a manner that is consistent with Directive 2003/4/EC (the **Directive**), the Constitution and the EU Treaties. According to Anglo it would not be permissible for the Minister to either limit or extend the definition of public authority contained in the Directive and transposed in article 3(1)(a)-(c) of the Regulations. Therefore Anglo is of the view that the definitions 3(1)(i)-(vii) are provided for clarification but are essentially superfluous since a public authority must meet one of the definitions in (a) to (c) to be subject to the Regulations. Anglo is asking the Commissioner to interpret the Regulations in a way that is inconsistent with the Regulations but gives effect to what it considers the only legal way in which the Directive could have been transposed.
9. In making its arguments Anglo cites the Commissioner's previous decision in case CEI/07/0005<sup>4</sup>. The Applicant wishes to point out that the Taoiseach appealed this decision to the High Court which in overturning the decision held that the Commissioner does not have the jurisdiction to interpret the Regulations other than as they have been adopted. The High Court was emphatic that the Commissioner must take the Regulations as adopted and is not entitled to consider the legality of the transposition of the Directive<sup>5</sup>:

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<sup>4</sup>Mr Gary Fitzgerald BL -v- An Taoiseach

<sup>5</sup>*An Taoiseach v The Commissioner for Environmental Information* [2010] IEHC 241 at para 7.10

*“[The Commissioner] was not entitled to embark on a consideration of whether the regulations correctly transposed the Directive and she had no jurisdiction to disapply the Regulations.... The jurisdiction given to her under the laws of this state was confined to the Regulations and no more.”*

10. In other words the Commissioner does not have the jurisdiction to consider whether or not the Regulations have been correctly or legally transposed nor does she have jurisdiction to interpret the Regulations other than as they are presented. However this is precisely what Anglo is asking the Commissioner to do. Its central argument is that it is not a public authority because sub-articles 3(1)(i) to (vii) are not to be included in the definition of public authority and are superfluous. Anglo is asking the Commissioner to disapply the Regulations in favour of what it considers to be the only legal transposition of the Directive.
11. The Applicant is of the view that the Commissioner does not have the jurisdiction to consider the Constitutionality of the Regulations, the legality of the transposition nor the compatibility with the EC Treaties and that Anglo, as a company under the Companies Act where all the shares are held by the Minister for Finance, clearly is a public authority due to sub article 3(1)(vii)(I).

## **Definition of Public Authority**

### Meaning of “and includes”

12. Anglo’s interpretation of the definition of “public authority” is not supported by the Directive or its transposition in the Regulations. The definition in article 3 of the Regulations is constructed as follows:

“public authority” means X and includes Y

where X represents the three types of public authority 3(1)(a) to (c) and Y is a list of bodies and categories of bodies i.e. 3(1)(i) to (vii) that are included in the definition. Anglo clearly falls within the definition of 3(1)(vii)(I) since it is a company under the Companies Acts where all the shares are held by the Minister for Finance or his nominee.

13. It is a general principle of statutory interpretation that where examples are included at the end of a provision they may extend but do not limit the meaning of the provision. Section 11 of the Interpretation Act 2005 places this principle on a statutory footing where the word “Example” is used in a provision. The same principle applies to the interpretation of the definition of public authority in the Regulations. Sub-articles 3(1)(i) to (vii) are provided as examples and are included in the definition. As Anglo points out the Minister would not be entitled to narrow the definition of public authority unless

specifically provided for in the Directive, on the other hand and contrary to Anglo's submission<sup>6</sup> the Directive does allow for Member States to broaden the definition. Recital 24 of the Directive states:

*"The provisions of this Directive shall not affect the right of a Member State to maintain or introduce measures providing for broader access to information than required by this Directive."*

Article 3(1)(a), (b) and (c)

14. Without prejudice to the Applicant's view that Anglo is a public authority by reason of article 3(1)(vii)(I) he also considers that Anglo is a public authority under articles 3(1)(b) and/or 3(1)(c). The Applicant agrees with Anglo that it is not a public authority as defined in article 3(1)(a)
15. Article 3(1)(b) of the Regulations states that "*any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment*" is a public authority. The Applicant wishes to point out that article 3(1)(b) is not limited to bodies with specific duties, activities or services in relation to the environment.
16. A number of decisions of the UK Information Tribunal are relevant in terms of providing guidance on the interpretation of the term "*public administrative functions*". The UK Information Commissioner proposed a two step analysis in its decision FER0265609 (*PhonepayPlus*)<sup>7</sup>:
  - i. Does the body exercise functions that are public in nature?
  - ii. Are these functions administrative?
17. The answer to both question depends on the facts of each case with no single factor being decisive. There would appear to be no dispute in relation to whether or not Anglo is a public body at all, therefore the focus of the analysis rests on whether or not the functions of Anglo are administrative in nature. The UK Commissioner in *PhonepayPlus* went on to characterise administrative functions as follows:

*"Administration can be visualised as the managing of power within the state apparatus and the achievement of a non legal goal through reliance on specific legal powers."*
19. Clearly Anglo is engaged in managing power within the State apparatus to achieve the public interest goal of maintaining the stability of the financial system in the State.

