THE HIGH COURT

[2021] IEHC 46

[2019 No.87 MCA]

BETWEEN

RIGHT TO KNOW CLG

APPELLANT

AND

COMMISSIONER FOR ENVIRONMENTAL INFORMATION

RESPONDENT

AND

RAHEENLEAGH POWER DAC

NOTICE PARTY

JUDGMENT of Mr. Justice Alexander Owens delivered the 25th day of January 2021

1. The issue in this appeal is whether the Commissioner for Environmental Information (the Commissioner) erred in law in deciding that Raheenleagh Power DAC (RP) is not a "*public authority"* as defined in article 3(1) of the European Communities (Access to Information on the Environment) Regulations 2007 (the Regulations) which transpose Directive 2003/4/EC (the Directive) on public access to environmental information into Irish law. The reasons for this conclusion are set out in a ruling dated 9 January 2019.

2. Article 3(1) of the Regulations repeats the relevant part of Article 2(2) of the Directive which reads as follows:

> *'Public authority' shall mean:*
>
> *(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 (a) or (b)."*

3. The Commissioner decided that RP is not a "*public authority*" as defined in article 3(1)(b) or article 3(1)(c) of the Regulations. These provisions correspond with Article 2(2)(b) and Article 2(2)(c) of the Directive.

4. Paragraph 52 of the judgment of the European Court of Justice in Case C-279/*12 Fish Legal and Shirley v Information Commissioner, United Utilities and Others* (para. 52) gives the following guidance on the meaning and effect of Article (2)(2)(b) of the Directive:

> "The second category of pubic 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."

5. Directive 2003/4/EC does not provide a definition of "*the environment*". The scope of this term is indicated by the definition of "*environmental information*" as comprising *"any information on:*

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction amongst these elements;

(b) factors such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

……..

(f) the state of human health and safety, including contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)."

6. RP is a joint-venture company which operates a wind farm in a forest in the Wicklow Mountains. The wind farm supplies electricity to the national grid. The issued shares were divided equally between Coillte CGA (Coillte) and a subsidiary of the Electricity Supply Board (the ESB). A shareholders' agreement governs the relationship between the shareholders. Each party to this agreement has nominated two directors. We are not told whether the agreement regulates deadlock in proceedings of directors or shareholders.

7. Coillte provided the site for the wind turbines. The ESB group provided expertise on building a windfarm, electricity generation and supply. RP applied to the statutory regulator and was given a licence to generate electricity and an authorisation to construct the wind farm under ss. 14 and 16 of the Electricity Regulation Act 1999 (the 1999 Act).

8. In 2018 the Coillte shares in RP were sold to GR Wind Farms 1 Ltd. This entity is a private company within a group which holds investments in renewable energy projects. GR Wind Farms 1 Ltd has replaced Coillte as a party to the shareholders' agreement.

9. Day-to-day responsibility for operation of the wind farm has been delegated by RP to an ESB subsidiary. The electricity is sold into the national grid through another ESB subsidiary and is consumed by final customers of electricity suppliers in Ireland and abroad. In order to develop and use the wind farm it was necessary to get planning permission.

10. An applicant for an authorisation can seek a special order from the regulator allowing it to acquire by compulsory purchase any land or access necessary for infrastructure required to connect to the national grid. This power was originally given to the ESB by s.47 of the Electricity Supply Act 1927 (the 1927 Act). The ESB did have to seek an authorisation to exercise the power.

11. The holder of an authorisation may also exercise powers to carry out some works without consent of landowners. It can break up streets and roads and lay cables under them. Most of these powers may only be exercised with the consent of the regulator. The powers include rights to lay electric lines over or under land and to affix lines to buildings under s.53 of the 1927 Act, as amended by the Electricity (Supply) (Amendment) Act 1985.

12. Coillte was established under the Forestry Act 1988 and holds State forests formerly owned by the Minister for Energy. Its main purpose is to manage these forests as a semi-State commercial enterprise. Coillte is subject to ministerial direction on policy relating to forestry development and related activities, and on provision and maintenance of services and facilities and use of land for specified purposes.

13. The ESB was set up by the 1927 Act to generate and supply electricity. Until recently it was the monopoly generator and supplier of electricity in the State. It built and controlled the national grid and the distribution system. The ESB continues to operate generating plants which supply the national grid. The ESB, through Electric Ireland, is also a supplier of electricity to final customers. The national grid is controlled by an independent semi-State company. The grid is connected to electricity transmission systems in Europe. Suppliers of electricity to final customers are allowed to use the ESB distribution network.

