[2024] IEHC 729

THE HIGH COURT
PLANNING & ENVIRONMENT

[H.MCA.2024.0000054]

IN THE MATTER OF AN APPEAL PURSUANT TO ARTICLE 13 OF THE EUROPEAN COMMUNITIES (ACCESS TO INFORMATION ON THE ENVIRONMENT) REGULATIONS 2007-2014

BETWEEN

RAIDIÓ TEILIFÍS ÉIREANN

APPELLANT

AND

THE COMMISSIONER FOR ENVIRONMENTAL INFORMATION

RESPONDENT

AND

RIGHT TO KNOW CLG

NOTICE PARTY

JUDGMENT of Humphreys J. delivered on Friday the 20th day of December 2024

1. How should the law balance the right of access to environmental information, which is particularly important in relation to the problem of false balance in media coverage of the climate emergency, with the right of public broadcasters to exercise their press freedom? The context is a dispute as to whether Raidió Teilifís Éireann (**RTÉ**) is a public authority for the purpose 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 (the **AIE directive**). After disposing of the domestic points, all the issues are going to come down to ones of EU law, specifically the interpretation of art. 2 of the directive, and typically in such a situation, all sides appear to claim that the answers are *acte clair* in their respective favour. But in contrast to many situations, we have massive evidence that the matter is not *acte clair* in anybody's favour, for the simple reason that RTÉ have been able to survey practice across the EEA which show substantial divergence in approach, and indeed shows a majority of countries not applying the directive to their public broadcasters.

Judgment history

2. While there is no previous litigation history regarding the matter at hand, there was a previous action between the parties concerning a different request, *Right to Know CLG v. Commissioner for Environmental Information and RTÉ* [2021] IEHC 353, [2021] 4 JIC 2008 (Unreported, High Court, Barrett J., 20th April 2020). In that case RTÉ did not make an issue of whether it was a public authority. That doesn't prevent it from disputing that here, as it does. The court there concluded *inter alia* that broadcasting and reporting on the issue of climate change was a measure and activity within the meaning of paragraph (c) of the definition of environmental information. It was also determined that climate change is a factor affecting or likely to affect the elements of the environment within the meaning of paragraph (b) of the definition of environmental information. If RTÉ is ultimately held to be a public authority, RTÉ doesn't dispute these matters for the purposes of the present judgment, without prejudice to their right to do so at some future stage.

Facts in relation to the status of RTÉ

3. RTÉ is Ireland's public service broadcaster and is one of the oldest continuously operating public service broadcasters in the world. What is now RTÉ radio service began testing on 14th November 1925 – just short of 100 years ago, and regularly broadcasting on 1st January 1926, as 2RN. As Radio Éireann it was statutorily established by the Broadcasting Authority Act 1960. The name of Radio Éireann was changed to Radio Teilifís Éireann by s. 3 of the Broadcasting Authority (Amendment) Act 1966. In its current iteration, its name was changed to Raidió Teilifís Éireann by s. 113 of the Broadcasting Act 2009, under which it stands established as a statutory corporation. RTÉ is established as a public service broadcaster to work within the parameters of the statute. All members of the board of RTÉ are appointed by the Government. RTÉ is required to report to the Minister for the Environment, Climate and Communications, the Oireachtas and the public as to the performance of its functions. It must have a statutory code of conduct and is subject to statutory disclosure of interests. It reports to Oireachtas committees and has many of the indicia of public law bodies guided by public law constraints.

4. The principal objects and associated powers of RTÉ are in s. 114 of the 2009 Act. They include *inter alia* the establishment, maintenance and operation of a national television and sound broadcasting service, which shall have the character of a public service, be a free-to-air service and be made available, as far as is practicable, to the whole community on the island of Ireland. In

pursuance of this, RTÉ is obliged to provide community, local or regional broadcasting services. RTÉ's objects under s. 114(1) also include the maintenance of a website in connection with its services, the establishment and maintenance of an orchestra, archives and libraries and to assist public bodies to disseminate information in the event of a major emergency. The legislative framework includes an obligation to provide news and programming in both the Irish and English languages as well as specific statutory obligations regarding its broadcast of news and current affairs content. RTÉ currently provides television and radio services as well as a non-linear/simulcast and on-demand service such as the "RTÉ Player".

5. RTÉ is dual-funded. Pursuant to s. 123(1) of the 2009 Act, the relevant Minister may pay to RTÉ out of monies provided by the Oireachtas in respect of each financial year after the passing of the Act an amount equal to the total of receipts in that year in respect of television licence fees, less expenses and payments to the Broadcasting Fund. RTÉ is also obliged to earn commercial revenue. Pursuant to s. 114(1)(j) of the 2009 Act, RTÉ is obliged to exploit commercial opportunities as may arise in pursuit of its public service objects.

6. Section 98 of the 2009 Act provides that, "[s]ubject to the requirements of this Act, [RTÉ] shall be independent in the pursuance of its objects". Further, the duties of the board, defined by s. 87 of the 2009 Act, include an obligation, at subparagraph (d), to "safeguard the independence of the corporation, as regards, the conception, content and production of programmes, the editing and presentation of news and current affairs programmes and the definition of programme schedules from State, political and commercial influences."

7. I accept the affidavit of Richard Dowling insofar as it sets out uncontested facts regarding the operation of RTÉ.

8. Requests which have been made to RTÉ pursuant to the European Communities (Access to Information on the Environment) Regulations 2007 to 2014 (S.I. No. 133 of 2007, S.I. No. 662 of 2011, S.I. 615 of 2014 and S.I. 309 of 2018) (the **AIE regulations**) to date include:

(i) names and qualifications of staff who reported on the Corrib gas field controversy;
(ii) records on how RTÉ should report climate change, policies and guidelines issued;
(iii) records relating to research which showed Morning Ireland's "poor" environmental coverage;
(iv) briefing materials for the director general and then head of news relating to reporting on the environment;
(v) copies of strategy or policy documents relating to "Climate Week" initiative;
(vi) information relating to RTÉ Investigates programme entitled "A Rock & A Hard Place"; including locations of all quarries, details of county councils using products from unauthorised quarries, description of all information held by RTÉ;
(vii) records relating to RTÉ's refusal to host a debate involving party leaders on climate change during election coverage;
(viii) records prepared for the RTÉ board about the RTÉ Player, it being contended that the data storage, processing and power consumption make these environmental records;
(ix) records relating to a debate on the environment on Prime Time;
(x) records to back up statement that a traffic ban will continue and records held by journalist;
(xi) records held by RTÉ which discuss a twitter account critical of RTÉ's environmental coverage;
(xii) legal costs associated with AIE requests;
(xiii) contracts for the sponsorship of the Countrywide radio programme, sponsorship of the weather bulletins, sponsorship of traffic updates; the amount of money or value in kind received by RTÉ from these over the last three years;
(xiv) records in relation to the publication on Twitter from then head of news apologising for RTÉ's climate coverage;
(xv) records of guidance and presentations given to RTÉ editorial staff on reporting climate change;
(xvi) a copy of all video footage, whether broadcast or not, generated or obtained by RTÉ Investigates programme including a list of staff who worked on the programme, a copy of all information provided to the programme from persons who were outside of RTÉ, the costs of the programme, information relating to the knowledge of programme makers of vehicle tracking devices used during the making of the programme and whether the programme-makers benefitted from the information generated by tracking devices;
(xvii) details of financial contributions made to the independent production company for Ecoeye;

(xviii) records on RTÉ programmes stating their carbon footprint; RTÉ policy on carbon offsetting for flights and other polluting activities;
(xix) pest control reports and invoices;
(xx) names of people who received a complaint from an individual about an RTÉ member of staff;
(xxi) details of RTÉ's policies arising from a High Court decision that found broadcasting was a factor that could impact on the environment;
(xxii) records supporting claim on programme that Atlantic salmon could disappear from Irish rivers from 2030 onwards; and
(xxiii) list of all AIE cases received by RTÉ over a three year period and costs involved.

9. Clearly these include requests for information which relates to journalistic activities and that which would, at a level of principle, benefit from privilege associated with journalistic activities and press freedom.

10. I accept Mr Dowling's evidence that it is of serious concern to RTÉ that information relating to its journalistic activities could, in principle, be subject to disclosure pursuant to the AIE regulations. Information of this nature can be highly sensitive and can include information provided by sources to journalists. I accept his evidence insofar as it is to the effect that RTÉ has concerns that this would have significant, adverse consequences for the journalistic activities that are undertaken by RTÉ staff and would potentially require significant information that is held by RTÉ, and its staff, to be subject to disclosure. This could include, for example, notes of off-the-record briefings or information provided by whistle-blowers. Whether RTÉ's concerns are well-founded to the extent advocated by them is not something I need to decide right now, but it is obvious that the general, high-level, concern that access to information should not interfere with journalistic freedom is valid, and Mr Foxe effectively accepts the legitimacy of such concerns in any cases where it is justified, as reflected in his affidavit.

11. Ms O'Leary for the commissioner legalistically objected on affidavit to the admissibility of this list of items but sensibly that objection was not pursued in oral argument, so I can take that list into account.

Facts in relation to the problem of false balance

12. As regards the affidavit of Mr Foxe, much of this is in substance legal submission or merely counter-argument to the relevance or substance of RTÉ's concerns. However I accept the following averments:

> "History of false balance and other concerns with media reporting on climate and the environment
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> 9. Part of the background to this request and others that the Notice Party has made to RTÉ is the issue of false balance in the reporting of climate change. This occurs where a media organisation feels that it must ensure balance in its reporting of climate change by including coverage of climate change denial, even though there is overwhelming scientific consensus concerning the reality of and the harm caused by climate change.
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> 10. The issue was serious enough that An Taisce made a formal complaint in 2016 to the Broadcasting Authority of Ireland concerning an RTÉ Prime Time programme entitled 'How much will climate change cost Ireland'. I beg to refer to a copy of An Taisce's press release at Tab 1 of the exhibit.
>
> 11. RTÉ is not alone amongst media organisations in being the subject of criticism for this issue. The BBC in 2018 accepted that it got coverage of climate change wrong too often and in fact issued guidance to all staff warning them to be aware of the issue of false balance. This came after Ofcom, the UK's broadcasting regulator, censured the BBC for not sufficiently challenging climate change denier, Nigel Lawson. I beg to refer to reporting in the Guardian and Carbon Brief on this issue at Tab 2 and Tab 3 of the exhibit.
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> 12. In fact in 2021, the Managing Director of RTÉ News published an article which acknowledged criticism of its failings in its coverage of climate change (https://www.rte.ie/news/analysis-and-comment/2021/0726/1237408-climate-change/). I beg to refer to a copy of this article at Tab 4 of the exhibit.
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> 13. In 2023 RTE published a strategy on Climate Change (https://about.rte.ie/wp-content/uploads/2023/05/RTE-Climate-Action-Screen.pdf) which states:
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> > As Ireland's principal public service media organisation, RTÉ plays a trusted and vital role in informing our audiences about the key issues which concern us and in shaping national debate. Climate change is one of these issues, now more than ever. Given the urgency in addressing climate change, we in RTÉ are mindful of the need to do more, to be a positive influence, not just within our own industry, but also across the public sector and across Irish society as a whole. …
>
> 14. The issue is broader than this. As set out in the affidavit of Ms O'Leary, the Notice Party has a pending appeal seeking details of the commercial relationship between RTÉ and

the AA (a motoring lobbyist), Avonmore (a dairy company) and the Irish Farmer's Journal (a newspaper owned by the Irish Farmers Association). Clearly the use of motor vehicles, and animal-based farming entail very significant emissions of carbon and other pollutants yet organisations with commercial interests in these areas also have (or had) a commercial relationship with RTÉ through sponsorship of traffic alerts, the weather forecast and Countrywide, a program concerned with rural affairs.

15. An Taisce expressed similar concerns around sponsorship of the Late Late Show by Renault including payments to Ryan Tubridy that are now subject to investigation and the commercial relationship between other celebrities and car brands and their alleged use of RTÉ property to promote these brands as part of their commercial relationship. I beg to refer to a report on this issue in the Irish Independent at Tab 6 of the exhibit.

16. At a general level, RTÉ derives approximately 40% of its funding from commercial revenue which is mainly advertising and sponsorship. This includes commercial sponsorships such as those listed above. The balance of RTÉ's funding is from the licence fee. In addition, some of its best-known celebrities are independent contractors with outside interests who often promote products and services.

17. I say that while RTÉ has a very significant journalistic function, it also produces a wide range of content that is not journalistic in nature. This includes entertainment, sports, drama, music, education, religion, arts, and factual programming.

18. I say that it is well known that significant governance issues have been discovered in RTÉ in relation to secret payments, corporate entertainment, and undisclosed severance packages to senior executives. I say that it is concerning that RTÉ, at a time when these issues have been exposed and when it is under severe budgetary pressure, is spending further public money seeking to reduce the level of transparency that it is subject too. RTÉ has accepted since 2007 that it was a public authority and routinely answered AIE requests, yet now when, in my view it should be more transparent, it is seeking to reduce the level of scrutiny that it is subject to.

Environmental transparency is important for RTÉ as a public service broadcaster

19. The EPA has carried out research into the role of the media in communicating climate change issues (Climate Change in Irish Media, Report No 300, November 2019). The executive summary states (Tab 7 of the exhibit):

> As scientists, policymakers, environmental non-governmental organisations (NGOs) and climate activists seek to engage the public on climate change, it is important to first understand how climate change is communicated to the public via the media. Research indicates that public concern about climate change is largely derived from media consumption. However, assessing media coverage of climate change is not simply about the accumulation of content over time. Rather, it concerns the complex and evolving relationships between media production practices, scientific knowledge, policy agendas, and public understanding and engagement.

20. I believe access to environmental information is a critical tool in terms of creating public awareness of environmental issues and ensuring that there is an exchange of views on these issues. This is reflected in Recital 1 of the AIE Directive which makes it clear that AIE is not concerned only with public participation in decision making but also with the wider goal of ensuring that the public has access to environmental information generally so that they are well informed on environmental issues.

21. In fact it would be surprising if RTÉ itself has not made use of the right of access to environmental information to obtain information to inform its reporting. I find it extraordinary that an organisation like RTÉ which prides itself on its current affairs and investigative journalism is pursuing a case that would make it much more difficult for it to be scrutinised to the same standard as it scrutinises other public authorities."

13. The exhibited EPA report (https://www.epa.ie/publications/research/climate-change/research-300-climate-change-in-irish-media.php) contains a summary as follows at p. xi:

> "As scientists, policymakers, environmental nongovernmental organisations (NGOs) and climate activists seek to engage the public on climate change, it is important to first understand how climate change is communicated to the public via the media. Research indicates that public concern about climate change is largely derived from media consumption. However, assessing media coverage of climate change is not simply about the accumulation of content over time. Rather, it concerns the complex and evolving relationships between media production practices, scientific knowledge, policy agendas, and public understanding and engagement.
>
> Although some large-scale comparative studies of international climate change coverage include Ireland, there are few in-depth studies of climate change across Irish media. This current report represents a systematic effort to map climate change coverage across Irish

print, visual, broadcast and online media, and makes recommendations specific to Ireland regarding the public communication of climate change. To do so, the project draws on multidisciplinary expertise in computing and data science [Dublin City University (DCU) Insight Centre for Data Analytics], journalism (DCU Institute for Future Media and Journalism), science communication (DCU Celsius Research Cluster) and media studies (DCU School of Communications). The main findings are summarised below.

The pattern of Irish newspaper coverage of climate change broadly follows international trends, peaking during international climate change conferences and extreme weather events and falling when other pressing issues, such as politics and economics, dominate the news agenda. By European standards, overall coverage in Ireland is low, with *The Irish Times* affording the greatest volume of coverage among national newspapers. Across these newspapers, climate science is not contested to any great extent. However, climate change is predominately framed as a political or ideological game, emphasising the personalities or parties involved, rather than the extent of the challenge. The opportunity frame, which portrays responses to climate change as opportunities for positive change, is weakly represented.

Scholars now recognise that images are a valuable tool for fostering engagement with climate change. An analysis of the images associated with climate change on *The Irish Times* website highlights the shifting cultural politics of climate change. A wide range of images links climate change to the practices of everyday life, but this apparent normalisation stands in contrast to the dearth of images linking climate change to topical news stories such as flooding and economic recovery. Moreover, images of farming and agriculture are rarely linked to climate change, even though agriculture is one of Ireland's major sources of CO_2 and non-CO_2 emissions.

Given the constraints of much commercial media across Europe, publicly funded broadcasters such as RTÉ would appear ideally placed to communicate climate change to the public. Prior to 2000, climate change was largely an invisible issue on RTÉ. Since then, there have been broad fluctuations in the volume of coverage. A range of high-profile international events, such as Live Earth, brought a sharp increase in RTÉ coverage in 2007. However, coverage fell significantly following the financial crisis and did not recover until the build-up to the United Nations (UN) Conference of the Parties in 2015. Much like newspaper coverage, the national broadcaster does not appear to follow a specific editorial climate change agenda, although some individual journalists do appear to focus attention on climate change from time to time.

On social media, climate change discourses are led by distinct influential groups, including the mainstream media, the NGO sector and the non-governmental sector. Although these groups dominate engagement during the high-profile UN Conference of the Parties, the presence of citizen-led and organised scepticism is also notable. In particular, we find a high volume of content linking to the US-based Heartland Institute indicating the capacity of 'fake news' and misinformation to infiltrate online platforms."

14. The exhibited press release regarding the complaint by An Taisce to RTÉ is in the following terms (https://www.antaisce.org/news/an-taisce-lodges-complaint-to-rte-on-primetime-climate-change-debate):

"An Taisce Lodges Complaint to RTÉ on 'PrimeTime' Climate Change Debate

An Taisce has lodged a formal complaint with RTÉ regarding the Prime Time programme broadcast on December 3rd, 2015, entitled 'How much will climate change cost Ireland'. This has been done because RTE's flagship current affairs programme completely failed to reflect the overwhelming expert consensus on the core findings of climate science.

RTE Prime Time has, in our view, once again misled the public on the crucial issue of climate change by failing to present a scientifically credible and informed debate on the essential decisions for the future of the Irish economy including agriculture.

The full complaint can be found at the link below, see Note 1. (Please note: this Complaint does not relate to the short, pre-recorded video introductory segment or its reporter, but to the extended 'studio panel debate' that followed).

An Taisce fully supports RTÉ's key role in enabling free and open debate and to 'operate in the public interest, providing News and Current Affairs that is fair and impartial, accurate and challenging' (see Note 2). In our view though, these values were ignored in much of the programme's panel discussion, breaching both the Broadcasting Authority of Ireland (BAI) rules and RTÉ's own Journalism Guidelines (2012). This complaint follows similar concerns regarding a previous Prime Time programme on climate change that was aired early last year (Note 3).

The December 2015 programme's discussion topic was the possible economic effects on Irish agriculture arising from the national policy aiming to reduce national greenhouse gas

emissions in line with Ireland's declared United Nations and EU commitments. However, Prime Time misleadingly introduced a complete non-expert in this field (a specialist in atmospheric meteorology) as an agricultural policy expert.

This panelist was then allowed to divert discussion into areas of climate science on which neither the presenter nor the other panelists had sufficient knowledge, so allowing serious misrepresentations of the expert findings of the Intergovernmental Panel on Climate Change (IPCC) to occur. Personal views were therefore aired without any 'forceful questioning' (Note 4), despite the fact that Prime Time knew full well in advance that this panelist represents a tiny 'contrarian' minority among scientists. At least two Irish academic specialists had refused invitations to participate in the panel, clearly stating their concerns regarding the potential 'false balance' presentation of climate science that, regrettably, did indeed result.

An Taisce believes that normal editorial and presenter preparation could easily have accessed and noted the necessary key statements of the IPCC climate report (Note 5) to properly rebut misleading statements but clearly this did not happen. Indeed, such a shortage of journalistic rigor and basic climate understanding is far too often seen in climate change coverage in our media. Here, this lack of rigor resulted in Prime Time allowing personal advocacy, aimed at promoting climate inaction, being presented under cover of supposed scientific authority, having been introduced as such by the presenter. Free speech must be respected and a scientist is, of course, fully entitled to advocate for a personal view on policy, but it is important that both they and the presenter make clear that they are doing so. This did not happen.

In the complaint, An Taisce urges RTÉ and the BAI to consider introducing appropriate policies and procedures on the accurate reporting of climate change science and policy. As seen in the past, in the tobacco industry's long running campaign to delay action to control tobacco sales, vested interest efforts to delay action to control greenhouse gas emissions have aimed to create public doubt by misrepresenting science and minimising potential harmful impacts (Note 6). RTÉ and other media need to be far more aware of basic climate science in order to avoid being manipulated in this way.

Clearer guidelines specific to climate change reporting, as have already been introduced by the BBC and other media organisations would help RTÉ editors and presenters further to 'maintain a balance of opinion that reflects the weight of evidence'. Regrettably, this 'weight of evidence', was noticeably absent from RTE Prime Time in both its March 2014 and December 2015 segments on climate change – and these were the only segments Prime Time dedicated to this crucial topic in the last two years.