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<sup>6</sup>Para 6.6

<sup>7</sup>Para 30

20. The UK Information Tribunal provided further guidance in its decision in the *Port of London* case<sup>8</sup>. The analysis of Anglo within the *PhonepayPlus and Port of London* framework is relatively straightforward since Anglo has no other purpose other than to serve the public interest. Its operations only exist due to its nationalisation and due to the approval of State Aid by the European Commission. The bank operates under significant constraints set out in the Act and in the European Commission State Aid decision approving the Eligible Liabilities Guarantee Scheme<sup>9</sup>. The Central Bank and the Taoiseach have stated that Anglo will be closed as soon as possible<sup>10</sup>. The facts do not support the proposition that Anglo operates or will ever operate as an independent commercial entity.
21. Anglo has provided some information regarding the relationship framework<sup>11</sup> that existed between Anglo and the Minister to support its proposition that the government's objective in nationalising Anglo was to restore it as an independent commercial bank as quickly as possible. It is now clear in light of public statements from Patrick Honohan, Governor of the Central Bank, and Taoiseach Brian Cowen that Anglo will be closed as soon as possible. Accordingly the relationship framework existing between Anglo and the government has changed since Anglo made its submission and the position as expressed by Anglo in its submission<sup>12</sup> is now out of date and should not be relied upon by the Commissioner.
22. Even if Anglo was considered to be a commercial bank competing in the market there is no prohibition on a publicly owned commercial entity having obligations under the Regulations. For example a local authority which operates a commercial waste service, and the State forestry agency Coillte, among others.
23. Anglo cites *The General Medical Services (Payments) Board -v- Minister for Social Welfare*<sup>13</sup> as Irish authority in relation to the definition of public authority. Hamilton J stated that a public authority has public and statutory duties to perform and performs these duties and carries out transactions for the benefit of the public and not for private profit. According to Anglo that since it is a for-profit commercial concern it is not a public authority. This is a misapplication of the Court's definition of public authorities. It did not rule out **public** profit making bodies being public authorities merely private profit making concerns. Since Anglo has statutory duties to be performed in the public interest under the Act and since its profits are not private by reason of the 100% shareholding by the State, Anglo is a public authority according to the Court's decision in *General Medical*

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<sup>8</sup>Port of London Authority v Information Commissioner (EA/2006/0083)

<sup>9</sup>European Commission Decision in State Aid case N349/2009 at point 24. Decision available at [http://ec.europa.eu/community\\_law/state\\_aids/comp-2009/n349-09.pdf](http://ec.europa.eu/community_law/state_aids/comp-2009/n349-09.pdf)

<sup>10</sup><http://www.irishtimes.com/newspaper/ireland/2010/1130/1224284430926.html>

<sup>11</sup>A relationship framework is provided for in Section 3 of the Act.

<sup>12</sup>Anglo submission, last paragraph on page 12

<sup>13</sup>[1976-1977] ILRM 210

*Services.*

24. Anglo is not correct to claim that it does not perform any “specific duties, activities or service in relation to the environment”. It is well known that the bulk of Anglo’s activity consists of providing loans for development land purchases and commercial property developments. “Environmental information” as defined in article 3 of the Regulations includes information relating to both land as an element of the environment and to built structures. Since land and buildings form part of the environment the provision of loans for the purchase of development land and commercial property development is a specific service in relation to the environment.
  
25. The Applicant also wishes to point out that the definition of environmental information does not exclude financial information or financial activities and specifically includes economic analyses relating to activities affecting or likely to affect elements of the environment.

**Conclusion**

26. For the reasons outlined above Anglo is clearly a public authority under the Regulations and is therefore obliged to grant the Applicant access to the information requested. Anglo was incorrect to refuse the Applicant’s request and therefore the Commissioner should allow this appeal and direct Anglo to grant access to all the information sought.

December 8, 2010