14. The regulator grants authorisations and licences to construct generating stations; generate electricity and supply electricity to final customers. The 1999 Act removed the ESB monopoly and includes provisions which promote competition and development of electricity generation using sources of renewable energy. Development of generating facilities using renewable energy is promoted by a price support for electricity from such sources. Some 350 authorisations have been issued to construct generating stations and 380 entities have been licenced to generate electricity for supply to the national grid. This electricity is sold into a market of suppliers who sell to final customers. Holders of authorisations and licences are given access to valuable State-controlled infrastructure.

15. Right to Know CLG (Right to Know) seeks to make information available in the public interest. The European Union and the State are parties to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in

Environmental Matters of 1998 (the Aarhus Convention). The Directive gives effect to this Convention.

16. In May 2017 Right to Know asked RP for data relating to wind turbine noise which supported information provided in the application for planning permission for the wind farm. This request was refused on the ground that RP is not a "*public authority*". The refusal was appealed to the Commissioner.

17. The Commissioner considered whether RP is a "*public authority*" within Article 2(2)(b) or Article 2(2)(c) of the Directive. He concluded that RP is not a "*public authority*" within either of these provisions.

18. Under article 12 of the Regulations the Commissioner carries out an investigation in relation to any matter which is referred to him and he can call for material which may be relevant to his decision. A problem may arise on appeal to the High Court on a point of law if some error is identified which can only be corrected following consideration of further material. The parties are agreed that the Commissioner had sufficient material before him to make a determination on all points.

19. My jurisdiction on appeal is limited. I can review whether legal conclusions are supported by material available to the Commissioner and whether those legal conclusions are correct. I can also review whether the Commissioner has failed to consider materials which he ought to have considered. I do not have any power on appeal on a point of law to decide disputed factual matters and I have no investigatory role.

20. If the Commissioner has come to an incorrect legal conclusion on the material before him the appropriate course on appeal is to reverse his decision. There is no necessity to remit any matter for further consideration.

21. I have concluded that the Commissioner erred in law in deciding that RP is not a "*public authority*" within Article 2(2)(b) of the Directive. This error related to his analysis of the functional effect of the statutory regime governing the activities of RP in European Law. My conclusion is that RP is a "*public authority*" within that provision.

22. On the appeal against the findings of the Commissioner on Article 2(2)(c), I agree with the argument advanced by Right to Know that RP is a "*public authority"* because it is under the "*control*" of the ESB which itself is a public authority within Article 2(2)(b). RP has "*public responsibilities or functions…,in relation to the environment*" and is "*providing public services, in relation to the environment*". The Commissioner erred in law in concluding that the effect of deregulation of the market in electricity generation and the participation of a number of entities in electricity generation and supply to the national grid meant that RP was not providing "*public services*" and did not have "*public responsibilities or functions*" for the purposes of Article 2(2)(c).

23. My general comment is that where it is necessary to apply any test mandated by law in determining whether an entity comes within the definition of "*public authority*" in Article

2(2)(b) or Article 2(2)(c) of the Directive, the Commissioner should decide all factual and legal matters relevant to that test.

24. These tests are composite in the sense that it is not conceptually possible to apply some of their elements on a stand-alone basis. Furthermore, the public interest in effective administration requires that the Commissioner makes a complete decision on any factual or legal issue relevant to whether an entity is a "*public authority*" within Article 2(2)(b) or Article 2(2)(c) of the Directive. The Commissioner should also have decided the issue relating to "*control*", applying the test set out *Case C-279/12 Fish Legal and Shirley*.

25. I agree that it may be appropriate for the Commissioner to reject applications on procedural grounds or for some other valid reason without making substantive determinations in some cases. In my view, this was not such a case.

26. I now turn to the findings of the Commissioner.

27. His first finding was that RP is not a "*public authority*" within Article (2)(2)(b) of the Directive because the provisions of Part VIII of the 1999 Act do not vest RP "*under the legal regime which is applicable to [it], with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law."*

28. The Commissioner concluded that the powers conferred by Part VIII are not capable of being regarded as "*special*" in the sense used by the European Court of Justice in para. 52. His reasons are that Part VIII of the 1999 Act gives the regulator power to sanction compulsory acquisition and that most of the other Part VIII powers can only be exercised with the consent of the regulator.

29. In light of this conclusion, the Commissioner did not engage with the first part of the analysis mandated by para. 52. If the Commissioner is incorrect in his view of the effect of the provisions of Part VIII of the 1999 Act, it must follow that he erred in law.