An Taisce looks forward to a detailed and comprehensive response from RTÉ Prime Time regarding this complaint, and, if requested, we are prepared to engage constructively with RTÉ in helping to draw up evidence-based guidelines on environmental and climate-related reporting. We would urge all media editors and reporters working in all sectors – including economics, energy and transport as well as agriculture – to be far more aware of core IPCC climate science and policy guidance so that they can report climate change more accurately and objectively, and so be better equipped to deal with 'special pleading' from powerful interest groups opposing action on climate change.

The core finding of the overwhelming consensus, of scientists and experts, from all fields of climate science and policy, is that acting immediately and strongly to cut our national and personal greenhouse emissions will be far safer and far cheaper than delaying decisions and acting later. Knowing this, we and our media need to critically question those who argue otherwise.

Acting on climate change quickly and deeply will be required to meet the extremely challenging 1.5C and 2C targets set out in the recent Paris Agreement, as is necessary to prevent catastrophic climate change in the coming decades. Any and all debate now needs to reflect the very challenging arithmetic of carbon budgets and emissions pathways now needed by every nation, including Ireland.

The results of failing to act to cut emissions are already becoming abundantly evident in extreme heat and drought events around the world, and specifically right now, in the extreme flooding and storm events now directly affecting Ireland.

An Taisce strongly supports the right of the media to act independently and free from censorship from any source in its reporting; this in turn right carries clear responsibilities, the most crucial of which, we contend, is not 'balance' but accuracy.

We can limit the very worst effects of climate change if we act now. We urge our media to reflect this reality.

ENDS

...

NOTES

1. Link to full complaint document. http://www.antaisce.org/sites/antaisce.org/files/prime-time-complaint-2015-12-03-final.pdf
2. RTÉ Journalism Guidelines (2012) p.2
3. RTÉ Prime Time programme March 18th, 2014. See discussions: http://www.thinkorswim.ie/a-prime-lesson-in-how-not-to-cover-climate-change/
4. http://www.irishexaminer.com/viewpoints/columnists/victoria-white/prime-time-and-rte-are-in-denial-of-the-truth-about-climate-change-264064.html
5. See BAI Rule 22: 'It is an important part of the role of a presenter of a current affairs programme to ensure that the audience has access to a wide variety of views on the subject of the programme or item; to facilitate the expression of contributors' opinions – sometimes by forceful questioning; and to reflect the views of those who cannot, or choose not to, participate in content.'
6. IPCC (2015) Video summary of the AR5 Synthesis Report. https://www.youtube.com/watch?v=fGH0dAwM-QE
7. Authoritative reports presented at all levels from simple to complex are available from http://www.ipcc.ch
8. Oreskes N, Conway EM (2010) Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues from Tobacco Smoke to Global Warming. Bloomsbury Press.

Published: 3rd January, 2016"

15. An Irish Independent story on another complaint, exhibited, states (https://archive.is/ZS4ki):

"An Taisce, the national environmental trust, has complained that RTÉ's role as a public service broadcaster and its climate-action coverage is undermined by its presenters receiving cars or acting as brand ambassadors.

It also says the sponsorship of RTÉ shows by car brands is concerning.

The trust appealed to Media Minister Catherine Martin to investigate potential conflicts of interest at the broadcaster.

Letters seen by the Sunday Independent show how the trust thinks 'the legal status, remit and function of RTÉ as a public service, licence-fee-supported broadcaster has been compromised.'

An Taisce heritage officer Ian Lumley said this was a consequence of 'presenters receiving cars or acting as "brand ambassadors"' for car companies, or 'directly and indirectly' getting other benefits.

He claimed lifestyle shows were affected as much as hard news and current affairs reporting.

'The "sponsorship" of RTÉ radio and TV shows by car sales brands, including the Late Late Show by Renault, has been a concern raised over a number of years by RTÉ ClimateWatch,' Mr Lumley wrote.

RTÉ ClimateWatch is a social-media account which monitors RTÉ's coverage of climate-change issues. It is not affiliated with the broadcaster.

Mr Lumley wrote to Ms Martin on July 5 last year at a time when RTÉ was facing huge public scrutiny over previously undisclosed payments to former Late Late Show host Ryan Tubridy.

The payments related to €75,000 that Tubridy received from Renault when RTÉ reduced its income from the car brand by the same amount.

The Renault payment controversy contributed to Tubridy's departure from RTÉ last year.

An Taisce wanted further scrutiny of the broadcaster. Mr Lumley urged Ms Martin to intervene and investigate conflicts of interest by employees and broadcasters so brand deals would be governed better.

Mr Lumley's letter referenced comments Tubridy made on his radio show in 2019 about climate activist Greta Thunberg addressing a UN climate summit.

Tubridy's comments, which he later clarified were well-intended, related to Ms Thunberg's age and whether her campaigning was good for her mental health and well-being.

An Taisce claimed issues around Tubridy receiving €75,000 in payments from Renault brought his comments about Ms Thunberg into question.

Mr Lumley referenced 2FM presenter Lottie Ryan publicising a Toyota car in a video recorded in RTÉ's car park, and also highlighted deals Operation Transformation host Kathryn Thomas had with Land Rover and Peugeot.

The minister's private secretary responded to Mr Lumley three weeks later. She said Ms Martin recognised RTÉ's governance failings 'undermined the trust of the public' and agreed there was a need for public service broadcasting to be 'independent and have public interests as its core motivation'.

The minister sought independent examinations of RTÉ's accounts, contractor fees, governance and culture, the private secretary said. However, An Taisce again wrote to the minister as it felt these probes needed to go further.

'We consider that this involvement of a number of presenters in car and SUV brand and sales promotion create an irreconcilable conflict of interest, when the same presenter is involved in any radio or TV discussion on climate action, traffic generation and congestion, resource consumption of private motor vehicles, road pricing, air- and tyre-particle pollution, traffic safety and other transport issues,' Mr Lumley wrote.

'It is our submission this constitutes a serious governance and competence issue with regard to the statutory role of RTÉ as a public service broadcaster, and that this conflict of interest requires comprehensive and independent examination, in addition to the three elements outlined in your letter.'

This weekend a spokesman for RTÉ defended its climate-change coverage.

The spokesman said employees and contractors at the station were required to declare all conflicts of interests and to seek approval for all external activities. Any conflicts of interest were fully considered, in line with Comisiúin na Meán regulatory codes and RTÉ's statutory obligations to be objective and impartial.

'Everyone working for or on behalf of RTÉ in the production of content — on all our platforms — is required to comply with RTÉ's journalism and content guidelines which are designed to protect our editorial independence. Any suggestion that RTÉ's editorial independence is undermined due to perceived conflicts of interest is unfounded,' he added.

'RTÉ provides extensive coverage and analysis of climate change and related issues throughout our television, radio and online services, with coverage embedded in many of the daily stories and reports across these services.

'Some of the major themes covered last year included coastal erosion, decarbonisation of agriculture, modal shift in transport, active travel, decarbonising the electricity grid, offshore wind, sustainable aviation fuels, rewetting/rewilding agriculture land, afforestation, species protection and preservation.'"

16. The BBC guidance was reported on as follows (https://www.carbonbrief.org/exclusive-bbc-issues-internal-guidance-on-how-to-report-climate-change/) as exhibited by Mr Foxe:

"The BBC, one of the world's largest and most respected news organisations, has issued formal guidance to its journalists on how to report climate change.

Carbon Brief has obtained the internal four-page 'crib sheet' sent yesterday to BBC journalists via an email from Fran Unsworth, the BBC's director of news and current affairs. The crib sheet includes the BBC's 'editorial policy' and 'position' on climate change.

All of the BBC's editorial staff have also been invited to sign up for a one-hour 'training course on reporting climate change'. Carbon Brief understands this is the first time that the BBC has issued formal reporting guidance to its staff on this topic.

The move follows a ruling earlier this year by Ofcom, the UK's broadcasting regulator, which found that BBC Radio 4's flagship current-affairs programme Today had breached broadcasting rules by 'not sufficiently challenging' Lord Lawson, the former Conservative chancellor.

Lawson, who chairs a UK-based climate-sceptic lobby group, had made false claims about climate change in an interview on Today in August 2017. Before Ofcom published its ruling in April, the BBC had already apologised for breaching its general editorial guidelines during the Lawson interview.

The broadcaster has faced repeated criticism over the past decade for enabling 'false balance' on the topic of climate change, as well as for failing to fully implement the recommendations of the BBC Trust's 2011 review into the 'impartiality and accuracy of the BBC's coverage of science'.

This is the email sent by Fran Unsworth to BBC journalists yesterday:

> Dear all
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> After a summer of heatwaves, floods and extreme weather, environment stories have become front of mind for our audiences. There are a number of important related news events in the coming months – including the latest report from the UN Intergovernmental Panel on Climate Change and Green Great Britain Week in October – so there will be many more stories to cover. Younger audiences, in particular, have told us they'd like to see more journalism on the issue.
>
> With this in mind, we are offering all editorial staff new training for reporting on climate change. The one hour course covers the latest science, policy, research, and misconceptions to challenge, giving you confidence to cover the topic accurately and knowledgeably.

> Please book now by choosing a time from MyDevelopment (you'll be prompted to login first), searching 'reporting climate change' on MyDevelopment, or emailing XXXXXX@bbc.co.uk to set up a tailored session for your team.
> In the meantime, you can read the Climate Change for BBC News crib sheet, and the Analysis and Research website by searching 'climate change' which cover the basics.
> I hope you find the training useful.
> Fran

If a journalist clicks on the email's link to book a place on the course, they are taken to this page on the BBC intranet:

…

(To avoid the risk of personal abuse or intimidation, Carbon Brief has decided to redact the email address of the BBC employee running the course. Carbon Brief can confirm, though, that the individual is not one of the BBC journalists who report on climate change.)

The crib sheet, below, includes a summary of the 'basics' on climate science, the BBC's 'editorial policy' and 'position' on climate change, and a precis of domestic climate policies in the UK as well as at the international level.

This is the document's wording for the BBC's 'editorial policy' and 'position' on climate change:

> Editorial Policy
> Climate change has been a difficult subject for the BBC, and we get coverage of it wrong too often. The climate science community is clear that humans have changed the climate, but specifically how is more difficult to evidence. For instance, there is very high confidence that there will be more extreme events – floods, droughts, heatwaves etc. – but attributing an individual event, such as the UK's winter floods in 2013/2014, to climate change is much less certain.
> We must also be careful to distinguish between the statements. For example: 'Climate change makes this kind of event both more frequent and more severe,' and 'Climate change caused this event'. The former uses previous scientific evidence to say 'it is likely' the event is the result of climate change, whereas the latter may be making an assertion without the proof to back it up.
> What's the BBC's position?
>
> - Man-made climate change exists: If the science proves it we should report it. The BBC accepts that the best science on the issue is the IPCC's position, set out above.
> - Be aware of 'false balance': As climate change is accepted as happening, you do not need a 'denier' to balance the debate. Although there are those who disagree with the IPCC's position, very few of them now go so far as to deny that climate change is happening. To achieve impartiality, you do not need to include outright deniers of climate change in BBC coverage, in the same way you would not have someone denying that Manchester United won 2-0 last Saturday. The referee has spoken. However, the BBC does not exclude any shade of opinion from its output, and with appropriate challenge from a knowledgeable interviewer, there may be occasions to hear from a denier.
> - There are occasions where contrarians and sceptics should be included within climate change and sustainability debates. These may include, for instance, debating the speed and intensity of what will happen in the future, or what policies government should adopt. Again, journalists need to be aware of the guest's viewpoint and how to challenge it effectively. As with all topics, we must make clear to the audience which organisation the speaker represents, potentially how that group is funded and whether they are speaking with authority from a scientific perspective – in short, making their affiliations and previously expressed opinions clear.

The document concludes with a list of 'common misconceptions' produced by the Science Media Centre (SMC). The list appears to be an adapted update of a document (pdf) published by the SMC in 2012.

The SMC was established in 2002 and seeks to 'provide, for the benefit of the public and policymakers, accurate and evidence-based information about science and engineering through the media, particularly on controversial and headline news stories when most confusion and misinformation occurs'.

(For the same reasons stated above, Carbon Brief has decided to remove the metadata showing which BBC employee created the original document.)

> Carbon Brief asked Prof Ed Hawkins to examine the crib sheet. Hawkins is a professor of climate science at the University of Reading and a lead author of the Intergovernmental Panel on Climate Change (IPCC)'s next assessment report due in 2021-22. Hawkins makes the follow observations:
>
> - The IPCC report is not being updated later this year. It is publishing a special report on 1.5C. But this is minor detail.
> - The definition of 'climate change' could be improved, but isn't wrong.
> - The paragraph on projections is confusing and could be clarified to discuss that the level of future warming depends on our choices on future emissions. I also do not agree that there is a consensus on 2C of warming being 'irreversible'.
> - The 'implications' section could do with a mention of heatwaves and intense rainfall.
> - The 'editorial policy' could be more explicit about what would constitute false balance in its coverage. In the past, too many inaccurate statements made about climate science have not been effectively challenged by the interviewer.
> - Regarding the UK's domestic stage, it could mention that emission cuts are already being made.
>
> Hawkins adds:
>
> 'Overall, it's great to see the BBC doing this. This set of BBC guidelines is long overdue. There have been too many occasions when the BBC's audience has been misled over the realities of climate change.'
>
> The BBC said it had nothing further to add in response to Carbon Brief's request for comment."

17. What is clear is that false balance ("bothsidesism" in contemporary English) is a serious problem, not just in relation to climate denial but in any other context where false narratives are brought forward to undermine factual information generally, or science in particular, such as nonsense theories like vaccine denialism or intelligent design. It is also clear that public broadcasters have a key role to play in public understanding of science and environmental matters.

18. Presenting both sides sounds reasonable but only if there are two sides of equal scientific validity. That isn't the case in relation to climate. In the not unrelated context of the bogus unscientific theory of intelligent design, Richard Dawkins and Jerry Coyne have written (https://www.theguardian.com/science/2005/sep/01/schools.research):

> "It sounds so reasonable, doesn't it? Such a modest proposal. Why not teach 'both sides' and let the children decide for themselves? As President Bush said, 'You're asking me whether or not people ought to be exposed to different ideas, the answer is yes.' At first hearing, everything about the phrase 'both sides' warms the hearts of educators like ourselves.
>
> ...
>
> Intelligent design is not ... a scientific argument at all, but a religious one. It might be worth discussing in a class on the history of ideas, in a philosophy class on popular logical fallacies, or in a comparative religion class on origin myths from around the world. But it no more belongs in a biology class than alchemy belongs in a chemistry class, phlogiston in a physics class or the stork theory in a sex education class. In those cases, the demand for equal time for 'both theories' would be ludicrous. Similarly, in a class on 20th-century European history, who would demand equal time for the theory that the Holocaust never happened?
>
> ...
>
> If ID really were a scientific theory, positive evidence for it, gathered through research, would fill peer-reviewed scientific journals. This doesn't happen. It isn't that editors refuse to publish ID research. There simply isn't any ID research to publish. Its advocates bypass normal scientific due process by appealing directly to the non-scientific public and - with great shrewdness - to the government officials they elect."

19. Substitute denial of anthropogenic climate change for intelligent design and we have the problem that is created if public broadcasters were to give balance to science and ignorance. The vigilance of NGOs such as the requester here is essential to ensure that media organisations don't become the equivalent of purveyors of the "stork theory", with potentially significant consequences for public support for the inevitably painful steps that are going to be required to address the climate emergency. How painful? This is a matter already well-rehearsed in the public domain and in caselaw, but what's clear is that the Intergovernmental Panel on Climate Change (**IPCC**) has stated that to meet climate targets, rapid, deep and in most cases immediate cuts in GHG emissions are required. That isn't happening at anything remotely like the required scale and pace.

20. Perhaps it's not illegitimate to note by way of reminder that *Toole v. Minister for Housing, Local Government and Heritage I (No. 5)* [2023] IEHC 590, [2023] 10 JIC 2705 (Unreported, High Court, 27th October 2023) cites the Sixth IPCC assessment report (https://www.ipcc.ch/assessment-report/ar6/) (at para. 9). As stated in *Toole v. Minister for*

Housing, Local Government and Heritage II [2024] IEHC 610 (Unreported, High Court, 1st November 2024), the summary for policymakers (https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf) includes the following:

> "A.1 Human activities, principally through emissions of greenhouse gases, have unequivocally caused global warming, with global surface temperature reaching 1.1°C above 1850-1900 in 2011-2020. Global greenhouse gas emissions have continued to increase, with unequal historical and ongoing contributions arising from unsustainable energy use, land use and land-use change, lifestyles and patterns of consumption and production across regions, between and within countries, and among individuals (*high confidence*). ...
> A.2 Widespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have occurred. Human-caused climate change is already affecting many weather and climate extremes in every region across the globe. This has led to widespread adverse impacts and related losses and damages to nature and people (high confidence). Vulnerable communities who have historically contributed the least to current climate change are disproportionately affected (*high confidence*). ...
> A.3 Adaptation planning and implementation has progressed across all sectors and regions, with documented benefits and varying effectiveness. Despite progress, adaptation gaps exist, and will continue to grow at current rates of implementation. Hard and soft limits to adaptation have been reached in some ecosystems and regions. Maladaptation is happening in some sectors and regions. Current global financial flows for adaptation are insufficient for, and constrain implementation of, adaptation options, especially in developing countries (*high confidence*). ...
> A.4 Policies and laws addressing mitigation have consistently expanded since AR5. Global GHG emissions in 2030 implied by nationally determined contributions (NDCs) announced by October 2021 make it likely that warming will exceed 1.5°C during the 21st century and make it harder to limit warming below 2°C. There are gaps between projected emissions from implemented policies and those from NDCs and finance flows fall short of the levels needed to meet climate goals across all sectors and regions. (*high confidence*) ...
> B.1 Continued greenhouse gas emissions will lead to increasing global warming, with the best estimate of reaching 1.5°C in the near term in considered scenarios and modelled pathways. Every increment of global warming will intensify multiple and concurrent hazards (*high confidence*). Deep, rapid, and sustained reductions in greenhouse gas emissions would lead to a discernible slowdown in global warming within around two decades, and also to discernible changes in atmospheric composition within a few years (*high confidence*). ...
> B.2 For any given future warming level, many climate-related risks are higher than assessed in AR5, and projected long-term impacts are up to multiple times higher than currently observed (*high confidence*). Risks and projected adverse impacts and related losses and damages from climate change escalate with every increment of global warming (*very high confidence*). Climatic and non-climatic risks will increasingly interact, creating compound and cascading risks that are more complex and difficult to manage (*high confidence*). ...
> B.3 Some future changes are unavoidable and/or irreversible but can be limited by deep, rapid, and sustained global greenhouse gas emissions reduction. The likelihood of abrupt and/or irreversible changes increases with higher global warming levels. Similarly, the probability of low-likelihood outcomes associated with potentially very large adverse impacts increases with higher global warming levels. (*high confidence*) ...
> B.5 Limiting human-caused global warming requires net zero CO2 emissions. Cumulative carbon emissions until the time of reaching net zero CO2 emissions and the level of greenhouse gas emission reductions this decade largely determine whether warming can be limited to 1.5°C or 2°C (*high confidence*). Projected CO2 emissions from existing fossil fuel infrastructure without additional abatement would exceed the remaining carbon budget for 1.5°C (50%) (*high confidence*)....
> B.6 All global modelled pathways that limit warming to 1.5°C (>50%) with no or limited overshoot, and those that limit warming to 2°C (>67%), involve rapid and deep and, in most cases, immediate greenhouse gas emissions reductions in all sectors this decade. Global net zero CO2 emissions are reached for these pathway categories, in the early 2050s and around the early 2070s, respectively. (*high confidence*) ...
> B.7 If warming exceeds a specified level such as 1.5°C, it could gradually be reduced again by achieving and sustaining net negative global CO2 emissions. This would require additional deployment of carbon dioxide removal, compared to pathways without overshoot, leading to greater feasibility and sustainability concerns. Overshoot entails adverse impacts, some irreversible, and additional risks for human and natural systems, all growing with the magnitude and duration of overshoot. (*high confidence*) ...

Urgency of Near-Term Integrated Climate Action
C.1 Climate change is a threat to human well-being and planetary health (*very high confidence*). There is a rapidly closing window of opportunity to secure a liveable and sustainable future for all (*very high confidence*). Climate resilient development integrates adaptation and mitigation to advance sustainable development for all, and is enabled by increased international cooperation including improved access to adequate financial resources, particularly for vulnerable regions, sectors and groups, and inclusive governance and coordinated policies (*high confidence*). The choices and actions implemented in this decade will have impacts now and for thousands of years (*high confidence*). ...
C.2 Deep, rapid, and sustained mitigation and accelerated implementation of adaptation actions in this decade would reduce projected losses and damages for humans and ecosystems (*very high confidence*), and deliver many co-benefits, especially for air quality and health (*high confidence*). Delayed mitigation and adaptation action would lock in high-emissions infrastructure, raise risks of stranded assets and cost-escalation, reduce feasibility, and increase losses and damages (*high confidence*). Near-term actions involve high up-front investments and potentially disruptive changes that can be lessened by a range of enabling policies (*high confidence*). ...
C.6 Effective climate action is enabled by political commitment, well-aligned multilevel governance, institutional frameworks, laws, policies and strategies and enhanced access to finance and technology. Clear goals, coordination across multiple policy domains, and inclusive governance processes facilitate effective climate action. Regulatory and economic instruments can support deep emissions reductions and climate resilience if scaled up and applied widely. Climate resilient development benefits from drawing on diverse knowledge. (*high confidence*) ..."