30. The powers conferred by Part VIII of the 1999 Act were considered by the Commissioner without sufficient consideration of their purpose and functional effect. The Commissioner did not consider whether any other "*rights and powers*" having a public law element and not enjoyed by persons governed by private law were accorded to RP by the 1999 Act. Such rights include rights to access and supply the national grid. Any entity which buys out the shares in RP or which acquires its undertaking and gets a licence to generate electricity under the 1999 Act gets the benefit of these rights and also gets the benefit of any rights acquired as a result of the existence or exercise of compulsory purchase powers given by Part VIII. The para.52 test does not require that the powers be exercised. The presence of the powers will often be enough to enable the desired result for the entity which may wish to rely on them.

31. The para. 52 test requires examination of any relationship between performance of services of public interest which an entity may be "*entrusted*" with under the national legislation and the public law powers which enable it to perform those services. "*Special*

powers" within the test set out in para. 52 may include monopoly powers or other privileges. However, para. 52 does not require that the public entrustment be a monopoly or that "*special powers*" accompanying that entrustment be granted exclusively to a single entity or a small number of entities.

32. The Commissioner, in deciding not to determine the issue of whether RP was "*entrusted …,with the performance of services of public interest*" and in omitting to examine the "vested with special powers" issue in that context, erred in law in not fully examining the legal status of RP under the 1999 Act, as required by para. 52.

33. The Commissioner contrasted the position of commercial bodies supplying electricity to that of NAMA and monopoly suppliers of water and sewerage services in the UK. He considered that the role of RP was not comparable to that of NAMA or the UK undertakers. He emphasised that RP was one of hundreds of generators of electricity. He continued as follows:

> *"It can be argued, as the appellant has, that since the CRU has granted Raheenleagh Power an authorisation to construct or reconstruct a generating station and a licence to generate electricity under sections 16 and 14 of the 1999 Act, it has been entrusted by law with the performance of a service of public interest. However, many services are provided throughout the State which are of interest to the public -and indeed, may be seen as essential by some- but are not services of public interest in the context of public administrative functions being performed under national law.*
>
> *I therefore consider it to be more useful to examine whether Raheenleagh Power has been vested with special powers under Irish law for the purpose of determining whether it performs public administrative functions."*

34. I refer to para. 1 of the ruling of the European Court of Justice in its judgment of 19 December 2013 in *Case C-279/12 Fish Legal and Shirley*. This reads as follows:

> *"1. In order to determine whether entities such as United Utilities Water plc, Yorkshire Water Services Ltd and Southern Water Services Ltd 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/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, 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 reasoning behind this part of the ruling is clear from paras. 51 to 56 of the judgment which I will now quote in full.

"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 sewerage 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 classed as special powers.

56 In the light of the foregoing, the answer to the first two questions referred to 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."

36. A wide variety of services of public interest may be provided within the member states. These services can be supplied by undertakings under public control or by private

operators or by both and the undertakings may operate in competition or in partnership arrangements. In times gone by many of these services were provided in Great Britain and in Ireland by numerous privately-owned statutory undertakers using special powers given by local and personal Acts of Parliament.

37. The concept of "*public [administrative] authorities*" is "*defined in functional terms*". What are the functions of the entity being examined? Are those functions "*public*" in nature?

38. It is in the nature of services such as railways, canals, water, sewerage, waste disposal, electricity, gas and telecommunications that organs of State may be engaged in their establishment, regulation and upkeep, and to secure continuity of supply. The State may entrust responsibility for provision of these services to entities which meet defined criteria. These criteria may include environmental criteria. It is important to have functioning and secure supply of these services for homes and businesses. It is also important to have reliable public road, railway, tram and service delivery systems and infrastructure.

39. The State may also control pricing of these services. Many of these services require subvention from public funds or other forms of support. State powers of licencing, intervention and regulation may be indicia of the concept of entrusting an entity "*under the legal regime which is applicable….with the performance of services of public interest".* Those "entrusted" by national law with the provision of such services will usually be given rights and powers not enjoyed by persons governed by private law. Such rights and powers may include rights to operate as suppliers of utilities and powers of compulsory purchase. These rights may include special access to public infrastructure.

40. The legal regime applicable to RP is the 1999 Act, as amended. In order to decide whether this regime "*entrusted*" RP "*with the performance of services of public interest*", it is necessary to examine the provisions of this legislation.

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 has been "*entrusted*" by Irish law with "*the performance of services of public interest*". While RP 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.

45. I now turn to the view of the Commissioner on the provisions of Part VIII of the 1999 Act. Where exercised, these powers affect private landowners who are forced to give rights to RP.