Facts in relation to position in other EEA states and the UK

21. The AIE directive is a text with EEA relevance: https://www.efta.int/eea-lex/32003l0004. Thus the law and practice of EU and other EEA members as well as former members is relevant – potentially 30 countries excluding Ireland. RTÉ obtained information from other EBU members in February 2024 on practice, and with some updates and adding the UK, it shows no evidence that most countries treat public broadcasters as public authorities under the directive. The current position insofar as information available to me indicates is as follows. Note that Demark is divided in two on the basis that one public broadcaster appears to be regarded as within the definition and another one is not. The total applicability of the AIE directive in this table is EU 27 + 3 other EEA + 1 former EU member (UK) minus Ireland (position to be determined in these proceedings) =30.

	EEA member states/ former member state	Number of states
States where available information indicates an understanding that public service broadcaster is not a public authority	Austria, Bulgaria, Czech Republic Denmark (TV2), Estonia, Finland, France, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg Netherlands, Poland, Romania, Slovakia, Spain, Sweden United Kingdom	19.5
Countries where available information indicates an understanding that public service broadcaster is a public authority	Belgium Croatia Cyprus Denmark (DR) Germany Iceland	8.5

	Norway Portugal Slovenia	
States in respect of which no information received	Liechtenstein Mata	2
Total		30

Facts in relation to the request

22. A request for access to information was made by Mr Ken Foxe of Right to Know CLG on 19th July 2021. The following categories of documents were sought:

(i) Copies of any guidance, training or other such advice issued to RTÉ journalists on how to communicate/cover climate change to audience, with this part of the request to cover the period from 1st January 2020 to the date of receipt of the request, being 19th July 2021.

(ii) A record of how many representations RTÉ received regarding its coverage of climate change from 1st January 2020 to 19th July 2021.

(iii) A copy of all representations or correspondence received by RTÉ relating to their coverage of climate change issues in 2021. In respect of this category, Mr Foxe indicated that he would accept a representative sample of roughly 25 items of correspondence should there be a large volume of correspondence.

23. Insofar as concerns category (i), Copies of any guidance, training or other such advice issued to RTÉ journalists on how to communicate/cover climate change to audience, with this part of the request to cover the period from 1st January 2020 to the date of receipt of the request, being 19th July 2021, no basis has been shown to say that this may relate to privileged journalistic activity.

24. Insofar as concerns category (ii), a record of how many representations RTÉ received regarding its coverage of climate change from 1st January 2020 to 19th July 2021, such a record in itself does not relate to privileged journalistic activity.

25. Insofar as concerns category (iii), a copy of all representations or correspondence received by RTÉ relating to their coverage of climate change issues in 2021, an examination of these documents would be required and findings made as to whether they involve journalistic privilege, if that were to be an issue. In respect of this category, Mr Foxe indicated that he would accept a representative sample of roughly 25 items of correspondence should there be a large volume of correspondence.

26. Generally the affidavit evidence wasn't contradicted but we must subtract from it averments that while evidential in form are legal or argumentative in substance.

27. I accept Mr Foxe's averment that this was not intended to impinge on journalistic freedom. Whether a request actually so impinges would be a matter for decision in adjudicating on any specific request.

28. I accept Mr Dowling's evidence that RTÉ does not have a record (that is, as a stand-alone document) of the number of representations received by it regarding its coverage of climate change in 2020 or 2021. I accept his evidence that the creation of such a record would require extensive work by RTÉ. Whether that amounts to a disproportionate burden is a matter for evaluative judgment if that arises.

29. On the same basis I accept his evidence as follows:

> "41. In this context, it can be noted that RTÉ receives a multiplicity of representations on a wide range of issues, including some made in respect of issues relating to climate change. There is no single unit to which representations on individual issues such a climate change are directed. RTÉ encourages people to contact programmes directly, which many do on a daily basis. In addition, people also get in contact with their views via feedback@rte.ie and info@rte.ie, which are managed by the Information Office. People can, and do, contact individual reporters, programme makers and senior executives such as the Head of News and Current Affairs and the Director General with their views on a wide range of issues.
>
> 42. Therefore, there are a wide range of individuals, programmes and sections which potentially receive representations on climate change. This includes the newsroom, individual programmes on television and radio, individual staff in both editorial and corporate divisions. This demonstrates the difficulty in creating a single record which identifies the number of representations received by RTÉ on any single topic. To be in a position to create an accurate record, it would be necessary to engage with every individual who may have received such representation to try to ascertain whether they held any records or information which fell within the scope of the request.
>
> 43. This would involve engagement with many hundreds of individuals and would require a review of each of their email inboxes, along with any hard copy correspondence, including journalists notes and notebooks retained by them. It would also require a close review of

the contents of any representations to identify whether they addressed issues relating to climate change, irrespective of whether that term was used or not. Further, as noted to the Commissioner, this process would be impacted by the fact that in 2021 RTÉ changed its computer operating system, a change which included the deletion of non-essential records.

44. This exercise would be required to be carried out simply for the purpose of creating a record of the number of representations received in respect of climate change. It would then be necessary to carry out a separate review of each representation to identify whether it is subject to disclosure or comes within one of the exemptions in the AIE Regulations. This would require the use of significant resources and would be disruptive to the core functions of RTÉ.

45. The difficulties in collating records which fall within the scope of the request made is illustrated by the exercise completed by RTÉ for the purpose of releasing a sample of representations to Right to Know. It was explained to the Commissioner that in order to try to identify representations which were made to RTÉ on the issue of climate change, the Information Office was asked to carry out a review of the two operating email accounts which allow anyone to contact RTÉ. A search of those email inboxes using the phrase 'climate change' resulted in a total of 614 emails being captured. For the purposes of releasing a sample of representations to Right to Know, 40 emails were randomly selected and a sample were released from that sub-set.

46. This demonstrates the volume of records which could be generated if it was necessary to extend the searches to any person or programme who may have received a representation in respect of climate change. As noted above, all of those records would then have to be reviewed to confirm whether the representation was, in fact, relating to climate change and, if so, whether it was subject to any exemption. As set out in the previous paragraph, the search that was done was only conducted using one search term. If additional search terms were used, it would inevitably result in further records being returned, thus increasing the scope of the review exercise."

30. In order to identify records, RTÉ carried out searches of inboxes associated with two email addresses, which are the main avenues to contact RTÉ, and of the telephone log of the information office, using the search term "climate change".

31. By decision dated 17th August 2021, RTÉ made an initial decision, authored by Mr Dowling, who replied to Mr Foxe, indicating that RTÉ did not have any documents in the first two categories. In respect of the third category, RTÉ released a number of documents but noted that this was not done in furtherance of any particular legal duty, and indicated that this was a pragmatic decision taken by RTÉ and not intended to create any precedent. RTÉ reserved its rights in respect of all issues concerning the application of the AIE regulations.

32. The records released by RTÉ were a sample of documents which fell within (c) of the request made by Right to Know, with personal information redacted. They were not a "representative" sample because one could only assert that if one had a knowledge of the entire group from which representatives were selected.

33. By email dated 17th August 2021, Mr Foxe sought a review of the initial RTÉ decision. In respect of the categories, Mr Foxe's response was as follows:

(i) in relation to Category 1, he accepted that there were no such documents;

(ii) in relation to Category 2, Mr Foxe contended that the AIE regulations do not require a requester to seek records, and that, in his opinion, RTÉ could provide the requested information "with a minimum of effort"; and

(iii) finally, in relation to Category 3, Mr Foxe argued that redactions had been made to the records "with no detailed explanation or justification of why this has happened".

34. An internal review of the decision was carried out by Ms Eleanor Bleahene. By decision dated 14th September 2021, Ms Bleahene upheld the decision on the second and third categories, concluding that the information that came within the third category was not environmental information.

35. On 29th September 2021, Right to Know lodged an appeal against the decision of RTÉ with the commissioner pursuant to art. 12 of the AIE regulations.

36. By email dated 12th October 2021, the commissioner informed RTÉ that the commissioner had accepted the appeal from Mr Foxe and requested certain information and submissions from RTÉ.

37. By email of 10th November 2021, RTÉ provided a submission to the commissioner in respect of the appeal. The submission contended, *inter alia*, that RTÉ is not a public authority within the meaning of art. 3 of the AIE regulations.

38. Also by emails of 10th November 2021, RTÉ provided the commissioner with a copy of the records which had been released to Right to Know. Initially, redacted versions of the records were sent and subsequently un-redacted versions of the records were provided to the commissioner.

39. By letter dated 5th December 2022, Ms Emma Libreri of the Office of the Commissioner wrote to RTÉ indicating that she had been assigned to the appeal as investigator. Ms Libreri further raised queries, in respect of which any further submissions were to be filed by 19th December 2022. The relevant queries are the first five:

(i) whether RTÉ wished to maintain the same position in respect of its argument that it was not a public authority within the meaning of the AIE regulations as advanced in OCE-108819-S8Z3Y7;

(ii) similarly, Ms Libreri queried whether RTÉ was adopting the same position as in OCE-108819-S8Z3Y7 in respect of whether the information sought constituted environmental information within the meaning of the AIE regulations;

(iii) what steps would be required of RTÉ to provide an estimate of the number of representations received by RTÉ in the timeframe specified;

(iv) what steps were taken by RTÉ to identify whether information within the scope of part (b) of the request were held by it; and

(v) Ms Libreri noted that the commissioner had considered the meaning of "material form" in the AIE regulations in OCE-109706-Y8Y0V3 (Logue & An Bord Pleanála) and queried whether RTÉ had any further comments to make in that respect.

40. Following correspondence between Mr Dowling and Ms Libreri, on behalf of the commissioner, on 15th December 2022 and 16th December 2022, the deadline for RTÉ to file submissions was extended to 19th January 2023.

41. RTÉ filed submissions in respect of the appeal on 19th January 2023.

42. Subsequently, the commissioner delivered a written decision dated 30th November 2023. The decision was notified to RTÉ on 1st December 2023.

43. The decision itself summarises the outcome as follows:

"Issue: Whether (i) RTÉ is a public authority within the meaning of the AIE Regulations; (ii) the information requested is 'environmental information' within the meaning of the Regulations; and (iii) article 9(2)(a) of the Regulations provides grounds for refusal of the request.

Summary of Commissioner's Decision: The Commissioner found that (i) RTÉ is a public authority within the meaning of the AIE Regulations; (ii) the information requested is 'environmental information' within the meaning of the Regulations; and (iii) article 9(2)(a) of the Regulations does not provide grounds for refusal of the request."

44. There are a number of other requests of relevance:

(i) A previous decision of the commissioner which addressed the question of whether RTÉ is a public authority. That decision issued in June 2022 under reference OCE-108819-S8Z3Y7, made on remittal following the decision in *Right to Know CLG v. Commissioner for Environmental Information and RTÉ* [2021] IEHC 353 (Unreported, High Court, Barrett J., 20th April 2021). The commissioner determined that RTÉ was a public authority within the meaning of each of paragraphs (a), (b) and (c) of the definition of environmental information. This decision was not appealed by RTÉ for various reasons (RTÉ did not so object initially, plus the information had been released anyway so the matter was moot). But that doesn't prevent RTÉ from making the objection in the present case.

(i) Another pending appeal which has not yet been determined by the commissioner – reference number OCE-111364-K0R7J3. In that context RTÉ disputed whether it was a public authority – something which prompted the commissioner to consider that in the OCE-108819-S8Z3Y7 matter.

(ii) There are four other pending appeals where this issue arises which are currently pending before the commissioner.

45. It is also relevant to RTÉ's objections to the commissioner seeing *prima facie* privileged material that in another case, the commissioner insisted on seeing papers even though *prima facie* they were privileged – in that case requests for legal advice – see para. 15 of Mr X and Forestry Appeals Committee OCE-144739-W3Z9K6 (https://ocei.ie/en/ombudsman-decision/bcc91-mr-x-and-forestry-appeals-committee/).

Procedural history

46. The appeal was lodged in the High Court on 30th January 2024.

47. The appeal was first returnable before the High Court on 12th February 2024.

48. Points of opposition were filed by the commissioner on 19th April 2024.

49. Points of opposition were filed by the notice party on 25th April 2024.

50. On 29th April 2024, the appeal was listed for hearing on 13th November 2024.

51. Legal submissions were filed by RTÉ on 30th September 2024.

52. Legal submissions were filed by the commissioner on 18th October 2024.

53. Legal submissions were filed by the notice party on 24th October 2024.

54. The matter was heard on 13th and 14th November 2024. It was then adjourned to 18th November 2024 for a further affidavit and an analysis by counsel of the relevant factual situation in comparable broadcasters across the EEA. At that point, the possibility of further submissions on discrete issues was raised and the matter was adjourned to 2nd December 2024 for that purpose, with the affidavit to be on hold pending further information form Malta and Liechtenstein.

55. Ultimately the matter was listed on 16th December 2024 at which point additional information was received and judgment was reserved subject to the parties adding a table of the evidence of practice in the relevant jurisdictions if such could be prepared imminently.

Relief sought

56. The reliefs sought in the notice of motion are as follows:

"1. An Order setting aside the decision of the Commissioner for Environmental Information made under Article 12(5) of the European Communities (Access to Information on the Environment) Regulations 2007 - 2018 under Reference OCE-113639-G4G9Z9 dated 30 November 2023 and issued on 1 December 2023.

2. Such Declarations of the legal rights and/or legal position of the Appellant and/or persons similarly situated and/or the legal duties and/or legal position of the Respondent as the Court shall consider appropriate.

3. Such further or other Order as this Honourable Court may deem fit.

4. If necessary, a Declaration that sections 3 and 4 of the Environment (Miscellaneous Provisions) Act 2011, and/or the interpretative obligation set out in Case C-470/16 North East Pylon Pressure Campaign Limited v. An Bord Pleanála whereby in proceedings where the application of national environmental law is at issue, it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention, apply to these proceedings.

5. An Order for the costs of and incidental to this Appeal."

Grounds of appeal

57. The core grounds of appeal are as follows:

"1. The Commissioner for Environmental Information erred in law and mis-interpreted the definition of a public authority in Article 3 of the European Communities (Access to Information on the Environment) Regulations 2007 – 2018 as amended in concluding that Raidió Teilifís Éireann is a public authority for the purposes of the AIE Regulations and, in particular, within the meaning of paragraph (a) of that definition.

2. The Commissioner for Environmental Information erred in law and mis-interpreted the definition of environmental information in Article 3(1) of the European Communities (Access to Information on the Environment) Regulations 2007 – 2018 as amended in concluding that the records which were the subject of the request made by Right to Know CLG were environmental information within the meaning of Article 3(1) of those Regulations. The Commissioner for Environmental Information erred in law in concluding that the records requested by Right to Know CLG was information on a factor within the meaning of paragraph (b) of the definition of environmental information and/or was information on a measure within the meaning of paragraph (c) of the definition of environmental information.

3. The Commissioner for Environmental Information erred in law and mis-interpreted the meaning of the term 'material form' in the definition of environmental information in Article 3 of the European Communities (Access to Information on the Environment) Regulations 2007 – 2018 as amended.

4. The Commissioner for Environmental Information erred in law, mis-applied and failed to properly interpret Article 9(2)(a) of the European Communities (Access to Information on the Environment) Regulations 2007 – 2018 as amended and wrongly concluded that Raidió Teilifís Éireann was not entitled to rely on that exemption when the matter was remitted to it for further consideration."

Procedure for appeal – art. 6(2)

58. Article 9(1) of the Aarhus convention provides:

"1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law. In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law. Final decisions under this

paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph."

59. Article 6 of the AIE directive provides for recourse to review:

"Article 6

Access to justice

1. Member States shall ensure that any applicant who considers that his request for information has been ignored, wrongfully refused (whether in full or in part), inadequately answered or otherwise not dealt with in accordance with the provisions of Articles 3, 4 or 5, has access to a procedure in which the acts or omissions of the public authority concerned can be reconsidered by that or another public authority or reviewed administratively by an independent and impartial body established by law. Any such procedure shall be expeditious and either free of charge or inexpensive.

2. In addition to the review procedure referred to in paragraph 1, Member States shall ensure that an applicant has access to a review procedure before a court of law or another independent and impartial body established by law, in which the acts or omissions of the public authority concerned can be reviewed and whose decisions may become final. Member States may furthermore provide that third parties incriminated by the disclosure of information may also have access to legal recourse.

3. Final decisions under paragraph 2 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this Article."

60. While art. 9(1) of Aarhus has a requirement of expedition, the EU legislature has transferred that to an internal type review created in art. 6(1) of the directive and otherwise implemented in arts. 6(2) and 9(1). In the Irish context, the internal review corresponds to art. 6(1) of the directive and the appeal to the commissioner corresponds to art. 6(2). Access to the court is either under art. 6(2) or by way of gold-plating of EU requirements, something which we don't need to decide for present purposes.

61. In Case ACCC/C/2016/141 (Ireland), the Aarhus Convention Compliance Committee has decided that the court is also acting under the first sub-paragraph of art. 9(1) of Aarhus, and is subject to a requirement of timeliness under art. 9(4), a requirement that was not being complied with in Ireland as of the date of that finding (https://unece.org/sites/default/files/2021-04/ece_mp.pp_c.1_2021_8_eng.pdf).

62. The appeal is brought to the court against the decision of the respondent under art. 13 of the European Communities (Access to Information on the Environment) Regulations 2007:

"Appeal to High Court on point of law

13. (1) A party to an appeal under article 12 or any other person affected by the decision of the Commissioner may appeal to the High Court on a point of law from the decision.

(2) An appeal under sub-article (1) shall be initiated not later than 2 months after notice of the decision under article 12(5) was given to the party to the appeal or other person affected.

(3) Where an appeal under this article by an applicant or other person affected is dismissed by the High Court or, on appeal from that Court, the Supreme Court, the Court may order that some or all of the costs in relation to the appeal of any person affected be paid by the public authority concerned, if it considers that the point of law concerned was of exceptional public importance, and but for this sub-article, would not so order.

(4) In an appeal under this article to the High Court or, on appeal from that Court, the Supreme Court, the Court shall, where appropriate, specify the period within which effect shall be given to its order."

63. The appeal process is discussed in *Deely v. Information Commissioner* [2001] IEHC 91, [2001] 3 I.R. 439 (McKechnie J.); *Sheedy v. Information Commissioner* [2005] IESC 35, [2005] 2 I.R. 272, [2005] 2 I.L.R.M. 374 (Fennelly J., Kearns J.); *Fitzgibbon v. Law Society* [2014] IESC 48, [2015] 1 I.R. 516, [2016] 2 I.L.R.M. 202 (Denham C.J., McKechnie J., Clarke J.); and *Minch v. Commissioner for Environmental Information* [2017] IECA 223, [2017] 7 JIC 2807 (Unreported, Court of Appeal, Hogan J., 28th July 2017). Insofar as the commissioner demands curial deference relying on *Westwood v. Information Commissioner* [2014] IEHC 375, [2015] 1 I.R. 489 (Cross J.); *F.P. v. Information Commissioner* [2019] IECA 19, [2019] 1 JIC 3003 (Unreported, Court of Appeal, Peart J., 30th January 2019); *Minister for Communications, Energy and Natural Resources v. The Information Commissioner* [2020] IESC 57, [2022] 1 I.R. 1, [2021] 2 I.L.R.M. 81 (Baker J.), there isn't a more restricted standard of review on an "appeal" as opposed to that applying to judicial review. Nor would that be logical. Nor is there a special standard of review for the commissioner. The standard has been discussed in other cases (see the caselaw cited in *O'Donnell v. An Bord Pleanála* [2023] IEHC 594, [2023] 11 JIC 0102 (Unreported, High Court, 1st November 2023); *Friends of the Irish Environment v. Minister for Housing, Local Government, Heritage & Ors.* [2024] IEHC 588 (Unreported, High Court, 17th October 2024) (where the point was made that there was

no special standard for review of ministerial directions – it almost seems that in every case somebody claims there is a special standard of review – not a correct approach):

(i) review of issues of law is non-deferential;
(ii) review of mixed questions of fact and law is somewhat deferential; or
(iii) review of findings of fact is highly deferential.

64. If one is to ask how can a finding of fact even arise when the appeal to the court is meant to be confined to law, the answer is that an unreasonable finding of fact involves a legally cognisable error, and even an ostensibly clear finding of fact may include a methodological issue or a procedural issue which itself is an issue of law subject to non-deferential review. Furthermore, in the case of contested facts, the court to which the appeal is brought must in the first instance view the matter through the prism of the evidence and the extent to which it is contested.

65. Ultimately there is no disputed issue of domestic or EU law that requires resolution under this heading, leaving aside the challenging question as to what are the implications of the need to prevent further delay in breach of EU law – an issue to which we return under the third question below.

EU law

66. Article 47 of the EU Charter of Human Rights provides:

"Article 47 - Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."

67. The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (done at Aarhus on 25 June 1998, entered into force 30 October 2001), 2161 UNTS 447 (the **Aarhus Convention**) was adopted on behalf of the EU which *inter alia* provides for access to information as one of the three pillars of the convention alongside public participation and access to justice.