46. These powers are a vital part of the legislation. The procedure relating to the main power of compulsory acquisition may be initiated at the stage of application for an authorisation. The purpose is to ensure that the applicant does not have to wait for the grant of the application before applying for approval of a compulsory purchase scheme. The approval process requires notice to those potentially affected and may involve a public enquiry.

47. Most land in the State is in private ownership. This includes land under many public roads. Without the advantages given by Part VIII, many authorisations to construct generating stations and licences to generate electricity for supply to the national grid would be useless. 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.

48. I do not accept that the test mandated by para. 52 requires that the position of RP be contrasted with that of holders of other authorisations under the 1999 Act who are given the same powers. 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.

49. The Commissioner placed importance on the effect of the amendment made to s.45 of the 1927 Act by s.47 of the 1999 Act. He considered that this provision, which now confers the power to make the statutory "*special order*" for compulsory acquisition on the regulator, deprives that power of the character of "*special powers beyond those which result from the normal rules applicable in relations between persons governed by private law".* He took a similar view of the minor powers conferred by other provisions of Part VIII of the 1999 Act which may now only be exercised by the holder of an authorisation with consent of the regulator.

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 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.

51. Section 45(4) of the 1927 Act contains provisions which are usual in compulsory purchase legislation. The regulator must ensure that any proposed exercise of these powers is necessary and proportionate and he must give due consideration to rights of those affected.

52. Notice must be given to persons likely to be affected by the making of the "*special order*". Representations and objections to the making of the order must be considered. It may be necessary for the regulator to cause a public enquiry to be held. In the case of proposed exercise of the minor powers, the regulator has supervisory control.

53. Similar provisions to those in Part VIII of the 1999 Act are to be found 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.

54. Right to Know also contends that the Commissioner erred in law in deciding that RP is not a "*public authority*" within Article 2(2)(c) of the Directive.

55. It is accepted that the ESB and Coillte are "*public authorities*" within either Article (2)(2)(a) or Article (2)(2)(b) of the Directive.

56. It is necessary to apply a functional test in interpreting terminology used in Article 2(2)(c) of the Directive. This provision extends the concept of "*public authority*" to " *any natural or legal person….under the control of a body or person falling within (a) or (b)".*

57. Control is part of the test under Article 2(2)(c). Not every legal entity which can be described as "*under the control of*" entities which come within Article 2(2)(a) or Article 2(2)(b) will automatically come within Article 2(2)(c). This is because the entity being considered must also have "*public responsibilities or functions…,relating to the environment"* or provide "*public services, relating to the environment*".

58. The Commissioner concluded that RP does not have any "*public responsibilities or functions"* and does not provide any "*public services*". He decided to apply the test set out in Article 2(2)(c) by examining three issues in successive stages. Firstly, he considered whether RP is a body which has "*public responsibilities or functions or provides public services"*. Secondly, he proposed to consider whether such responsibilities, functions or services *relate* "*to the environment*". Thirdly, he proposed to consider

whether RP was "*under the control*" of a "*public authority*" within Article 2(2)(a) or Article 2(2)(b).

59. As he concluded that RP does not have any "*public responsibilities or functions*" or provide any "*public services*" he did not examine issues of whether a particular function or responsibility or service might relate to the environment. He did not consider the issue of whether RP was "*under the control of"* one or more "*public authorities*".

60. The Commissioner reasoned that the provision by RP of electricity as a generator is not a "*public service*" and does not involve having "*public responsibilities or functions*" as described in Article 2(2)(c) of the Directive because electricity is being provided by a number of producers in a commercial market. Whether he is correct in stating that RP could elect not to supply electricity to the market might depend on the terms of its licence to supply electricity to the grid. Provisions of the 1999 Act have a bearing on security of electricity supply. If RP decided to cease to supply to the grid it would be forced to close down operations as it would have no market elsewhere.

61. The Commissioner was influenced by the number of authorisations for generating plants and licences to grant electricity granted by the regulator.

62. An affidavit on behalf of RP indicates that special purpose vehicle corporate structures are used to facilitate loan finance arrangements for wind farm developments. Investors in these entities get tax incentives. These factors inflate the number of holders of licences and authorisations.

63. The fact that the regulator has given out a number of authorisations and generation licences under the 1999 Act to wind farm operators is irrelevant to the test under Article 2(2)(c). All of these entities are governed by an authorisation and licencing regime under public law.

64. Article 2(2)(c) mandates examination of the activities of the entity concerned and assessment of whether these activities involve public responsibilities relating to the environment or the discharge of public functions relating to the environment or performance of public services relating to the environment. This test is also a composite test. The question of whether a responsibility or function or service is "*public*" must be examined in context. A relationship must exist between the public responsibility, function or service and the environment. These matters must be looked at together.