68. Article 9 provides:

"Article 9

ACCESS TO JUSTICE

1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having a sufficient interest

or, alternatively,

(b) Maintaining impairment of a right, where the administrative

procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice."

69. The Aarhus Convention Implementation Guide (https://unece.org/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf) provides useful interpretative assistance, although we also need to be alert to differences in wording between the convention and the directive.

70. Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment initially provided for access to information on the environment.

71. Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information repealed and replaced Directive 90/313.

72. Article 2 provides:

"Article 2

Definitions

For the purposes of this Directive:

1. 'Environmental information' shall mean any information in written, visual, aural, electronic or any other material form on:

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

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

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

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

2. '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).

Member States may provide that this definition shall not include bodies or institutions when acting in a judicial or legislative capacity. If their constitutional provisions at the date of adoption of this Directive make no provision for a review procedure within the meaning of Article 6, Member States may exclude those bodies or institutions from that definition.

3. 'Information held by a public authority' shall mean environmental information in its possession which has been produced or received by that authority.
4. 'Information held for a public authority' shall mean environmental information which is physically held by a natural or legal person on behalf of a public authority.
5. 'Applicant' shall mean any natural or legal person requesting environmental information.
6. 'Public' shall mean one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organisations or groups."

73. Article 6 provides:

"Article 6
Access to justice
1. Member States shall ensure that any applicant who considers that his request for information has been ignored, wrongfully refused (whether in full or in part), inadequately answered or otherwise not dealt with in accordance with the provisions of Articles 3, 4 or 5, has access to a procedure in which the acts or omissions of the public authority concerned can be reconsidered by that or another public authority or reviewed administratively by an independent and impartial body established by law. Any such procedure shall be expeditious and either free of charge or inexpensive.
2. In addition to the review procedure referred to in paragraph 1, Member States shall ensure that an applicant has access to a review procedure before a court of law or another independent and impartial body established by law, in which the acts or omissions of the public authority concerned can be reviewed and whose decisions may become final. Member States may furthermore provide that third parties incriminated by the disclosure of information may also have access to legal recourse.
3. Final decisions under paragraph 2 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this Article."

CJEU caselaw

74. In the judgment of 12 June 2003, *Eva Glawischnig v Bundesminister für soziale Sicherheit und Generationen*, C-316/01, ECLI:EU:C:2003:343 the CJEU decided:

"Article 2(a) of Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment is to be interpreted as meaning that the name of the manufacturer and the product description of foodstuffs which have been the subject of administrative measures for controlling compliance with Council Regulation (EC) No 1139/98 of 26 May 1998 concerning the compulsory indication [in] the labelling of certain foodstuffs produced from genetically modified organisms of particulars other than those provided for in Directive 79/112/EEC, as amended by Commission Regulation (EC) No 49/2000 of 10 January 2000, the number of administrative penalties imposed following those measures, and the producers and products concerned by such penalties do not constitute information relating to the environment within the meaning of that provision."

75. In the judgment of 13 April 2005, *Verein für Konsumenteninformation v Commission of the European Communities*, T-2/03, ECLI:EU:T:2005:125, a refusal of information as manifestly unreasonable was annulled.

76. In the judgment of 28 July 2011, *Office of Communications v Information Commissioner, C-71/10*, ECLI:EU:C:2011:525, the CJEU held:

"Article 4(2) 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 must be interpreted as meaning that, where a public authority holds environmental information or such information is held on its behalf, it may, when weighing the public interests served by disclosure against the interests served by refusal to disclose, in order to assess a request for that information to be made available to a natural or legal person, take into account cumulatively a number of the grounds for refusal set out in that provision."

77. In the judgment of 19 December 2013, *Fish Legal and Emily Shirley v Information Commissioner and Others*, C-279/12, ECLI:EU:C:2013:853 (Grand Chamber), the CJEU decided:

(i) "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.

(ii) Undertakings, such as United Utilities Water plc, Yorkshire Water Services Ltd and Southern Water Services Ltd, 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.

(iii) Article 2(2)(b) of Directive 2003/4 must be interpreted as meaning that a person falling within that provision constitutes a public authority in respect of all the environmental information which it holds. Commercial companies, such as United Utilities Water plc, Yorkshire Water Services Ltd and Southern Water Services Ltd, which are capable of being a public authority by virtue of Article 2(2)(c) of the directive only in so far as, when they provide public services in the environmental field, they are under the control of a body or person falling within Article 2(2)(a) or (b) of the directive are not required to provide environmental information if it is not disputed that the information does not relate to the provision of such services."

78. In the judgment of 23 November 2016, *Bayer CropScience SA-NV and Stichting De Bijenstichting v College voor de toelating van gewasbeschermingsmiddelen en biociden*, C-442/14, ECLI:EU:C:2016:890, the CJEU decided:

(i) "Article 4(2) 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 must be interpreted as meaning that the fact that the applicant for authorisation to place a plant protection product or biocide on the market, did not, during the procedure for obtaining that authorisation, request that information submitted under that procedure be treated as confidential on the basis of Article 14 of Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market, Article 19 of Directive 98/8/EC of the European Parliament and of the Council of 16 February 1998 concerning the placing of biocidal products on the market or Article 33(4) and Article 63 of Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC does not preclude the competent authority, which has received, following the closure of that procedure, a request for access to the information submitted on the basis of Directive 2003/4 by a third party, from examining the applicant's objection to that request for access and refusing it, if necessary, pursuant to point (d) of the first subparagraph of Article 4(2) of that directive on the ground that the disclosure of that information would adversely affect the confidentiality of commercial or industrial information.

(ii) The second subparagraph of Article 4(2) of Directive 2003/4 must be interpreted as follows:

– 'emissions into the environment' within the meaning of that provision covers the release into the environment of products or substances such as plant protection products or biocides and substances contained in those products, to the extent that that release is actual or foreseeable under normal or realistic conditions of use;

– 'information on emissions into the environment' within the meaning of that provision covers information concerning the nature, composition, quantity, date and place of the 'emissions into the environment' of those products or substances, and data concerning the medium to long-term consequences of those emissions on the environment, in particular information relating to residues in the environment following application of the product in question and studies on the measurement of the substance's drift during that application, whether the data comes from studies performed entirely or in part in the field, or from laboratory or translocation studies.

(iii) The second subparagraph of Article 4(2) of Directive 2003/4 must be interpreted as meaning, in the event of a request for access to information on emissions into the environment whose disclosure would adversely affect one of the interests referred to in points (a), (d), and (f) to (h) of the first subparagraph of Article 4(2) of that directive, that only relevant data which may be extracted from the source of information concerning emissions into the environment must be disclosed where it is possible to separate those data from the other information contained in that source, which is for the referring court to assess."

79. In the judgment of 15 April 2021, *Friends of the Irish Environment Ltd v Commissioner for Environmental Information*, C-470/19, ECLI:EU:C:2021:271, the CJEU held:

"Article 2, point 2, 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 must be interpreted as meaning that it does not govern access to environmental information contained in court files, where neither the courts nor the bodies or institutions under their control, which thus have close links with those courts, constitute 'public authorities' within the meaning of that provision and therefore do not fall within the scope of that directive.

80. This case seems to have the implication that the *Fish Legal* conditions may be necessary but are not sufficient to determine whether a body is a public authority. Some argument also focused on Advocate General Bobek's opinion in the case.

81. In the judgment of 20 January 2021, *Land Baden-Württemberg v D.R.*, C-619/19, ECLI:EU:C:2021:35, the CJEU decided:

(i) "Article 4(1)(e) 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 must be interpreted as meaning that the term 'internal communications' covers all information which circulates within a public authority and which, on the date of the request for access, has not left that authority's internal sphere – as the case may be, after being received by that authority, provided that it was not or should not have been made available to the public before it was so received.

(ii) Article 4(1)(e) of Directive 2003/4 must be interpreted as meaning that the applicability of the exception to the right of access to environmental information provided for by it in respect of internal communications of a public authority is not limited in time. However, that exception can apply only for the period during which protection of the information sought is justified."

Domestic law

82. The European Communities (Access to Information on the Environment) Regulations 2007 (https://revisedacts.lawreform.ie/eli/2007/si/133/front/revised/en/html) transpose the directive in Irish law. Article 3 is as follows:

"3. (1) In these Regulations—

'applicant' means any natural or legal person requesting environmental information pursuant to these Regulations;

'Commissioner' means the holder of the office of Commissioner for Environmental Information established under article 12;

'Directive' means Directive 2003/4/EC of the European Parliament and of the Council of 28 January 20031, which, for convenience of reference, is set out in the Schedule;

'environmental information' means any information in written, visual, aural, electronic or any other material form on—

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

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

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

(d) reports on the implementation of environmental legislation,

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c), and

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

'environmental information held by a public authority' means environmental information in the possession of a public authority that has been produced or received by that authority;

'environmental information held for a public authority' means environmental information that is physically held by a natural or legal person on behalf of that authority;

'Minister' means the Minister for the Environment, Heritage and Local Government;

'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;

'request' means a request for environmental information pursuant to article 6.
(2) Notwithstanding anything in sub-article (1), in these Regulations 'public authority' does not include—
(a) the President,
(b) the Office of the Secretary General to the President,
(c) the Council of State,
(d) any Commission for the time being lawfully exercising the powers and performing the duties of the President, or
(e) any body when acting in a judicial or legislative capacity.
(3) A word or expression that is used in these Regulations and is also used in the Directive has the same meaning in these Regulations that it has in the Directive."

83. Article 7 states:
"7. (1) A public authority shall, notwithstanding any other statutory provision and subject only to these Regulations, make available to the applicant any environmental information, the subject of the request, held by, or for, the public authority.
(2) (a) A public authority shall make a decision on a request and, where appropriate, make the information available to the applicant as soon as possible and, at the latest, but subject to paragraph (b) and sub-article (10), not later than one month from the date on which such request is received by the public authority concerned.
(b) Where a public authority is unable, because of the volume or complexity of the environmental information requested, to make a decision within one month from the date on which such request is received, it shall, as soon as possible and at the latest, before the expiry of that month—

(i) give notice in writing to the applicant of the reasons why it is not possible to do so, and
(ii) specify the date, not later than 2 months from the date on which the request was received, by which the response shall be made,

and make a decision on the request and, where appropriate, make the information available to the applicant by the specified date.
(3) (a) Where a request has been made to a public authority for access to environmental information in a particular form or manner, access shall be given in that form or manner unless—

(i) the information is already available to the public in another form or manner that is easily accessible, or
(ii) access in another form or manner would be reasonable.

(b) Where a public authority decides to make available environmental information other than in the form or manner specified in the request, the reason therefor shall be given by the public authority in writing.

(4) Where a decision is made to refuse, in whole or in part, a request for environmental information, the public authority concerned shall—
(a) subject to paragraph (b), notify the applicant of the decision not later than one month following receipt of the request,
(b) in a case to which sub-article (2)(b) applies, notify the applicant as soon as possible but not later than 2 months following receipt of the request,
(c) specify the reasons for the refusal,
(d) inform the applicant of his or her rights of internal review and appeal in accordance with these Regulations, including the time within which such rights may be exercised.
(5) Where a request is made to a public authority and the information requested is not held by or for the authority concerned, that authority shall inform the applicant as soon as possible that the information is not held by or for it.
(6) Where sub-article (5) applies and the public authority concerned is aware that the information requested is held by another public authority, it shall as soon as possible—
(a) transfer the request to the other public authority and inform the applicant accordingly, or
(b) inform the applicant of the public authority to whom it believes the request should be directed.
(7) Where a request is made to a public authority which could reasonably be regarded as a request for environmental information but which is not a request that has been made in accordance with—
(a) article 6(1), or
(b) the Freedom of Information Acts 1997 and 2003,
the public authority concerned shall inform the applicant of his or her right of access to environmental information and the procedure by which that right can be exercised, and shall offer assistance to the applicant in this regard.
(8) Where a request is made by the applicant in too general a manner, the public authority shall, as soon as possible and at the latest within one month of receipt of the request, invite the applicant to make a more specific request and offer assistance to the applicant in the preparation of such a request.
(9) Where, in a request for information on factors affecting or likely to affect the environment, the applicant specifies that he or she requires information on the measurement procedures, including methods of analysis, sampling and pre-treatment of samples, used in compiling that information, the public authority shall, as Article 8(2) of the Directive requires, either make the information available to the applicant or refer the applicant to the standardised procedures.
(10) A public authority shall, in the performance of its functions under this article, have regard to any timescale specified by the applicant.
(11) Where a request is made for information which has been provided to the public authority on a voluntary basis by a third party and, in the opinion of the public authority, release of the information may adversely affect the third party, the public authority shall take all reasonable efforts to contact the third party concerned to seek consent or otherwise to release the information, pursuant to article 8(a)(ii) and article 10."

84. Article 11 states:
"Internal review of refusal
11. (1) Where the applicant's request has been refused under article 7, in whole or in part, the applicant may, not later than one month following receipt of the decision of the public authority concerned, request the public authority to review the decision, in whole or in part.
(2) Following receipt of a request for a review under sub-article (1), the public authority concerned shall designate a person unconnected with the original decision whose rank is the same as, or higher than, that of the original decision-maker to review the decision and that person shall—
(a) affirm, vary or annul the decision, and
(b) where appropriate, require the public authority to make available environmental information to the applicant,
in accordance with these Regulations.
(3) A decision under sub-article (2) shall be notified to the applicant within one month from receipt of the request for the internal review.
(4) Where the decision under sub-article (2) affirms a decision under article 7, or varies it in a way that results in the request being refused in whole or in part, the public authority concerned shall—
(a) specify the reasons for the decision under sub-article (2), and

(b) inform the applicant of his or her right of appeal in accordance with these Regulations, including the time within which such right may be exercised.
(5) In sub-article (1) and article 12(3)(a), the reference to a request refused in whole or in part includes a request that—
(a) has been refused on the ground that the body or person concerned contends that the body or person is not a public authority within the meaning of these Regulations,
(b) has been inadequately answered, or
(c) has otherwise not been dealt with in accordance with Article 3, 4 or 5 of the Directive (including the ground that the amount of the fee charged under article 15(1) is excessive)."

85. Article 12 states:

"Appeal to Commissioner for Environmental Information
12. (1) There is established the office of Commissioner for Environmental Information and the holder of the office shall be known as the Commissioner for Environmental Information and shall be independent in the performance of his or her functions.
(2) The holder of the office of Commissioner for Environmental Information shall be the person who, for the time being, holds the office of Information Commissioner under the Freedom of Information Acts 1997 and 2003.
(3) Where—
(a) a decision of a public authority has been affirmed, in whole or in part, under article 11, or
(b) a person other than the applicant, including a third party, would be incriminated by the disclosure of the environmental information concerned,
the applicant, the person other than the applicant or the third party may appeal to the Commissioner against the decision of the public authority concerned.]
(4) (a) An appeal under this article shall be initiated—
(i) not later than one month after receipt of the decision under article 11(3), or
(ii) where no decision is notified by a public authority, not later than one month from the time when a decision was required to be notified under article 11(3).
(b) Where the Commissioner is satisfied, in the circumstances of a particular case, that it is reasonable to do so, he or she may extend the time for initiating an appeal under this sub-article.
(5) Following receipt of an appeal under this article, the Commissioner shall—
(a) review the decision of the public authority,
(b) affirm, vary or annul the decision concerned, specifying the reasons for his or her decision, and
(c) where appropriate, require the public authority to make available environmental information to the applicant, in accordance with these Regulations.
(6) The Commissioner may, for the purposes of this article, do any of the following:
(a) require a public authority to make available environmental information to the Commissioner and, where appropriate—
(i) require the public authority concerned to attend before the Commissioner for that purpose, and
(ii) where the public authority is a body corporate, require its chief officer to attend,
(b) examine and take copies of any environmental information held by a public authority and retain it in his or her possession for a reasonable period,
(c) enter any premises occupied by a public authority and there require to be furnished with such environmental information as he or she may reasonably require, or take such copies of, or extracts from, any environmental information found or made available on the premises.
(7) A public authority shall comply with a decision of the Commissioner under sub-article (5) within 3 weeks after its receipt.
(8) Where a public authority fails to comply with a decision of the Commissioner within the period specified in sub-article (7), the Commissioner may apply to the High Court for an order directing the public authority to comply with that decision and, on the hearing of such an application, the High Court may grant such relief accordingly.
(9) (a) The Commissioner may refer any question of law arising in an appeal under this article to the High Court for determination and shall postpone the making of a decision until after the determination of the court proceedings.
(b) The High Court or, on appeal from that Court, the Supreme Court, may order that some or all of the costs of an applicant or other person affected in relation to a reference under this sub-article be paid by the public authority concerned.

(10) The Commissioner shall be assisted by the staff of the office of the Information Commissioner and by such other resources as may, from time to time, be available to that office."

86. Article 13 states:

"Appeal to High Court on point of law

13. (1) A party to an appeal under article 12 or any other person affected by the decision of the Commissioner may appeal to the High Court on a point of law from the decision.

(2) An appeal under sub-article (1) shall be initiated not later than 2 months after notice of the decision under article 12(5) was given to the party to the appeal or other person affected.

(3) Where an appeal under this article by an applicant or other person affected is dismissed by the High Court or, on appeal from that Court, the Supreme Court, the Court may order that some or all of the costs in relation to the appeal of any person affected be paid by the public authority concerned, if it considers that the point of law concerned was of exceptional public importance, and but for this sub-article, would not so order.

(4) In an appeal under this article to the High Court or, on appeal from that Court, the Supreme Court, the Court shall, where appropriate, specify the period within which effect shall be given to its order."

87. Numerous provisions of the Broadcasting Act 2009 (https://revisedacts.lawreform.ie/eli/2009/act/18/front/revised/en/html) are relevant.

88. Section 2(1) includes the following definitions:

"'corporation' means RTÉ or TG4 or both, as the case may be;

...

'Raidió Teilifís Éireann' means the authority established under section 3 of the Broadcasting Authority Act 1960;

...

'RTÉ' means Raidió Teilifís Éireann;

...

'Teilifís na Gaeilge' means the body established by section 44 of the Act of 2001;

'TG4' means Teilifís na Gaeilge;"

89. Section 81 states:

"81.— (1) The number of members of the board of a corporation shall be 12 in number, of which—

(a) 6 of them shall be appointed by the Government on the nomination of the Minister,

(b) subject to subsection (2), 4 of them shall be appointed by the Government on the nomination of the Minister,

(c) one shall be appointed by the Government following an election in accordance with section 83, and

(d) one shall be the director general of the corporation.

(2) Where an appointment is to be made by the Government under subsection (1)(b) or under that paragraph arising from a vacancy referred to in section 84(12)—

(a) the Minister shall inform the Joint Oireachtas Committee of the proposed appointment,

(b) The Minister in respect of an appointment under subsection (1)(a) shall provide a statement to the Joint Oireachtas Committee indicating the relevant experience and expertise of the persons or person nominated by the Minister for appointment or appointed by the Government on the nomination of the Minister, and such other matters as the Minister considers relevant,

(c) the Joint Oireachtas Committee shall within the period of 90 days of being so informed, advise the Minister of the names of the persons or name of the person it proposes that the Minister should nominate under subsection (1)(b) giving reasons, such as relevant experience and expertise, in relation to the proposed named persons or person,

(d) the Minister shall have regard to the advice and may accept the proposed named persons or some of them or the named person or decide to nominate as he or she sees fit other persons or another person, and

(e) inform the Joint Oireachtas Committee of his or her decision.

(3) Not less than 5 of the members of the board of a corporation shall be men and not less than 5 of them shall be women.

(4) The Joint Oireachtas Committee for the purposes of providing advice to the Minister under subsection (2) may establish a panel, for such duration, and consisting of such number of persons as the Joint Oireachtas Committee shall think proper.

(5) Persons placed on a panel established under subsection (4) shall—

(a) have experience of or have shown capacity in one or more of the matters stated in section 82 (1),

(b) in respect of TG4 comply with the requirements of section 82 (2), and

(c) be chosen with a view to representing the public interest in respect of public service broadcasting matters.

(6) The Joint Oireachtas Committee shall, insofar as is practicable, endeavour to ensure that among the persons placed on a panel under subsection (4) there is an equitable balance between men and women.

(7) The Joint Oireachtas Committee shall have sole responsibility for the selection and placing of candidates on a panel established under subsection (4)."

90. Section 98 states:

"98.— Subject to the requirements of this Act, a corporation shall be independent in the pursuance of its objects."

91. Section 110 states:

"110.— (1) A corporation shall, not later than 30 June in each year make a report to the Minister (in this section referred to as the 'annual report') in such form as the Minister may approve, on the performance of its functions and activities during the preceding year, and the Minister shall cause copies of the report to be laid before each House of the Oireachtas.

(2) Whenever the Minister so directs, the annual report shall also include such additional information on the performance of the corporation's functions and activities during the preceding year as the Minister may specify.

(3) A corporation shall co-operate with the Minister and the Authority in the performance of their respective functions under this Act including providing them with all necessary information.

(4) RTÉ shall on the third and fifth anniversaries of 18 April 2007 carry out a review of the provision of the television broadcasting service and sound broadcasting service referred to in paragraph (f) of section 114 (1).

(5) RTÉ shall make a report to the Minister of each review carried out by it under subsection (4).

(6) The Minister shall cause copies of each report made to him or her under subsection (5) to be laid before each House of the Oireachtas."

92. Section 114(1) states:

"114.— (1) The objects of RTÉ are—

(a) to establish, maintain and operate a national television and sound broadcasting service which shall have the character of a public service, be a free-to-air service and be made available, in so far as it is reasonably practicable, to the whole community on the island of Ireland,

(b) to establish and maintain a website in connection with the services of RTÉ under paragraphs (a), (c), (d), (e), (f), (g), (h) and (i),

(c) to establish and maintain a concert orchestra and other cultural performing groups in connection with the services of RTÉ under paragraphs (a), (f), (g) and (h),

(d) to assist and co-operate with the relevant public bodies in preparation for, and execution of, the dissemination of relevant information to the public in the event of a major emergency,

(e) to establish and maintain archives and libraries containing materials relevant to the objects of RTÉ under this subsection,

(f) to establish, maintain and operate a television broadcasting service and a sound broadcasting service which shall have the character of a public service, which services shall be made available, in so far as RTÉ considers reasonably practicable, to Irish communities outside the island of Ireland,

(g) subject to the consent of the Minister, the Minister having consulted with the Authority, to establish, maintain and operate, in so far as it is reasonably practicable, community, local, or regional broadcasting services, which shall have the character of a public service, and be available free-to-air,

(h) subject to the consent of the Minister, the Minister having consulted with the Authority, to establish and maintain audiovisual on-demand media services, in so far as it is reasonably practicable, which shall have the character of a public broadcasting service (such consent not being required in respect of such services which are ancillary to a broadcasting service provided under paragraphs (a), (d), (f) and (g)),

(i) to establish, maintain, and operate one or more national multiplexes,

(j) so far as it is reasonably practicable, to exploit such commercial opportunities as may arise in pursuit of the objects outlined in paragraphs (a) to (i)."

93. Section 123 provides:

"123.— (1) The Minister, with the approval of the Minister for Public Expenditure and Reform, may pay to RTÉ and TG4 out of monies provided by the Oireachtas, in respect of each financial year beginning with the financial year commencing on 1 January 2011, an amount

equal to the total of the receipts in that year in respect of television licence fees apportioned to RTÉ and TG4 as the Minister determines in accordance with subsection (1A) less—
(a) any expenses certified by the Minister as having been incurred by him or her in that year in relation to the collection of those fees, and
(b) any amount paid under section 156(2).
(1A) (a) The Minister shall, after consultation with the Minister for Public Expenditure and Reform, determine the portion of the amount referred to in subsection (1) to be paid to RTÉ and TG4 respectively.
(b) When making a determination for the purposes of paragraph (a), the Minister shall have regard to the ability of RTÉ and TG4 to fulfil their public service objects.
(2) The amount paid to RTÉ in each financial year under subsection (1) of this section, shall be used by RTÉ solely for the purposes of—
(a) pursuing its public service objects, and
(b) paying amounts levied on RTÉ under section 33.
(2A) The amount paid to TG4 in each financial year under subsection (1), shall be used by TG4 solely for the purposes of—
(a) pursuing its public service objects, and
(b) paying amounts levied on TG4 under section 33.
(3) The Minister, with the consent of the Minister for Finance, may from time to time, pay to RTÉ such an amount as he or she determines to be reasonable for the purposes of defraying the expenses incurred by RTÉ in the pursuance of its public service objects.
(4) The Minister, with the consent of the Minister for Finance, may from time to time, pay to TG4 such an amount as he or she determines to be reasonable for the purposes of defraying the expenses incurred by TG4 in—
(a) pursuing its public service objects, and
(b) paying amounts levied on TG4 under section 33.
(5) The Minister in making a determination under subsection (4) shall consider the multi-annual funding needs of TG4."

94. The original AIE directive was transposed by the European Communities Act 1972 (Access to Information on the Environment) Regulations 1998 (S.I. No. 125 of 1998).

95. The 2007 AIE regulations which revoke the 1998 regulations involve an almost literal transposition of the current AIE directive.

96. A relevant aspect of the domestic regulations is that the body carrying out the investigation, namely the commissioner, is also the body deciding whether there should be access to records that are *prima facie* privileged. So there is a lack of independence in that decision. The constitutionality of this procedure has not been challenged, although on one view it cuts against the tenor of the Supreme Court decision in *Damache v. DPP* [2012] IESC 11, [2012] 2 I.R. 266 (Denham C.J.).

Domestic caselaw

97. The regulations and the directive have been discussed in a number of domestic cases including the following:

(i) *NAMA v. Commissioner for Environmental Information* [2015] IESC 51, [2015] 4 I.R. 626, [2015] 2 I.L.R.M. 165 (O'Donnell J.) – the domestic regulations should be interpreted through the prism of EU law; NAMA is a public authority, having regard *inter alia* to its special powers under law.

(ii) *Minch v. Commissioner for Environmental Information* [2017] IECA 223, [2017] 7 JIC 2807 (Unreported, Court of Appeal, Hogan J., 28th July 2018) – a report prepared by the Minister for Communications, Energy and Natural Resources entitled "Analysis of Options for Potential State Intervention in the Role out of Next-Generation Broadband" amounted to information "on" an economic analysis or analyses used in the framework of a measure which itself affected or was likely to affect the environment.

(iii) *Right to Know CLG v. An Taoiseach* [2018] IEHC 372, [2019] 3 I.R. 22, [2019] 1 I.L.R.M. 270 (Faherty J.) – the constitutional protection for cabinet confidentiality is not dispositive of disclosure under the directive.

(iv) *Electricity Supply Board v. Commissioner for Environmental Information* [2020] IEHC 190, [2020] 4 JIC 0308 (Unreported, High Court, O'Regan J., 3rd April 2020) – *inter alia*, the commissioner's decisions were "confusing and contradictory" and (at para. 50(5)) the commissioner could not conclude that a transcript was environmental information in the circumstances "without either … specifying how the information is environmental on the content of the transcript, or how same is integral to the development of electricity infrastructure".

(v) *Redmond v. Commissioner for Environmental Information* [2020] IECA 83, [2021] 3 I.R. 695 (Collins J.) – in effectively deciding the appeal on the basis of the absence

of any direct evidence of (the public authority's knowledge of) a purchaser of lands' intentions for the use and/or development of the lands, the commissioner took an approach that was unduly restrictive. In addition, the commissioner's conclusion that certain records did not constitute "environmental information" was flawed and must be set aside, the commissioner asked himself the wrong question, did not have sufficient regard to the evidence available to him (and failed to have any regard to a significant portion of that evidence) and failed to carry out an appropriate investigation.

(vi) *Right to Know CLG v. Commissioner for Environmental Information & RTÉ* [2021] IEHC 353, [2021] 4 JIC 2008 (Unreported, High Court, Barrett J., 20th April 2021) – referred to above.

(vii) *Right to Know CLG v. Commissioner for Environmental Information* [2022] IESC 19, [2023] 1 I.L.R.M. 122 (Baker J.) – the President is not a "public authority" within the meaning of the AIE directive and the regulations.

(viii) *Bord na Móna plc v. Commissioner for Environmental Information* [2023] IEHC 57, [2023] 2 JIC 0702 (Unreported, High Court, Hyland J., 7th February 2023) – as regards whether a body may be treated as holding environmental information on behalf of a public authority where it also holds that information on its own behalf, it is possible to interpret "on behalf of" to cover situations where the holder of information is holding it both for its own purposes, and for the public authority.

(ix) *Electricity Supply Board v. Commissioner for Environmental Information* [2024] IEHC 17 (Unreported, High Court, Heslin J., 17th January 2024) (under appeal) – the commissioner erred in law in finding that the transcript, in its entirety, is environmental information (*i.e.* information "on" the development of electricity infrastructure, coming within para. (c) of the definition of "environmental information").

(x) *Right to Know CLG v. Commissioner for Environmental Information & Raheenleagh Power DAC* [2024] IESC 7 (Unreported, Supreme Court, O'Malley J., 6th March 2024) – the commissioner erred in separating out the components of the relevant tests for paras. (b) and (c) of art. 3(1) of the regulations and in the assessment of the questions relating to special powers, public responsibilities, services and functions and the control of the company in question.

Core ground 1 – art. 2(2) – public authority

98. Core ground 1 is:

"1. The Commissioner for Environmental Information erred in law and mis-interpreted the definition of a public authority in Article 3 of the European Communities (Access to Information on the Environment) Regulations 2007 – 2018 as amended in concluding that Raidió Teilifís Éireann is a public authority for the purposes of the AIE Regulations and, in particular, within the meaning of paragraph (a) of that definition."

99. The parties' positions as recorded in the statement of case are summarised as follows:

"RTÉ

RTÉ is not a public authority within the meaning of paragraph (a) of the definition of a public authority in Article 3 of the AIE Regulations and/or Article 2(2) of the AIE Directive. The Commissioner erred in law and misapplied the definition of public authority for the purposes of AIE Regulations/Directive in concluding that RTÉ was a public authority on the basis that it was a 'legal person governed by public law which [has] been set up by the State'. The Commissioner wrongly concluded that because RTÉ was established by statute and was governed by public law it came within the scope of paragraph (a) of the definition. The Commissioner erred in law by equating paragraph (a) of the definition of a public authority with the national law concept of a body being amenable to Judicial Review.

Paragraph (a) of the definition is directed at bodies who form part of the Government or public administration of the State. There is no reasonable basis for a conclusion that a broadcasting authority, which has certain public service obligations but is independent from, inter alia, Government in the performance of its broadcasting functions, forms part of the Government or public administration of the State.

The determination that RTÉ is a public authority for the purposes of the AIE Regulations is not consistent with the protections afforded to RTÉ as regards its editorial and journalistic functions. There are no exemptions within the AIE Regulations for journalistic or editorial activities. This has the consequence that if RTÉ is held to be a public authority, there is a high probability that it will be required to disclose information which is sensitive or which was provided by journalistic sources. There is a particular concern because the AIE Regulations include a strong presumption in favour of disclosure of information, which is difficult to reconcile with the protection afforded to journalists by the Constitution and the

European Convention of Human Rights (as discussed in, for example, Mahon v. Keena [2010] 1 IR 336 and Corcoran v. Commissioner of An Garda Siochana [2023] IESC 15). While it is correct to say that there are exemptions from disclosure, that does not provide any real protection for material which is the subject of journalistic privilege, not least because the Commissioner requires all material which is the subject of a request to be disclosed to his office for the purpose of considering appeals and the failure to provide such information can result in an application being made to the High Court (see Article 12(6) – (8) of the AIE Regulations). That requires, at a minimum, journalists to disclose information to third parties, including the Commissioner and his staff, which would ordinarily be kept entirely confidential.

The possibility of RTÉ journalists having to disclose confidential editorial or journalistic information, or being subject to the demand and search powers which are a feature of the AIE Regulations, is entirely inconsistent with the Regulation (EU) 2024/1083 of the European Parliament and of the Council of 11 April 2024 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU ('the European Media Freedom Act'), in particular Article 4 thereof.

In these circumstances, RTÉ submits that it could never have been intended that the AIE Directive would apply to a journalistic broadcaster.

In that regard, the decision of the Commissioner is not consistent with the evidence which was before the Commissioner as regards the applicability of the Directive to broadcasters in other Member States.

The Commissioner failed to give reasons for its decision, failed to properly consider submissions made by RTÉ and had regard to irrelevant considerations. In particular, the Commissioner failed to explain how RTÉ forms part of the Government or public administration and only considers whether RTÉ is amenable to Judicial Review.

The Commissioner failed to properly engage with or address submissions made by RTÉ as part of the decision-making process. Beyond reciting that submissions were made, the Commissioner gave no consideration to the argument of RTÉ relating to the position of broadcasters with public service obligations in other Member State, which are not treated public authorities. The Commissioner failed to address a decision of the First Tier Tribunal in the United Kingdom (made pre-Brexit) which determined that the BBC is not a public authority.

OCEI

The Court of Justice of the European Union set out the test to be applied in relation to paragraph (a) of the definition of a public authority in Case C-279/12 Fish Legal at §51. It was applied correctly. It requires the Commissioner to ask four questions which was done. Notably, the Appellant doesn't even engage with this save to misrepresent matters saying the Commissioner baldly concluded that susceptibility to judicial review answered all relevant questions. This is plainly not what the Commissioner did and the four-fold test required by the CJEU was applied and answered.

Insofar as the Appellant says this all misses the point that RTÉ cannot be view qua part of Government, there is no such requirement. Indeed, it is very clear that the CJEU – when referring to bodies that are organically administrative bodies was contrasting that outcome (i.e. under Article 2(2)(a)) with the functional approach required under Article 2(2)(b). Absolutely nothing the Appellant has relied on explains why the Commissioner can be criticized for applying the test in §51 of Fish Legal.

All the points about journalistic freedom and press privilege are beside the point. Indeed, the Commissioner was criticized by the High Court in Right to Know for doing precisely what RTÉ requires here. All these principles simply do not amount to providing a de jure 'carve out' for a broadcaster in respect of all its output from the AIE Directive. The concerns are, by very definition, overblown and seek a disproportionate outcome. The exemptions in the Directive and Regulations can be applied in a case by case approach to deal with these issues. Indeed, even on a wider scale, it is by definition disproportionate to seek to approach the definition of a public authority by reference to concerns that would arise on a case specific basis. In any specific case where legitimate concerns arise by reference to counter-veiling legally recognized rights and principles, that will arise on a case-by-case basis where the relevant context, rights and interests are considered and weighed. By very definition invoking general press freedom to seek a general exclusion from this regime is simply over the top and inappropriate because many cases simply won't involve any associated interests or rights. Had the EU legislature intended for public service broadcasters to be outside the scope of the AIE Regime, it could have done so expressly, as it did in the Open Data Directive.

Notice Party

> The Commissioner correctly decided that RTÉ is a public authority because it satisfies the four criteria for a public authority under paragraph (a) of the definition as interpreted by the Court of Justice in the Fish Legal case, namely (i) it is a legal person (ii) governed by public law; (iii) set up by the State; and (iv) which the State alone can decide to dissolve. The Commissioner gave adequate reasons and took into account all relevant matters and didn't take into account irrelevant matters. The claims in relation to press freedom are purely hypothetical since they do not arise on the facts. The AIE Regulations provide a system of exceptions supervised by the Commissioner for Environment and the Courts. RTÉ's status as a public authority is therefore not incompatible with the Charter of Fundamental Rights."

100. Sensibly, RTÉ did not proceed with any argument in core ground 1 based on domestic law, so we don't need to be concerned with the alleged inadequacy of the reasons for the decision on whether RTÉ is a public authority. The reason that was sensible was that even if the decision wasn't adequately reasoned in some way, the commissioner made sufficient findings to enable the court to evaluate the lawfulness of those findings.

101. This is as good a point as any to note that in *Right to Know CLG v. Commissioner for Environmental Information & Raheenleagh Power DAC* [2021] IEHC 46 (Unreported, High Court, 25th January 2021), Owens J. decided as follows:

> "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*."
>
> This was effectively endorsed by O'Malley J. at para. 147 of her judgment on appeal ([2024] IESC 7 (Unreported, Supreme Court, 6th March 2024)).

102. If paras. (b) and (c) should be considered together, one also has the problem that para (c) refers back to para. (a), so if para. (a) is in issue at all, then one can see an argument that all aspects should logically be considered together in the sense of there being findings of fact in relation to (a) to (c) inclusive. However the parties here all agreed that the failure to decide under (b) and (c) wasn't an issue because it wasn't pleaded. In addition, the opposing parties agreed that *Raheenleagh* could be distinguished as it did not deal with para. (a). Thus with an unanimity of view, in an adversarial system, I can proceed on the basis that the commissioner's decision includes enough in the way of findings to be properly reviewable.

103. However there is one rather critical process issue I need to note here, which is something that clearly wasn't raised in the Supreme Court, namely whether the Aarhus/EU law need for expedition has priority over normal common law principles of remittal for full fact-finding. The approach taken by the Supreme Court, while of course totally conventional if I may very respectfully say so, doesn't necessarily result in early finalisation of a request. There is a lurking EU law issue here, namely whether a review body is required to simply make a decision on the request if possible, rather than remit, if remittal would create or prolong a breach of EU law. We can come back to that later.

104. We can turn to the substance of the definition of public authority. Starting with the Aarhus Convention, adopted on behalf of the EU, art. 2(2) of Aarhus defines public authority:

> "2. 'Public authority' means: (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) The institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention. This definition does not include bodies or institutions acting in a judicial or legislative capacity;"

105. The Aarhus Convention Implementation Guide (second edition, 2014) states in relation to (a), at p. 46:

> "(a) Government at national, regional and other level; 'Public authority' includes 'government'— a term which includes agencies, institutions, departments, bodies, etc., of political power — at all geographical or administrative levels. In a typical situation, national ministries and agencies and their regional and local offices, State, regional or provincial ministries and agencies and their regional and local offices, as well as local or municipal government offices, such as those found in cities, towns or villages, would be covered. It

must be emphasized that public authorities under the Convention are not limited to 'environmental authorities' within government. It is irrelevant whether a particular official works in an environmental ministry or inspectorate, or even understands that his or her responsibilities have links to the environment. All governmental authorities of whatever function are covered under subparagraph (a)."

106. The judgment of 16 February 2012, *Marie-Noëlle Solvay and Others v Région wallonne*, C-182/10, ECLI:EU:C:2012:82 at §27 recognises that the Aarhus Convention Implementation Guide, while not binding, can be a useful aid to interpretation.

107. The definition of public authority in art. 2(2) of the AIE directive is somewhat wider:

"2. '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).

Member States may provide that this definition shall not include bodies or institutions when acting in a judicial or legislative capacity. If their constitutional provisions at the date of adoption of this Directive make no provision for a review procedure within the meaning of Article 6, Member States may exclude those bodies or institutions from that definition."

108. Public authority is defined in similar terms in the 2007 regulations.

109. We can note that O'Malley J. in *Raheenleagh Power* said at para. 9 that:

"The definition of a 'public authority' set out in Article 3(1) mirrors that in Article 2(2) of the directive (which, in turn, is essentially identical to that in the Aarhus Convention)"

110. However that comment is meant to view things from a high level. Zooming in to the exact wording, the definition in art. 2(2) of the directive is *not* essentially identical with the Aarhus Convention – it includes in para. (a) the significant addition of reference to public administration and advisory bodies in addition to the wording of Aarhus which is referable to government bodies.

111. A starting point is the approach that disclosure is the general rule – see recital 16 of the directive and the judgment of 28 July 2011, *Office of Communications v Information Commissioner*, C-71/10, ECLI:EU:C:2011:525.

112. There wasn't any hugely persuasive argument that the *Fish Legal* tests were not satisfied here. The issue boiled down to whether these were simply necessary tests, or both necessary *and sufficient*. RTÉ said they were not sufficient because the position of a media organisation needs separate recognition. That is an issue not considered in *Fish Legal*.

113. The need for the concept of a public authority to be given an autonomous and uniform interpretation across the European Union (*Flachglas Torgau* at §37, *Fish Legal* at §45) is highly relevant given the significant differences in approach across the European legal space.

114. The issue is of great practical importance because the AIE regulations do not contain any express exemption for journalistic or editorial activities. Combined with the strong presumption in favour of disclosure of information, the inclusion of broadcasters as public authorities could have a negative effect on press freedom, or at least a chilling effect.

115. The commissioner also argued that to put RTÉ in a position where it was entitled to an exemption here would put it on a par with the legislature. But in a democratic society that isn't an insuperably problematic concept. Edmund Burke is supposed to have called the media the fourth estate of government (House of Commons, 19-20th February 1771), and they are also often viewed, like Shelley's comment on poets (1821), as unacknowledged legislators of the world. A modicum of belated acknowledgement doesn't seem totally unreasonable.

116. All that said, the policy rationale for exclusion of administrative functions of public broadcasters such as RTÉ seems rather weaker than the policy rationale for exclusion of their journalistic functions. That might make a case in favour of an interpretation, if that was available, whereby public broadcasters would be excluded from the definition of public authority for the purposes of their journalistic functions (or at least core/privileged journalistic functions) but not administrative functions.

117. At the level of principle it appears that this heading raises referrable questions of EU law.

Core ground 2 – art. 2(1) – environmental information

118. Core ground 2 is:

"2. The Commissioner for Environmental Information erred in law and mis-interpreted the definition of environmental information in Article 3(1) of the European Communities (Access to Information on the Environment) Regulations 2007 – 2018 as amended in concluding that the records which were the subject of the request made by Right to Know CLG were environmental information within the meaning of Article 3(1) of those Regulations.

The Commissioner for Environmental Information erred in law in concluding that the records requested by Right to Know CLG was information on a factor within the meaning of paragraph (b) of the definition of environmental information and/or was information on a measure within the meaning of paragraph (c) of the definition of environmental information."