65. Article 2(2)(c) is framed to catch entities under the control of a "*public authority*" coming within Article (2)(2)(a) or Article (2)(2)(b); but not in relation to all of their activities. The policy of Article 2(2)(c) is that entities which are in a subsidiary relationship to a "*public authority*" may have public responsibilities or functions in relation to the environment or provide public services in relation to the environment and that "*control*" carries with it an obligation to make access to environmental information relating to these public obligations, functions or services freely available.

66. This point is dealt with in paras. 81 to 83 of the judgment in *Case C-279/12 Fish Legal and Shirley.* An entity comes within Article (2)(2)(c) if it is under "*control*" of "*public authorities"* in the sense set out in para. 73 of that judgment. Where the entity is so controlled, the obligation to disclose environmental information only extends to matters concerning its public responsibilities in relation to the environment or its public functions relating to the environment or its provision of public services relating to the environment. Paragraph 73 of the judgment in *Case C-279/12 Fish Legal and Shirley* emphasises that the test of "*control*" involves an assessment of whether the potential controller is in a position to exert decisive influence on the action in the environmental field of the entity which is potentially under control.

67. The decision-maker should look at what the entity does and where it operates and assess whether any of its activities or purposes or rights or obligations may carry with them public responsibilities or public functions relating to the environment or to provide public services relating to the environment. The reference to "*public*" here is to the public law sphere of functions, obligations and provision of services and not to some general concept of the public good or the public interest. In this case it is necessary to examine whether any provisions of the 1999 Act or other rules of public law or sources of obligations or functions in public law such as might be found in the conditions of a public permission or licence or agreement involves such responsibilities or functions or the provision of such services.

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.

69. The starting point in applying the test is to examine what RP does and the public regulatory framework within which it operates and the significance of the information sought in the request to its activities or purposes. Does the request relate to material associated with either a public responsibility of RP relating to the environment or a public function relating to the environment or a public service relating to the environment? Can it be said, bearing in mind the comment by the European Court of Justice at para. 82 of the judgment in *Case C-279/12 Fish Legal and Shirley*, that the information sought could not relate to any engagement of RP in one or more of the three areas of public responsibilities, functions and services relating to the environment?

70. Right to Know advanced the argument that generator construction and electricity generation for the national grid under the regime provided for in the 1999 Act involve

public responsibilities, functions or services relating to the environment and that the subvention given to suppliers to assist renewable energy projects is relevant. I agree. This regime is 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 relevant provisions of the 1999 Act and in some subordinate legislation.

71. The exploitation and control of energy resources and other similar resources or activities such as water are aspects of the human environment which come within the matters listed in (a), (b) and (c) in the definition of "*environmental information*" supplied by Article 2 of the Directive. Under the 1999 Act and the 1999 Regulations one of the criteria for the grant of authorisations is that the Commission is satisfied that the applicant has or will apply for all applicable statutory consents relating to the matters referred to in s.18(2) of the 1999 Act. These include consents relating to the protection of the environment such as planning permissions. In my view, information provided in a planning application relating to turbine wind noise for a wind farm touches on discharge of "*public responsibilities…, relating to the environment*".

72. I now refer to the "control" issue. 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 RP. The substance of where the power to exert decisive influence over environmental matters resides prevails over the form. The statement that the directors of RP are independent in the sense that they are obliged to act in the best interests of RP is not decisive.

73. This is the test set out in ruling 2 of the judgment of the European Court of Justice in *Case-C279/12 Fish legal*. Paragraph 69 of the judgment gives clear guidance on how this test should be applied for the purposes of ruling 2 and para. 73 of the judgment and reads as follows:

> *"The manner in which such a public authority may exert decisive influence pursuant to the powers which it has been allotted by the national legislature is irrelevant in this regard. It 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."*

74. Coillte and the ESB are "*public authorities*" within Article 2(2)(a) or Article 2(2)(b) of the Directive. At the time Right to Know called for the information which is sought each of these two entities either acting together or acting alone was in a position to exert decisive influence on the actions of RP in the environmental field. As they were both "*public authorities*" one of them could not exercise decisive influence over the other on activities of RP having a bearing on the environment, so as to bring RP outside Article 2(2)(c).

75. On the issue of whether it makes a difference that Coillte which is a "*public authority*" has been replaced by a private operator, the governing element in the test under Article

2(2)(c) is "control". If "*control*" has ceased, then the entity concerned is not a "*public authority*" within Article 2(2)(c) and does not have an obligation to make environmental information available to the public.

76. RP 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 "*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. These facts lead inexorably to a legal conclusion that RP 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 are operated through the ESB group.