119. The parties' positions as recorded in the statement of case are summarised as follows:

"RTÉ

The Commissioner decided that the information requested was information 'on' one of the categories contained at (a) – (f) of the definition of environmental information and, in particular, that it was information on broadcasting on climate change (which was considered to be a 'measure' within the meaning of paragraph (c)) and on climate change as a factor affecting or likely to affect the elements of the environment (within the meaning of paragraph (b)). The Commissioner concluded that the representations made by members of the public to RTÉ could advance the purposes of the Convention and the Directive as they 'will provide information on their views as to that broadcasting' (at §55 of the decision). The Commissioner also concluded that the number of such representations was information on climate change broadcasting as it 'contributes to debate and discussion in relation to its climate change broadcasting'.

The decision lacks clarity as it does not properly address whether the records are environmental information within the meaning of paragraph (b) or paragraph (c).

The Commissioner misinterpreted the definition of environmental information and applied an overly broad interpretation of that definition which results in information which is far too remote from the identified measures being brought within the scope of the definition. In particular, the Commissioner failed to consider or explain how the information in question was critical, fundamental or integral to the measure or factor at issue. In making this error, the Commissioner failed to properly consider or explain how the release of the information could advance the aims of the AIE Directive and the Aarhus Convention.

OCEI

Having regard to the text in the Commissioner's Decision there is no case that can remotely be made out on reasons. The decision clearly sets out the correct test to be applied on the definition of environmental information, that being in the English case of Department for Business, Energy and Industrial Strategy v Information Commissioner [2017] EWCA Civ 844 ('Henney'). The application of that test is a matter within the expertise of the Commissioner and deference is due to the Commissioner by the Courts. There is no lack of clarity in the decision. It gives clear reasons and demonstrates a clear engagement with submissions made by RTE. Even in the event that the Court carries out a 'clean slate' review of the conclusions here it is patently clear that the information is 'on' the measure here and this all arises in the context of where RTÉ accept the findings of Barrett J in the prior RTK case.

Notice Party

The Commissioner acted within the margin of his discretion in deciding that the requested information was environmental information because it is information, which is about, relates to or concerns climate change and/or broadcasting on climate change and it advances the objectives of the Aarhus Convention and the AIE Directive. The Commissioner was entitled to draw the inferences he did from the facts. RTÉ has not shown that the Commissioner's decision was one that no reasonable decision maker could draw."

120. Article 2(1) of the directive defines environmental information:

"1. 'Environmental information' shall mean any information in written, visual, aural, electronic or any other material form on:

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

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

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they

are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)."

121. In *Department for Business, Energy and Industrial Strategy v. Information Commissioner & Henney* [2017] EWCA Civ 844, [2017] P.T.S.R. 1644, [2017] 6 W.L.U.K. 652, Beatson L.J. said at para. 43:

"It follows that identifying the measure that the disputed information is 'on' may require consideration of the wider context, and is not strictly limited to the precise issue with which the information is concerned, here the communications and data component, or the document containing the information, here the Project Assessment Review. It may be relevant to consider the purpose for which the information was produced, how important the information is to that purpose, how it is to be used, and whether access to it would enable the public to be informed about, or to participate in, decision-making in a better way. None of these matters may be apparent on the face of the information itself. It was not in dispute that, when identifying the measure, a tribunal should apply the definition in the EIR purposively, bearing in mind the modern approach to the interpretation of legislation, and particularly to international and European measures such as the Aarhus Convention and the Directive. It is then necessary to consider whether the measure so identified has the requisite environmental impact for the purposes of regulation 2(1)."

122. At para. 50:

"Mr Choudhury relied on the *Greenpeace* case as showing a limit being placed on a definition whose language is plain but very broad. He argued that the approach of the CJEU informs the meaning of the word 'on' in regulation 2(1)(c), because the CJEU held that it was wrong to ask whether the information contained a 'sufficiently direct link' to the factor. For the reasons I give in the next two paragraphs, the different legislative context means that I do not consider that the Department is in fact assisted by the *Greenpeace* case. But the decision does show that a purposive approach can be used to interpret a provision more narrowly than its very broad literal meaning. At §80, the CJEU relied on the purpose of enabling public participation in environmental decision-making to narrow the otherwise over-broad definition in Article 6(1) of regulation 1367/2006. It in effect 'read down' the provision by reference to the legislative purpose."

123. The commissioner here found as follows:

"49. Henney also suggests that, in determining whether information is 'on' the relevant measure or activity, it may be relevant to consider the purpose of the information such as why it was produced, how important it is to that purpose, how it ls to be used, and whether access to it advances the purposes of the Aarhus Convention and AIE Directive (paragraph 43; see also ESB at paragraph 42).

Information that does not advance the purposes of the Aarhus Convention and AIE Directive may not be 'on' the relevant measure or activity (Redmond at paragraph 99). As the Court noted in Henney, the recitals of both the Aarhus Convention and the AIE Directive provide a framework for determining the question of whether in a particular case information can properly be described as on a given measure (see Henney at paragraph 48 and RTÉ at paragraph 52). Finally, as the High Court noted in ESB information that is integral to the relevant measure or activity is information 'on' it (see paragraphs 38, 40 and 41) while information that is too remote from the relevant measure or activity does not qualify as environmental information (ESB at paragraph 43).

…

51. However, my reading of the guidance provided by the Courts in Henney, ESB and RTÉ is not that the information must be critical, fundamental or integral to the measure or factor at issue, but rather that there is a sliding scale, with information integral to a measure or factor at one end (in the sense that it is quite definitively information 'on' a measure or factor) and information considered too remote from the relevant measure or factor at the other (in the sense that it is not). The example referred to in Henney noted that a report on PR and advertising strategy might be considered information 'on' the Smart Meter Programme 'because having access to information about how a development is to be promoted will enable more informed participation by the public in the programme'. However, information relating to a public authority's procurement of canteen services in the department responsible for delivering a road project would likely be considered too remote (see paragraph 46).

…

53. I do not agree, however, with RTÉ's position that representations or correspondence from the public or external sources cannot advance the principles of the Aarhus Convention or the AIE Directive simply because they cannot directly influence editorial decisions. In my view, Henney makes it clear that the definition of environmental information should be

applied purposively having regard to matters such as 'the purpose for which the information was produced, how important it was to that purpose, how it is to be used and whether access to it would make the public better informed above, or to participate in, decision-making in a better way' (see paragraph 43).

54. Representations and correspondence on RTÉ's climate change broadcasting, may be somewhat less than critical to the immediate broadcasting process in that they do not, and cannot in RTÉ's view, directly influence editorial decisions in relation to such broadcasting. However, they do have some impact. RTÉ itself accepts that it is always cognisant of what its viewers and listeners are saying. As outlined above, section 114(2) of the Broadcasting Act 2009 requires RTÉ to 'be responsive to the interests and concerns of the whole community' in pursuit of its objectives as a public service broadcaster. Section 114(3) requires RTÉ to ensure that the programme schedules of its broadcasting services 'provide a comprehensive range of programmes in the Irish and English languages that reflect the cultural diversity of the whole island of Ireland and include programmes that entertain, inform and educate, provide coverage of sporting, religious and cultural activities and cater for the expectations of the community generally as well as members of the community with special or minority interests and which, in every case, respect human dignity' (emphasis added). Representations and correspondence providing feedback on climate change broadcasting cannot therefore be considered so remote from RTÉ's broadcasting on climate change as to render them incapable of being considered information 'on' that measure."

124. The primary alleged errors are:

(i) the test isn't a sliding scale;

(ii) failure to specify whether the information is information on climate change or on RTÉ broadcasting on climate change (*i.e.*, which sub-paragraph of the definition was relevant); and

(iii) if there is a sliding scale it should be specified as to where and why the case falls both in relation to the factor aspect and the measure aspect.

Sub-issue 1 – the wrong test

125. The core objection is at para. 78:

"the Commissioner misinterpreted the definition of environmental information and applied an overly broad interpretation of that definition which results in information which is far too remote from the identified measures being brought within the scope of the definition. As explained above, the definition of environmental information is to be interpreted in a manner which would give effect to the aim of the Convention and the Directive which is to better enable participation in environmental decision-making. The case law has identified a test of remoteness which allows a consideration of how relevant particular information is to the measure in question."

126. That alleged problem isn't really recognisable from the actual decision. The commissioner does adopt a test of remoteness, which he calls a sliding scale. RTÉ don't like that terminology of course but it comes to the same thing. Remoteness isn't binary in itself, although as a legal concept there's a dividing point on the scale which channels the gradations of remoteness on one side of it into refusal territory, and on the other side into grant territory. The proposition we arrive at in the present case is that calling remoteness a sliding scale isn't in substance a different test to the "test" of remoteness argued for by RTÉ (if their argument even amounts to a test – by and large it is more a complaint of what the commissioner got wrong as opposed to what a correct decision would have looked like in practical terms). Or at least we need to read the decision in that way, that is, in a way in which it makes sense, since that is an available interpretation.

Sub-issue 2 – failure to specify which sub-paragraph was relevant

127. Insofar as RTÉ argues that the commissioner didn't specify which sub-paragraph was relevant, that is unfortunate and indeed the commissioner pretty much accepted the sub-optimality of that in argument. In another case it might be more of a problem. But here, the legalistic points complaining about reasons or the reasoning process made by RTÉ don't really get us anywhere. The commissioner's decision could have been clearer but was in no sense so flawed or unreasoned as to warrant being set aside. The commissioner's conclusion that if RTÉ is relevantly a public authority then this was environmental information has not been shown to be unreasonable or unlawful in any way that warrants it being set aside, and whichever paragraph the decision is to be read as basing itself on, the conclusion that guidance on reporting on the environment and representations in relation to such reporting come within one or other of the limbs of the definition of environmental information is what one arrives at any reasonable view of the decision, so further detail wouldn't have made difference. That hasn't been shown to be unreasonable or otherwise unlawful, or indeed anything other than a totally obvious conclusion.

Sub-issue 3 – lack of detail in the reasoning

128. There couldn't plausibly be a duty to give details as to where the case falls on a sliding scale if the legal position resolves into either grant or refusal. Sufficient reasons are given in the decision to meet minimum legal standards. Any decision by anybody is vulnerable to the cry that one didn't specify more detail in relation to particular aspects. That isn't the test. The test is – stand back and ask did the decision give main reasons on the main issues. No plausible basis has been made out to show that the commissioner has erred in some way material to the result that warrants the decision being set aside.

129. To conclude on the entire ground of challenge overall, the commissioner calls core ground 2 "unstateable"; and while I wouldn't want to be quoted as agreeing with that, I would confess that I had some difficulty in satisfactorily putting a completely coherent version of it into words for myself for the purposes of coming to grips with the case. But even assuming that's just a shortcoming on my part, the point, however stated, is one that doesn't have much in the way of merit.

Core ground 3 – art. 2(1) – environmental information – "material form"

130. Core ground 3 is:

> "3. The Commissioner for Environmental Information erred in law and mis-interpreted the meaning of the term 'material form' in the definition of environmental information in Article 3 of the European Communities (Access to Information on the Environment) Regulations 2007 – 2018 as amended."

131. The parties' positions as recorded in the statement of case are summarised as follows:

> "RTÉ
>
> The Commissioner erred in the manner in which he interpreted the term 'material form'. The request made by Right to Know included a request for 'a record of how many representations RTÉ has received regarding its coverage of climate change in (a) the calendar year 2020 and (b) the calendar year so far in 2021'. It is common case that no such record exists.
>
> The obligation is to release information which is held for or by RTÉ which is in a 'material form'. In other words, any information which is held in any form such as in paper, digital files or audio recordings. However, the basic requirement is for the information to actually exist, in whatever form that may be. That does not include an obligation to take certain information (in this case the actual representations made) which exists in a particular material form (i.e. as either paper or digital records) and create new information (i.e. the number of representations) and record that in a material form so that it can be released to the requester.
>
> OCEI
>
> The decision did not err in the definition of 'material form' and did not err in finding that the records did exist in a material form. It clearly stated that since the records existed, all that was required was for RTÉ to count them. This is all that arises – the information exists, and it exists in a material form. The fact that RTÉ have to actually engage in counting is simply a consequence of the definition. It is the plainly the case on the text of the Directive itself and this is also supported by a teleological interpretation of the Directive (and Regulations) as a whole, that the fact that information may require to be shaped into a transmissible or communicable form does not mean it is not environmental information.
>
> In any event, it is always the case that an AIE body, in replying to an AIE request, should create a new document in response to the request. This is the initial decision letter, either granting or refusing access. One of the standard items in these letters is the number of records covered by the request and ideally a schedule of same.
>
> Notice Party
>
> It is not disputed that there exist records of representations RTÉ received during the time frame specified by the requestor. Therefore, the information exists in a material form. Reporting in a decision letter the number of representations is not the creation of a new record since RTÉ is required in any event to make a decision in writing. Alternatively, RTÉ could have provided the requestor with copies of the relevant representations in response to this part of the request. RTÉ gave no explanation for this part of its initial decision or internal review and did not support the requestor with the aim of making environmental information effectively available."

132. RTÉ's basic position on this is that insofar as the request made by Right to Know included a request for "a record of how many representations RTÉ has received regarding its coverage of climate change in (a) the calendar year 2020 and (b) the calendar year so far in 2021", it is common case that no such record exists as a stand-alone document.

133. What exists are the representations themselves, which can be counted, and the count can be recorded. But that would, in RTÉ's view, involve the creation of a new record. The opposing parties say that what is involved is merely the transformation of existing records into a new form, namely one that constitutes a statement of how many such records there are.

134. While I would favour one of these characterisations as considerably stronger than the other, I can't say with complete confidence that such an answer is *acte clair*. Therefore this, as with core ground 1, raises a referrable issue of EU law.

Core ground 4 – art. 4(1)(b) – manifestly unreasonable refusal

135. Core ground 4 is:

"4. The Commissioner for Environmental Information erred in law, mis-applied and failed to properly interpret Article 9(2)(a) of the European Communities (Access to Information on the Environment) Regulations 2007 – 2018 as amended and wrongly concluded that Raidió Teilifís Éireann was not entitled to rely on that exemption when the matter was remitted to it for further consideration."

136. The parties' positions as recorded in the statement of case are summarised as follows:

"RTÉ

The Commissioner erred in his interpretation of Article 9(2)(a) of the AIE Regulations. Notwithstanding the fact that the Commissioner decided to remit the matter to RTÉ for further consideration, he purported to determine that RTÉ was not entitled to rely on Article 9(2)(a) of the AIE Regulations and therefore purported to pre-judge the issue.

The Commissioner wrongly concluded that that it would not be manifestly unreasonably to require RTÉ to undertake searches of all representations received by it, and to review the contents of those representations, in order to identify those representations which come within the scope of the request made by Right to Know. The exercise required by the Commissioner would require engagement with hundreds of individuals within RTÉ and a careful review of any records which are held by them which might fall within the request. The conclusion of the Commissioner to the contrary is wrong in law and unreasonable, having regard to the evidence accepted by the Commissioner relating to the scale and volume of representations received by RTÉ.

OCEI

The decision does not determine this issue and this is clear from a reading of the relevant part of the decision. This section of the decision was drafted in an attempt to assist the parties, and RTÉ in particular. It merely set out some issues that RTÉ might consider if it were to reply on the manifestly unreasonable exemption in the AIE Regulations. The decision simply did not make any conclusions on the application of the exemption and it is surprising that this point has been missed by RTE.

Notice Party

The Commissioner did not make a determination on this issue and did not pre-judge the issue. In fact the Commissioner expressly stated that he was not determining the issue since the scope of the request had not been ascertained and it was not clear whether RTÉ could rely on the exception in regulation 9(2)(a). Nonetheless, the Commissioner was entitled to give guidance to RTÉ without determining or pre-judging the matter. This Core Ground should not be ruled on by the Court for the same reasons that the Commissioner gave. Insofar as it is relevant, the Commissioner's reference to Case T-2/03 Verein für Konsumenteninformation was correct."

137. Article 4(1) of the AIE directive provides:

"Article 4

Exceptions

1. Member States may provide for a request for environmental information to be refused if:

(a) the information requested is not held by or for the public authority to which the request is addressed. In such a case, where that public authority is aware that the information is held by or for another public authority, it shall, as soon as possible, transfer the request to that other authority and inform the applicant accordingly or inform the applicant of the public authority to which it believes it is possible to apply for the information requested;

(b) the request is manifestly unreasonable;

(c) the request is formulated in too general a manner, taking into account Article 3(3);

(d) the request concerns material in the course of completion or unfinished documents or data;

(e) the request concerns internal communications, taking into account the public interest served by disclosure.

Where a request is refused on the basis that it concerns material in the course of completion, the public authority shall state the name of the authority preparing the material and the estimated time needed for completion."

138. Article 9 of the 2007 regulations provides:

"Discretionary grounds for refusal of information

9. (1) A public authority may refuse to make available environmental information where disclosure of the information requested would adversely affect—

(a) international relations, national defence or public security,
(b) the course of justice (including criminal inquiries and disciplinary inquiries),
(c) commercial or industrial confidentiality, where such confidentiality is provided for in national or Community law to protect a legitimate economic interest, or(d) intellectual property rights.
(2) A public authority may refuse to make environmental information available where the request—
(a) is manifestly unreasonable having regard to the volume or range of information sought,
(b) remains formulated in too general a manner, taking into account article 7(8),
(c) concerns material in the course of completion, or unfinished documents or data, or
(d) concerns internal communications of public authorities, taking into account the public interest served by the disclosure."

139. There are three basic questions under this heading:

(i) is this properly a challengeable decision;
(ii) was the commissioner correct to say that RTÉ should have considered more options before invoking the manifestly unreasonable exception; and
(iii) was the commissioner correct to hold that if RTÉ considered the request to be manifestly unreasonable it should have engaged with the requester in line with art. 3(3) of the directive as transposed by art. 7(8) of the 2007 regulations?

Sub-issue 1 – is this properly a challengeable decision?

140. While the commissioner didn't seem to be ultimately arguing that RTÉ couldn't raise this issue (a position that wasn't altogether clear on the papers), he did seem to be arguing at the same time that it wasn't (or was only barely) a decision at all. Unhelpfully, the decision purports to reject RTÉ's arguments, but with separate weak qualifications that are contradictory:

"Does article 9(2)(a) of the Regulations provide grounds for refusal of the request?
72. Finally, RTÉ argues that if it is a 'public authority' and the information requested is considered to be 'environmental information', it is still entitled to refuse the request on the grounds that it is 'manifestly unreasonable' such that article 9(2)(a) of the AIE Regulations would apply.
73. For the reasons outlined below, I do not consider it open to RTÉ to rely on article 9(2)(a) of the Regulations to refuse the request, as matters stand. Article 12(S)(c) of the Regulations provides me with jurisdiction 'where appropriate' to 'require the public authority to make available environmental information to the applicant'. However, I do not consider it appropriate to make such a direction in this case. This is because it is not currently clear exactly what information is held by or for RTÉ within the scope of the appellant's request nor is it clear, in my view, exactly what the appellant is seeking. As noted below, the appellant's request states that he would be 'happy to take a representative sample...if there is a particularly large volume of...correspondence'. While RTÉ did provide the appellant with what it considered to be a sample of representations and correspondence, no engagement took place with the appellant as to the scope of his request as RTÉ was of the view that it was not subject to the AIE Regulations in processing the request. As the precise information at issue has yet to be identified, I consider the most appropriate course of action to be a remittal of the request to RTÉ to be processed as a request for environmental information in accordance with the provisions of the AIE Regulations. I am conscious that this will give rise to further delays to the conclusion of a request which was made in 2021. However, the alternative is to require RTÉ to release an unknown number of representations or correspondence or to provide such representations or correspondence to this Office for analysis as part of this appeal. For the avoidance of doubt, I do not seek to pre-judge matters but it must be acknowledged that the level of representations coming within the scope of the request might be such as to make even a search and retrieval process so onerous that it could possibly fall within the manifestly unreasonable exception. It is not possible to make such an assessment in the absence of further information from RTÉ as to the extent of the information at issue. In circumstances where no engagement has taken place with the appellant the precise scope of his request cannot be understood. Given the delay that has passed however, and in an attempt to avoid further unnecessary delay, I do consider it appropriate to engage with some of the arguments currently made by RTÉ in support of its reliance on article 9(2)(a). None of the commentary below should be understood as a pre-judgment of any issues which might come before me in a future appeal, instead it is included to flag the issues which should be considered by RTÉ as part of its fresh decision-making process on the request.
...
84. The issue in this case, in my view, is that RTÉ has sought to interpret and apply the grounds for refusal contained at article 9(2)(a) in an overly broad manner contrary to the

> restrictive approach mandated by Recital 16 of the Directive which makes it clear that 'disclosure of information should be the general rule' and by article 10(4) of the Regulations which provides that 'the grounds for refusal must be interpreted on a restrictive basis having regard to the public interest served by disclosure'.
> 85. In this case, there is a clear public interest in my view, in disclosure of representations and correspondence received by RTÉ relating to its coverage of climate change issues. As noted by the High Court in RTÉ, the national broadcaster plays a crucial role in the dissemination of environmental information through the broadcasting and reporting of climate change issues (see paragraphs 32 and 33). The High Court also noted the 'remarkable ability of the national public service broadcaster to influence public opinion and hence individual behaviour' (paragraph 45). As outlined at paragraphs 54 and 55 above, section 114(2) of the Broadcasting Act 2009 requires RTÉ to 'be responsive to the interests and concerns of the whole community' in pursuit of its objectives as a public service broadcaster. Section 114(3) requires RTÉ to ensure that the programme schedules of its broadcasting services 'provide a comprehensive range of programmes in the Irish and English languages that...inform and educate...and cater for the expectations of the community generally as well as members of the community with special or minority interests and which in every case respect human dignity' (emphasis added). Representations from members of the public and external sources on RTÉ: climate change broadcasting will provide information on their views as to that broadcasting. The extent to which the national broadcaster, which has been given statutory responsibility for public broadcasting in a manner which is responsive to the needs of the community, is considering such feedback on matters related to climate change is of course relevant and important for the purposes of contributing to a greater awareness of environmental matters, a free exchange of views and more effective participation by the public in environmental decision making as referred to in Recital 1 of the Directive. One cannot know the extent to which such feedback and representations are being considered without having information as to the level and content of those representations. There is therefore a public interest in that information being accessible to the public.
> ...
> 89. In those circumstances, it does not appear to me that RTÉ is justified, as matters stand, in reaching the conclusion that the request is manifestly unreasonable such that article 9(2)(a) of the Regulations applies.
> ...
> 91. I therefore do not consider that RTÉ has demonstrated that article 9(2)(a) of the Regulations provides it with grounds for refusal of the appellant's request.
> 92. Having carried out a review under article 12(5) of the AIE Regulations, I annul RTÉ's decision and find that it is a 'public authority' within the meaning of the AIE Regulations and Directive, the information requested is 'environmental information' and it is not open to RTÉ to rely on the grounds for refusal contained at article 9(2)(a) of the Directive in the manner that it did in this case. I therefore direct RTÉ to process the appellant's request in accordance with its obligations under the AIE Regulations. In doing so, it is open to RTÉ to engage directly with the appellant to understand the precise scope of the request and to see if an analysis of the contents of the two formal feedback email accounts would be sufficient."

141. So which is it? Is the RTÉ position rejected "as matters stand" (para. 89), or is RTÉ not entitled to rely on the provision (para. 91), or only disentitled from applying it in the manner it did in this case (para. 92), or is the commissioner merely giving comments to be "considered" on remittal (para. 73)? It can't be all of these – indeed it can't be more than one of these. Yet the commissioner scolded RTÉ in the letter for its "regrettable ... haphazard" approach, "which has involved significant shifts in its position, [which] has created unnecessary confusion and results in a rather inefficient use ... of ... resources" (para. 11).

142. And on a second issue, the commissioner said at one place in the decision that his rejection of RTÉ's views on manifest unreasonableness were effectively without prejudice and don't prejudge anything – and on its papers seemed to cast a cloud of sorts over whether RTÉ has a right to access to justice to challenge these, effectively because the commissioner's statements are mere *obiter* musings of no significance or status. But in the decision, he damns RTÉ for its "approach of seeking to adopt non-committal positions 'without prejudice' to any desire to change its position in the future [which] undermines the fundamental purpose of the duty to give reasons which is outlined above. It also forms the basis of an argument which, if accepted, would circumvent the access to justice provisions in article 6 of the AIE Directive" (para. 12). Funnily enough, not only did the commissioner's decision have a without-prejudice energy on this point, but the commissioner himself uses expressly without prejudice arguments in submissions on this issue in the present proceedings (para. 100).

143. Carl Jung would have had something to say about accusation-as-confession (projection, in contemporary English). Indeed one should be indebted to him for his immortal insight that, if I can adapt it only slightly: "If there is anything that we wish to change in the [other], we should first examine it and see whether it is not something that could better be changed in ourselves" (*Vom Werden der Persönlichkeit* (1939) p. 285). On that note, the rather irritable tone of the decision is familiar from the similar tone in the decision scrutinised in *Coillte Cuideachta Ghníomhaíochta Ainmnithe v. Commissioner for Environmental Information* [2023] IEHC 640, [2023] 11 JIC 2201 (Unreported, High Court, 22nd November 2023). I appreciate that it is tiresome if public bodies aren't playing ball, but if the commissioner would be willing to entertain a modest suggestion in this regard, such a tone doesn't necessarily read very well in a forensic context. One might get better results by majoring on educating people how to do it right rather than stressing what they are doing wrong. In the general interests of owning it, I can comment on this from experience. Understatement doesn't particularly work but unfortunately neither does bracing over-candour, especially if based on good reasons. Of the two, the former is preferable on various grounds. One's errors have to be regarded as volitional and as the portals of discovery, so in that spirit I hope the commissioner will consider accepting my invitation through the latter.

144. To conclude on this issue, the decision should be read as valid rather than invalid, if a valid reading is available. I think one can read it as an evaluation of what was before the commissioner at the time, subject to re-evaluation following remittal, rather than impermissible prejudgment. But that implies that it is properly challengeable here. For the avoidance of doubt, while I do not think that the disclaimer is sufficient to prevent the decision being scrutinised thoroughly now, it does preclude the commissioner from objecting to any points of whatever kind made by RTÉ at any future point in this matter. The commissioner needs to be held to that as a matter of fairness. But especially since the commissioner himself brought up the question of resources being wasted as a result of haphazard and shifting wording, we may need to bookmark that point for costs purposes in due course, for the purpose of looking at the problems caused by the haphazard wording of the commissioner's decision here in the event that the appellant is unsuccessful.

Sub-issue 2 – should RTÉ have done more to consider the options regarding identifying information?

145. As regards whether RTÉ could have done more, Case T-2/03 *Verein für Konsumenteninformation* is relevant. There, the Court of First Instance held:

> "122 In this case, therefore, there are a number of factors which suggest that concrete, individual examination of all the documents in the Lombard Club file might represent a very large amount of work. Nevertheless, without there being any need to take a definitive view as to whether those factors demonstrate sufficiently in law that the amount of work involved exceeded the limits of what might reasonably be required of the Commission, it must be pointed out that the contested decision, which refuses altogether to grant the applicant any access, could in any event be lawful only if the Commission had previously explained specifically the reasons for which the alternatives to a concrete, individual examination of each of the documents referred to also represented an unreasonable amount of work."

146. The court then held *inter alia* at para. 126 that "it is not apparent from the reasons for the contested decision that the Commission considered specifically and exhaustively the various options available to it in order to take steps which would not impose an unreasonable amount of work on it but would, on the other hand, increase the chances that the applicant might receive, at least in respect of part of its request, access to the documents concerned."

147. It is possible to read the commissioner's decision regarding the need for RTÉ to do more as merely reflecting that caselaw. RTÉ haven't in this case produced any argument that the Court of Justice would be likely to differ from the Court of First Instance, now General Court, in this respect. So while they are of course free to argue that in some future case, or even at some further stage of the present matter if remitted, there's no basis to overturn the commissioner's decision here.

Sub-issue 3 – should RTÉ have invoked art. 3(3) of the directive?

148. Article 3(3) of the AIE directive provides:

> "3. If a request is formulated in too general a manner, the public authority shall as soon as possible, and at the latest within the timeframe laid down in paragraph 2(a), ask the applicant to specify the request and shall assist the applicant in doing so, e.g. by providing information on the use of the public registers referred to in paragraph 5(c). The public authorities may, where they deem it appropriate, refuse the request under Article 4(1)(c)."

149. Article 7(8) of the 2007 regulations transposes this:

> "(8) Where a request is made by the applicant in too general a manner, the public authority shall, as soon as possible and at the latest within one month of receipt of the request, invite the applicant to make a more specific request and offer assistance to the applicant in the preparation of such a request."

150. The commissioner said at para. 88:

"A public authority is not expected to achieve perfection, it is expected to do what is reasonable and appropriate to identify information. As noted above, RTE has identified a number of search terms which might be used to capture representations and correspondence received in relation to its climate change broadcasting such as 'environment', 'global warming' and 'conspiracy'. It is also open to RTE to engage with the appellant if it is unsure as to the scope of his request or whether the search terms it has chosen are sufficient to capture the information he is seeking or, indeed, if it considers that the only possible interpretation of the request is that it is too broad. This could involve a similar approach as that mandated by article 7(8) of the Regulations where an appellant has made a request which the public authority considers to be too general."

151. The commissioner's view on art. 7(8) of the regulations is somewhat odd in that at para. 88 refers to "a similar approach" to that provision when that is the very provision that is relevant.

152. What should have happened, if RTÉ considered that the request was manifestly unreasonable, was that it should have invoked art. 7(8) by reverting to the requester, or at least done so if there wasn't an alternative way to locate the records manageably in line with *Konsumenteninformation*. There wasn't anything wrong in principle in the commissioner saying so, although as noted his wording is sub-optimal.

153. Overall, reading the decision in a way that makes sense rather than the opposite, no basis has been made out to quash the commissioner's views arising under art. 4(1)(b).

Reference to the CJEU

154. Given the diversity of approaches in Europe, while there may be compatible explanations for these, the practice strongly indicates that the interpretation of the meaning of public authority is not *acte clair*. The issue regarding material form is not *acte clair* either, and also meets the criteria for referral. As a matter of discretion these questions should be referred.

155. In relation to reference to the CJEU, the parties comment as follows in the statement of case:

"RTÉ

RTÉ considers that it is acte clair that a broadcaster such as it does not form part of the government or other public administration, including public advisory bodies, at national, regional or local level, within the meaning of paragraph (a) of the definition of 'public authority'. However, in the event that the Court were not to accept that this is acte clair, RTÉ submits that, having regard, inter alia, to the evidence of the position in other EU Member States, the Court could not determine this issue in the Commissioner's favour without a preliminary reference to the CJEU. In the event that such a reference were to be made, the Court may also wish to consider referring additional questions relating to the other issues in the case.

RTÉ therefore sets out below possible questions that the Court may wish to consider referring to the CJEU:

(I) Is a broadcaster established pursuant to national law, which is funded by way of both commercial revenue and funding provided by the State and is independent in the pursuance of its objects and editorially and functionally independent, a public authority for the purposes of paragraph (a) of the definition of a public authority in Article 2(2) of Directive 2003/4/EC?

(II) If the answer to Question 1 is yes, does Directive 2003/4/EC provide for an exemption from the obligation to consider request for access to environmental information in respect of all information relating to or concerning editorial decision making, editorial processes and/or that which is gathered for the purposes of journalistic activity (whether broadcast or not) and/or that which is gathered in pursuit of the right of free expression?

(III) Does the definition of environmental information encompass information on the broadcasting of climate change, including representations made by members of the public to a broadcaster in respect of its broadcasting on climate change?

(IV) Does the term 'material form' in the definition of environmental information in Article 2(2) of the Directive include an obligation on a public authority to create records, which do not otherwise exist, for the purpose of responding to a request made pursuant to the Directive?

(V) Does Article 4(1)(b) of the Directive permit a public authority to refuse a request for access to environmental information where the consideration of that request would require the review of all records held by hundreds of staff (including records held by journalists) to identify whether they related to the subject matter of climate change and the subsequent consideration of whether identified records would be the subject of any exemptions and application of the public interest balancing test?

OCEI

The Commissioner comments as follows:

(I) The test for whether a body falls within paragraph (a) of the definition has already been set out by the CJEU and thus this question is unnecessary.
(II) This question does not arise on the facts of this case and this thus inadmissible as being purely hypothetical.
(III) This question has been determined in the previous Right to Know v OCEI & RTÉ case. In any event, all that arises in this dispute is a disagreement on the application of the law by the Commissioner in an area of his expertise.
(IV) This question does not arise as it is not accepted that RTÉ had to create a new record, beyond the normal process of responding to an AIE request.
(V) This question does not arise as no findings to this effect are made in the decision.
Notice Party
The Notice Party's comments on the proposed questions is as follows:
(I) This is acte éclairé since the Court of Justice has already ruled on the interpretation of Paragraph 2(2)(a) of the AIE Directive in the Fish Legal judgment at §51.
(II) This question would be inadmissible since it does not arise on the facts of this case having regard to the narrow scope of the request which did not concern confidential editorial or journalistic information.
(III) This question would be inadmissible since there is no dispute about the correct interpretation of the concept of 'environmental information' but rather the dispute is about the application of the correct legal interpretation to a specific request. Furthermore, this question has already been determined by the High Court in Right to Know v Commissioner for Environmental Information and RTÉ [2021] IEHC 353, a decision which RTÉ did not appeal.
(IV) This question presupposes that in order to respond to the request RTÉ had to create a new record. This is not accepted. Reporting the number of representations in a decision letter is not the creation of a new records or alternatively RTÉ could have provided the requested information without creating a new record. The question (if it arises at all) would be better framed in neutral terms as to what obligations a public authority has under the AIE Directive in the circumstances of this case.
(V) This question would be inadmissible since the Commissioner did not make a binding decision on the interpretation of Article 4(1)(b) and it has not yet been established whether RTÉ can in fact rely on this exception."

156. As noted above, I consider that there are significant questions of EU law here that are not *acte clair*, albeit not quite the questions proposed by RTÉ. I reformulate the relevant questions below bearing in mind the points made and issues decided in the present judgment. In accordance with normal practice in the List, insofar as issues of EU law properly arise, which I set out below, it would be necessary to have final written submissions from the parties in an *Eco Advocacy CLG v. An Bord Pleanála* [2021] IEHC 265, [2021] 5 JIC 2704 (Unreported, High Court, 27th May 2021) format with some modifications set out in the order below, before making the reference.

157. I am also expressly including a reminder as to the provision for *amici curiae* made by Eco Advocacy. Leaving the door open to this seems particularly appropriate where, for example, the impact on public broadcasters across the EEA may mean that there are other entities that may have an interest in the issue, although I stress that this is only an option which I am totally neutral on and it is entirely a matter for any given party as to whether to activate that or not. If reasonable further time is required to consider that beyond the timelines directed below, I am open to that in principle.

158. RTÉ stressed the question of whether a domestic competent authority carrying out the review procedure envisaged by art. 6(2) of the AIE directive is entitled to have access to any record held by the legal person for the purpose of determining whether any exemption from disclosure applies, even a record which is *prima facie* covered by journalistic privilege, and even if the decision to access such a *prima facie* privileged record is not made independently of the investigation being conducted for the purposes of the review procedure under art. 6(2). While this is perhaps a line call, I don't think that that question arises in that form as a separate question for referral just yet, although I am open to being persuaded otherwise, but that is without prejudice to RTÉ's right to seek to rely on this issue in submission on the primary problem of what is a public authority. If later in this matter a particular document was identified as privileged, but was demanded by the commissioner, that would be one of the situations of potential irreparable harm (as viewed by RTÉ – sufficient to launch the proceedings without anticipating any outcome of such proceedings) that would warrant court application during the process rather than awaiting a result. Most procedural skirmishes during any given process can be rectified by a court on review or appeal. But disclosure of privileged material relating to journalistic sources, even to a regulator, could potentially create harm that the court would be unable to rectify, so a court must be prepared to entertain injunctive or other proceedings should such a problem actually arise in concrete circumstances.

Possible reformulated questions

159. The next step was to consider whether any questions for the CJEU should be reformulated. To assist that, on 19th November 2024, I circulated proposed wording and provisional wording for the proposed relevance of the questions. The parties were invited to comment.

The first question

160. The first question was proposed as follows:

Does the definition of "public authority" in art. 2(2)(a) of the AIE directive have the effect that a legal person governed by public law and amenable to judicial review which has been set up by the State through statute law, which the State alone can dissolve, but having as its primary purpose broadcasting, journalism, editorial processes and decision-making and/or the pursuit of the right of free expression, which is publicly appointed and accountable but which is independent in its functions and is funded by both commercial revenue and public monies:

(a) is to be treated as a public authority in respect of all of its functions;

(b) is to be treated as a public authority in respect of its functions other than privileged journalistic activity such as interaction with sources and functions capable of affecting the privilege associated with such activity such as internal editorial communications concerning sources;

(c) is to be treated as a public authority in respect of its functions other than those concerning broadcasting, journalism, editorial processes and decision-making and/or the pursuit of the right of free expression; or

(d) is not to be treated as a public authority?

161. The relevance was proposed as follows:

The relevance of this question is that if the answer is either (a) or (b), then the commissioner's conclusion is correct in its result, subject to the note below, whereas if the answer is (c) or (d), then the decision would be set aside and no further substantive issues would arise in the main proceedings leaving aside remittal, subject to the third question.

Note regarding the categories and their privileged status: Insofar as concerns category (i), Copies of any guidance, training or other such advice issued to RTÉ journalists on how to communicate/cover climate change to audience, with this part of the request to cover the period from 1st January 2020 to the date of receipt of the request, being 19th July 2021: [this does not relate to privileged journalistic activity.]

(ii) A record of how many representations RTÉ received regarding its coverage of climate change from 1st January 2020 to 19th July 2021: [this does not relate to privileged journalistic activity.]

(iii) A copy of all representations or correspondence received by RTÉ relating to their coverage of climate change issues in 2021. In respect of this category, Mr Foxe indicated that he would accept a representative sample of roughly 25 items of correspondence should there be a large volume of correspondence: [the disclosed documents (which were a random sample) do not relate to privileged journalistic activity.] [To clarify – Is the requester contending that a random selection does not constitute a representative sample for the purposes of the proceedings, and/or that there is not a large volume of correspondence? If necessary, add – disclosure of all documents would require an examination in each case of whether the documents would impinge on privileged matters; this stage of the proceedings has not been reached as yet].

162. The appellant commented as follows:

"RTÉ Comments

- RTÉ agrees that this issue is relevant to the determination of the proceedings
- However, RTÉ does not accept that if it is a public authority within the meaning of (b) that the decision of the Commissioner would have been correct. The request made includes information relating to both editorial functions and, potentially, that which can be the subject of journalistic privilege. Consequently, the Commissioner's decision will only be correct if the answer is (a).
- The scope of the request is such that it encompasses matters which could be the subject of journalistic privilege, though the precise extent of such information caught by the request could only be ascertained by carrying out a full review of all 'representations' received by all persons in RTÉ, including journalists, in respect of climate change. That, of itself, is problematic, as is would require journalists to identify material which benefits from privilege and, given the breath of the Commissioner's power, be potentially required to furnish that to the Commissioner for review.
- As regards the factual basis of the question, it is a fact that the request is framed such that it includes representations made to or information given to journalists in relation

to coverage of climate change. It is irrelevant that a full review of all information that comes within the scope of the request has not been carried out because, at a level of principle, the request includes material which would have the benefit of privilege.

- Given the point at issue in this question relates to whether RTÉ is a public authority under paragraph (a) of Article 2(2) of the AIE Directive ('government or other public administration'), the Court can also have regard to other requests which have been made to RTÉ, which specifically include requests for privileged material.
- RTÉ notes the position of the Commissioner that a public authority can only be 'in' or 'out' but submits that this does not preclude the referral of a question to the CJEU as to whether there are functional exclusions or opt-outs.
- Finally, in respect of the 'preliminary point' made by the Commissioner, it is not correct to say that RTÉ has never suggested that there was an option other than RTÉ not fully being an public authority. The possibility of RTÉ being a public authority for certain, limited, functions was specifically averted to at §8.6 of the submission made by RTÉ to the Commissioner on 10 November 2021 (see Exhibit RD7)."

163. The respondent commented as follows:

"2. As preliminary point, the Commissioner highlights that RTE never once maintained (until the hearing) that they were contending for any option other than RTE was 'fully' not a public authority. That question can be determined and rejected (if that is the appropriate course) and European law does not require the Court to go beyond the pleaded point of law which was the basis of the appeal. RTE's case at all times and indeed that specifically put to the Commissioner was simply that it is not – at all – a public authority (i.e. option (d)).

Question (i)

The Question Itself

3. Respectfully, the Commissioner's finding that RTE was part of the public administration should be part of this matrix and/or the Court should reach a determination on that point. The Directive specifically includes 'public administration' within the definition and the Commissioner found RTE comes under that definition.

4. Whereas the Court may not require views on the merits (and apologies if that is the case and this takes too much time) it is the view of the OCEI that there is no textual basis in the Directive for options (b) and (c). In our view the only options are that RTE is fully in as a public authority with the benefit of the exemptions or fully out. The Directive allows for Member States exclude legislative and judicial bodies:

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

5. There is no scope in the Directive to expand this list to other functions. As such the Court can only rely on the definition in article 2(2) of the Directive, as implemented by Article 3 in the AIE Regulations to find that RTE is or is not a public authority. If the Court is considering making a finding that RTE falls into category (b) or (c), it has by definition concluded that it is a public authority under Article 2(2)(a). This is a finding, in agreement with the Decision, that it forms part of the public administration. In our view this disposes of the case as there is no basis for any functional opt-out beyond legislative or judicial.

6. If the Court were to create a new functional opt out for either journalistic functions (option b) or broadcasting functions more generally (option c), what would stop other public authorities making similar arguments in relation to important functions that they might carry out?

Relevance of the Question

7. With regard to category (i) of the request, there is no reason to doubt the Court's statement that 'this does not relate to privileged journalistic activity'. Similarly, with regard to category (ii) there is no reason to doubt the Court's statement 'that this does not relate to privileged journalistic activity.' With regard to category (iii) the Court makes no such statement or finding, and the Commissioner cannot factually agree the contents of the request to a point which would enable the Court to conclude that the request actually included or covered documents that would fall under category (c). However, the Commissioner must accept that it is possible but RTE have not established this nor even made the point beyond speculation which is consistent with their case being (up to the hearing) to only contend for category (d)."

164. The notice party commented as follows:

"The Notice Party considers that this is a relevant question.

In relation to the categories of information:

(i) This is not privileged and, in any event, RTÉ indicated that it did not hold any such information

(ii) This is not privileged and is still sought by the Notice Party

(iii) The information released is not privileged and cannot be considered confidential on any other basis since it has been effectively released in unredacted format. The Notice Party has clarified that it is satisfied with the information provided in response to this part of the request apart from disagreeing with RTÉ releasing the information on 'pragmatic' grounds and stating that it did not create a precedent.

In terms of other facts, it is not disputed that Mr Dowling's affidavit indicates that RTÉ has received other requests for a wide range of information some of which could be considered privileged and that there is one appeal against a refusal of seemingly privileged information that is on hold at the moment (OCE-134526). However there is no evidence as to how RTÉ handled, and apparently was able to refuse, the other requests for privileged information that are identified by Mr Dowling in his affidavit. The Notice Party considers it would be important to make factual findings in relation to how RTÉ has handled these other requests."

165. My conclusions are that in the light of the foregoing the question is relevant but can be reformulated.

166. The reformulated question is:

Does the definition of "public authority" in art. 2(2)(a) of the AIE directive have the effect that a legal person governed by public law and amenable to judicial review which has been set up by the State through statute law, which the State alone can dissolve, but having as its primary purpose broadcasting, journalism, editorial processes and decision-making and/or the pursuit of the right of free expression, and which is publicly appointed and accountable but is independent in its functions and funded by both commercial revenue and public monies:

(a) is to be treated as a public authority in respect of all of its functions;

(b) is to be treated as a public authority in respect of its functions other than privileged journalistic activity such as interaction with sources and functions capable of affecting the privilege associated with such activity such as internal editorial communications concerning sources;

(c) is to be treated as a public authority in respect of its functions other than those concerning broadcasting, journalism, editorial processes and decision-making and/or the pursuit of the right of free expression; or

(d) is not to be treated as a public authority?

167. The relevance is:

The relevance of this question is that if the answer is (a), then the commissioner's conclusion on that issue is correct; if the answer is (b) then the commissioner's conclusions on categories (i) and (ii) would be correct insofar as relates to the issue of whether the appellant is a public authority, and an examination of and findings in relation to the particular documents in category (iii) would need to be undertaken; if the answer is (c) or (d), then the decision would be set aside and no further substantive issues would arise in the main proceedings leaving aside remittal, subject to the third question.

The second question

168. The second question was proposed as follows:

If the answer to the first question is in a sense equivalent to (a) or (b) in that question, does the requirement that records exist in material form as provided for in art. 2(1) of the AIE directive have the effect that where a request is made seeking a record (the first-mentioned record) of the number of records (the second-mentioned records) of a particular type, the public body concerned is required to count the number of such second-mentioned records and create the first-mentioned record of that number if such a first-mentioned record does not otherwise exist?

169. The relevance was proposed as follows:

The relevance of this question is that subject to the previous question, if the answer is yes, the commissioner's decision would be upheld on this point whereas if the answer is no, it will be set aside at least to that extent in the main proceedings.

170. The appellant commented as follows:

"RTÉ Comments

- RTÉ agrees that this question is relevant to the determination of the proceedings (though it only arises for determination if RTÉ is considered to be a 'public authority' within the meaning of Article 2(2)(a)).
- RTÉ also agrees with the Commissioner's comment that the request is for information rather than for a record. The dispute in the proceedings is whether RTÉ is required to create information in the form of a record of the number of representations received on the issue of coverage of climate change as the information sought by Right to Know is not available in material form."

171. The respondent commented as follows:
"Question (ii)
The Question Itself.
8. This questions appears to the OCEI to be in substance the issue set out in the pleadings and submissions of the parties. However, it is important to note the request is not for a record, it is for information. The Commissioner's position has been that the Directive may well require a request for information to require the creation of a record, but for complete accuracy, the request is for information.
9. The position of the OCEI is that in the Decision, Respondent's Notice and legal submissions. The right under the Directive is to seek information and not records. R2K sought information from RTE. The sequence of this is that RTE will have to create a record. But as set out in the Statement of a Case, it is always the case that a public authority has to create a record on foot of an AIE request. It is best practice to count the number of records that are covered by a request for information and to create a schedule of these records. Thus the finding in the decision that RTE count the number of submissions covered by the request is not in any way a departure from what RTE should have been doing under the AIE Regulations since 2007.
Relevance of the Question
10. The Commissioner has no observations on this."

172. The notice party commented as follows:
"The Notice Party agrees that this is a relevant question
In the Notice Party's view this question should be modified as follows:
(a) Does answering the request involve the creation of a new record?
(b) If the answer to this question is 'yes' then the question posed by the Court concerning an obligation to create a record arises
(c) If the answer to part (a) is 'yes' and to part (b) is 'no' the court should ask what obligations (if any) are imposed on a public authority under Article 3(3), 3(5)(a), 3(5)(c), and 4(5) of the AIE Directive where it has information relevant to a question asked by an applicant but does not hold a specific record responsive to the request.
The Notice Party considers that the facts as set out in the affidavits are sufficient to ground this question"

173. My conclusions are that in the light of the foregoing the question is relevant but can be reformulated.

174. The reformulated question is:
If the answer to the first question is in a sense equivalent to (a) or (b) in that question, does the definition of "environmental information" in art. 2(1) of the AIE directive and in particular the term "material form" have the effect that where a request is made seeking information as to the number of records of a particular type, the public body concerned is required to count the number of such records and create a record of that number embodying the requested information in material form, if the information does not otherwise exist in material form apart from the extent to which it is capable of being extrapolated by counting the records concerned?

175. The relevance is:
The relevance of this question is that subject to the previous question, if the answer is yes, the commissioner's decision would be upheld on this point whereas if the answer is no, it will be set aside at least to that extent in the main proceedings.

The third question

176. The third question was proposed as follows:
Does art. 6(1) and/or (2) of the AIE directive and/or art. 9(1) of the Aarhus Convention and/or art. 47 of the EU Charter of Fundamental Rights insofar as the foregoing relate to the requirement that remedies be timely and/or expeditious have the effect that a national review body and/or a court acting under art. 6(2) of the AIE directive and/or art. 9(1) of the Aarhus Convention and/or art. 47 of the EU Charter of Fundamental Rights is entitled or required to interpret national law to the maximum extent possible to enable it to make a final decision on the request to which the review procedure or judicial procedure as the case may be relates, if necessary by making findings of fact and evaluative judgments in relation to the request in the light of circumstances in being as of the date on which the body or court is seized of the matter, in circumstances where remittal of the matter for either further fact-finding or a fresh decision would either create or prolong undue delay in finalising the response to the request.

177. The relevance was proposed as follows:
The relevance of this question is that, subject to RTÉ being a public authority for any relevant purpose, if the answer is no, any ruling of the CJEU would be required to be implemented

by the referring court either itself or by remittal to the commissioner. The commissioner might then himself remit the matter to RTÉ for a fresh decision. The overall process would by that stage be in its sixth year since the request for information was made, which would constitute an undue delay. If the answer is yes, the referring court would be in a position to exercise its full original jurisdiction to finalise the request itself and if necessary to find facts and/or undertake evaluations for that purpose. If the referring court is not entitled or required to do that, the commissioner could on remittal exercise his powers in that manner if required to do so.

178. The appellant commented as follows:

"RTÉ Comments

- This question could only arise in the event that RTÉ was determined to be a public authority within the meaning of Article 2(2)(a) of the AIE Directive and, any comments made by RTÉ hereunder are strictly without prejudice to the contention that it is not a public authority.
- RTÉ has not taken issue with the procedures by which the Commissioner determined the appeal, save as regards the question of pre-determination.
- To-date, the request has been determined in accordance with the procedures established by the AIE Regulations, including as regards the specific time limits which are identified in the Directive.
- There is no challenge in the appeal to the validity of the AIE Regulations nor is there any argument made that the procedures in those Regulations do not properly give effect to rights established under the Directive.
- In these circumstances and in light of the foregoing, it is not clear to RTÉ that this issue arises on the pleadings or that its resolution is therefore necessary to determine RTÉ's appeal.
- If it is determined that RTÉ is a public authority for the purpose of the Directive, any procedures which are adopted for the determination of the request should fully respect the rights of RTÉ to address ... the request at first instance in light of the procedures and requirements of the Directive and the AIE Regulations, having regard to any judgment of this Court and/or the CJEU."

179. The respondent commented as follows:

"Questions (iii)

11. It is unfortunate that delay through the legal system is a feature of the AIE regime. The reality is that if any entity that receives an AIE request argues that it is not a public authority, this is a threshold jurisdictional issue that must be finalised before any consideration can be given to release of any environmental information held by it. By necessity the entity asserting that it is not a public authority has a right of appeal to the High Court on a point of law, with a subsequent appeal to the Court of Appeal and Supreme Court. It is unavoidable that this process will be time-consuming.

12. In a normal public authority case, the OCEI would not examine the issue of environmental information or the application of exemptions as it does not have jurisdiction over bodies that are not public authorities. However, in this case the OCEI has already found that RTE was a public authority and RTE did not challenge that decision. As such the decision under appeal dealt with the public authority point and then considered the substance of the appeal.

13. The Minister, in enacting the AIE Regulations, created the OCEI as the primary appellant body for AIE appeals with a de novo jurisdiction and investigative powers. The AIE Regulations gives a limited right of appeal to parties affected by those decisions. The jurisdiction of the Superior Courts in such an appeal is well settled, there is no deference to findings of law but there is significant deference to findings of fact within the expertise of the Commissioner. AIE appeals are now part of the expedited procedure in the High Court's Planning and Environment List. We do not accept that there was delay in this case. It was appealed by RTE on 31st January 2024 and has already been heard. We are awaiting judgment on a primary net issue, whether or not RTE is part of the public administration of the State. An expedited procedure, it seems, could have been requested.

14. RTE has not pleaded in the appeal that there were deficiencies in the OCEI's investigation.

15. This is to be contrasted with the findings of the Supreme Court in Raheenleagh. In that case it was accepted by the Commissioner during the litigation that there were factual deficiencies in the original decision and that the OCEI was the most appropriate forum for those deficiencies to be addressed. Indeed, it was the decision of the High Court to make first instance findings, and the Court of Appeal to make alternative first instance findings, that compounded the delay caused by the initial error by the Commissioner.

16. It is not necessary for the High Court to make primary findings of fact or carry out evaluations. In this case the OCEI made the key finding of fact, that being on an application of the Fish Legal test that RTE was part of the public administration. This has been challenged as an error of law by RTE. The view of the OCEI is that it is an Article 6(2) body. The decisions of the OCEI become final once any appeal period to the High Court is ended, or on the conclusion of the statutory appeals process.

17. Finally, with regard to the statement of the Court that 'If the answer is yes, the referring court would be in a position to exercise its full original jurisdiction to finalise the request itself and if necessary to find facts and/or undertake evaluations for that purpose', it is not clear to the Commissioner how the Court would be in that position save for the Court to take full seisin of the matter rather than the matter going back to RTE. That would seem to involve the Court first assuming RTE's role (or supervising it) and being involved in making conclusions or mediating some engagement over the extent of the request and/or narrowing it with engagement with the Requester (i.e. 'finalising the request itself') and then having information produced to it, reaching conclusions on its contents and presumably reaching conclusions on the exemptions. Whereas it is possible that the Court could achieve this quicker than RTE and the Commissioner, it is also possible that a Court could give directions on time-frames and a further issue that arises in the balance is the trade-off against the costs of such an exercise and where and by who those costs would be born.

18. The Commissioner would simply observe that if the Court's concern is simply with finalising the request (i.e. carrying out the narrowing), the whole process here (and indeed the hearing) appears premature in circumstances where – had it been asked – the Requester may well not be concerned with any information in this request that would be covered by journalistic privilege.

19. Finally, the question of the relationship between the OCEI and the Superior Courts is predominantly one of national law. Any consideration of a change to the well-established division of responsibility of an expert decision-maker and the High Court in an appeal on a point of law should involve the relevant Minister, here the Minister for Environment, Climate and Communications."

180. The notice party commented as follows:

"The Notice Party agrees that this is a relevant question

The Notice Party considers that reference to Article 9(4) of the Aarhus Convention should be included since it is this provision which gives rise to an obligation of timeliness. The question should also refer to 'adequate and effective' remedies in the same context since these aspects were of concern to the Aarhus Convention Compliance Committee in its findings on case C/141 (report of 1 February 2021, §133(b)) in relation to court rulings on threshold issues, such as whether a body is a public authority.

The Notice Party considers that the facts as set out in the affidavits are sufficient to ground the question.

The Notice Party thinks it would assist the Court of Justice if a comprehensive description of the relevant Irish procedural law was included in the order for reference."

181. My conclusions are that in the light of the foregoing the question is relevant but can be reformulated.

182. Part of the context here is the principle that where a member state's law does not so provide, and the decision-maker produces an inconsistent decision following any given judgment, the national "court or tribunal must vary that decision which does not comply with its previous judgment and substitute its own decision for it as to the application ... disapplying as necessary the national law that would prohibit it from proceeding in that way": judgment of 29 July 2019, *Alekszij Torubarov v Bevándorlási és Menekültügyi Hivatal*, C-556/17, ECLI:EU:C:2019:626 (Grand Chamber). Order 84 RSC allows this, either by *mandamus* or by directions following *certiorari*. This question poses a related question going just one step further – should the court cut the Gordian knot in the administrative process if further delay would breach EU law rights?

183. The reformulated question is:

If the answer to the first question is in a sense equivalent to (a) or (b) in that question, does art. 6(1) and/or (2) of the AIE directive and/or art. 9(1) and/or (4) of the Aarhus Convention and/or art. 47 of the EU Charter of Fundamental Rights insofar as the foregoing relate to the requirement that remedies be timely and/or expeditious have the effect that a national review body and/or a court acting under art. 6(2) of the AIE directive and/or art. 9(1) and/or (4) of the Aarhus Convention and/or art. 47 of the EU Charter of Fundamental Rights is entitled or required to interpret national law to the maximum extent possible to enable it to make a final decision on the request to which the review procedure or judicial procedure as the case may be relates, if necessary by making findings of fact and evaluative judgments

in relation to the request in the light of circumstances in being as of the date on which the body or court is seized of the matter, in circumstances where remittal of the matter for either further fact-finding or a fresh decision would be likely to occasion further delay which would contravene EU law by failing to ensure an outcome to the request for information in a manner that was timely and/or expeditious.

184. The relevance is:

The relevance of this question is that, subject to RTÉ being a public authority for any relevant purpose, if the answer is no, any ruling of the CJEU would be required to be implemented by the referring court by remittal to the commissioner. There is a substantial prospect that the commissioner could then himself remit the matter to RTÉ for a fresh decision. The overall process would by that stage be in its sixth year since the request for information was made, which would perpetuate an undue delay in breach of EU law. If the answer is yes, the referring court would be in a position to exercise its full original jurisdiction to finalise the request itself in a timely manner having afforded a hearing to the parties and if necessary to find facts and/or undertake evaluations for that purpose.

Summary

185. In outline summary, without taking from the more specific terms of this judgment:

(i) The issue in core ground 1, of the extent, if any, to which RTÉ is a public authority, should be referred to the CJEU.

(ii) The issue in core ground 2, the claim that the commissioner applied the wrong test as to environmental information, or failed to specify which sub-paragraph applied, or failed to give sufficient detail in reasoning, has not been made out by the appellant.

(iii) The issue in core ground 3 of the alleged duty to create a new record, should also be referred to the CJEU.

(iv) The issue in core ground 4 regarding manifest unreasonableness has not been made out by the appellant. The decision was sufficiently definite as to be challengeable in the proceedings. However the commissioner's haphazard phrasing, which involved significant shifts in wording, created unnecessary confusion, and sought to adopt non-committal positions without prejudice to potentially changing his position in the future, impacting adversely on the application of the access to justice provisions of art. 6 of the AIE directive. This may be relevant to costs in due course subject to submissions in that regard. Nonetheless, no basis to quash the substance of the findings, such as they are, on the issue of manifest unreasonableness has been made out. Where such an issue arises, and subject to any further argument on remittal in the present case, a requestee should explore reasonable options to respond to the request that can be carried out without excessive difficulty and/or revert to the requester under art. 3(3) of the directive.

(v) The procedural question of whether the requirement of expedition or timeliness requires the commissioner and/or the court to engage in fact-finding and evaluation to finalise the request, rather than remit it, in order to avoid a breach of those EU law requirements of timeliness and expedition, should also be referred to the CJEU.

(vi) A decision by the court is not precluded by the fact that the commissioner did not decide all issues in that regard, because this is agreed by all parties not be a factor preventing that, on the basis that that is not pleaded as a bar to dealing with the matter (agreed to by all parties) and additionally because the case is said to be distinguishable from *Raheenleagh* (agreed to by opposing parties).

Order

186. For the foregoing reasons, it is ordered that:

(i) the identified questions be in principle referred to the CJEU under art. 267 TFEU;

(ii) the appellant be directed to serve the CSSO on behalf of the Minister for Environment, Climate and Communications (as suggested by the commissioner), Ireland and the Attorney General with all papers by 13th January 2025 (which may be via the ShareFile link, with access to be provided to such solicitors and counsel as are notified for the purpose by the CSSO to the List Registrar) and to inform the CSSO of the opportunity to contribute to the order for reference;

(iii) the parties are to provide simultaneous submissions by 24th January 2025 setting out the following:

(a) a list of any additional provisions of domestic legislation they consider particularly relevant to answering the questions other than provisions set out under the heading of Domestic law in this judgment;

(b) a list of any additional provisions of European law they consider particularly relevant to answering the questions other than provisions set out under the heading of EU law in this judgment;
(c) a one-sentence summary of the party's proposed answer to each question (maximum 200 words per question) (and for clarity, submissions on the wording of the questions are not being particularly invited unless a party considers that the court has overlooked something crucial or considers that additional questions are necessary);
(d) separately and optionally, more detailed reasons for the foregoing if they so wish (if for example the notice party thinks that a comprehensive description of Irish procedural law would be of assistance it should prepare such a text within 7 days, giving other parties 7 days to include any counter-responses in their own more detailed replies); and
(e) whether there should be any *amici curiae* added to the proceedings prior to the reference being made;

(iv) if Ireland and the Attorney General wish to make a submission, such submission be furnished by 24th January 2025;

(v) in line with *Eco Advocacy*, if any one or more *amici curiae* is to be added, such entities would bear their own costs throughout, in the Irish courts and in Luxembourg, and would not have any liability for the costs of any other participant in the proceedings, and that such entities would get involved on a written-submissions-only basis unless otherwise ordered, and the parties will have liberty to make any enquiries with any suitable entities whether domestic, European or international if and to the extent that they think fit, and for the avoidance of doubt have liberty to convey this judgment in unapproved form and any of the papers to any proposed *amicus curiae*;

(vi) within seven days from it being determined whether the Minister for Environment, Climate and Communications, Ireland and the Attorney General and/or any *amici curiae* are to be parties to the proceedings:
(a) the parties be required to complete the CJEU contact sheet set out in guidance notes to Practice Direction HC126 and submit that sheet to the List Registrar copying the relevant judicial assistant; and
(b) each party be required to advise the List Registrar as to whether any natural persons mentioned in this judgment who has sworn an affidavit for such party or is otherwise referred to on their behalf wish their names to be anonymised for the purposes of the CJEU proceedings and judgment;

(vii) following any such submissions, the court will issue the formal judgment for reference which will set out the final text of any questions together with material drawn from the parties' submissions;

(viii) the appellant as document management party be then required to prepare a draft contents page of documents for the CJEU and to agree this with the other parties or apply to the court in default of agreement. This should include:
(a) all relevant pleadings/ affidavits/ exhibits/ other documents; and
(b) all relevant judgments/ orders in the case including the formal order for reference when perfected and the final judgment for reference when delivered;
(c) this should not include cases or other authorities, especially where these are already cited in the judgment for reference;
(d) once the contents page is agreed, it is then the function of the document management party to prepare electronic versions for the CJEU as follows:
(I) all files should be in PDF format not exceeding 30 MB;
(II) the judgment for reference should be a single standalone PDF clearly identified as such; that PDF should be sent in a form (which should be final but may be unsigned) that preserves the hyperlinks and not as a scanned picture of the signed version;
(III) all other documents should be bundled together in a single PDF (or more than one if required to comply with the 30MB file size limit); and
(IV) the completed form of the contact details of the parties in the form attached to guidance notes to Practice Direction HC126;
(e) once prepared, the PDFs should be sent to the List Registrar by email or file sharing link, and for this purpose parties should not use password protected file transfers, this process to be completed within 28 days from the date of this judgment;

(ix) once the matter is formally referred, the parties should liaise to ensure that the referring court is copied with all submissions including those of member states and EU institutions, and the Advocate General's opinion, when permitted to do so by the rules of procedure of the CJEU, and to copy the referring court with relevant notifications such as regarding the date of any oral hearing, any opinion of the Advocate General, the date of delivery of the judgment and the judgment itself;

(x) all time periods in this order exclude vacations;

(xi) all costs to date be reserved; and

(xii) the matter be listed for mention on 27th January 2025.