AN CHÚIRT UACHTARACH

THE SUPREME COURT

[2024] IESC 7

S:AP:IE:2022:000120

Court of Appeal Record No: 2021/103

High Court Record No: 2019/87 MCA

Between/

RIGHT TO KNOW CLG

Appellant

AND

COMMISSIONER FOR ENVIRONMENTAL INFORMATION

Respondent

AND

RAHEENLEAGH POWER DAC

Notice Party

Judgment of Ms Justice O'Malley delivered the 6th day of March 2024

Introduction

1. The substantive issue in these appeals is whether or not Raheenleagh Power DAC ("Raheenleagh", or "the company") is a "public authority" within the meaning of the European Communities (Access to Information on the Environment) Regulations 2007-2008 (S.I.133/2007) ("the regulations").

2. Raheenleagh owns a wind farm. In that context it was authorised to construct the wind farm and it is licensed under the Electricity Regulation Act 1999 to generate electricity and sell it into the electricity market. If the company is a "public authority", it is obliged by the regulations to make available on request specified environmental information held by it. The campaign group Right to Know CLG ("RTK") maintains that the company does come within the regulations. It seeks to be given information concerning data (about wind turbine noise) submitted by Raheenleagh in the course of its application for planning permission to construct the wind farm. The Court of Appeal decided that Raheenleagh was not such a body ([2022] IECA 210). In so holding it reversed the findings of the High Court ([2021] IEHC 46), which had in turn reversed the decision of the Commissioner for Environmental Information ("the Commissioner"). Both RTK and the Commissioner now appeal to this Court.

3. Apart from the substantive question of the status of Raheenleagh, the appeals also concern certain process-related issues arising from the judgment of the Court of Appeal. Separately, there is an issue in relation to the position of the Commissioner

in this appeal. The Commissioner originally found that Raheenleagh was not a public authority within the meaning of the regulations. It did not appeal the decision of the High Court, even though that Court reversed it, but now appeals against the decision of the Court of Appeal, even though that Court reached the same conclusion as it had at first instance. Its concerns relate to the process by which the Court of Appeal came to its conclusions and also to certain aspects of its decision where, on its view, that Court misinterpreted the relevant law under the regulations. It considers that the decision has serious implications for its functions under the regulations. It is contended by Raheenleagh that the Commissioner is not entitled to maintain an appeal in the circumstances.

4. Raheenleagh has cross-appealed in respect of the finding of the Court of Appeal that it satisfied one element of the definition of a "public authority". The Court held that the company was vested by law with "special powers beyond the normal rules applicable to persons governed by private law" (an element of the test laid down by the Court of Justice of the European Union). Raheenleagh disputes that finding.

The regulations in context

5. The regulations implement directive 2003/4/EC, which in turn derives from the European Union's (and Ireland's) obligations as a party to the Aarhus Convention (the UNECE Convention on Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998). Article 1 of the directive defines its objectives as follows:

(a) to guarantee the right of access to environmental information held by or for public authorities and to set out the basic terms and conditions of, and practical arrangements for, its exercise; and

(b) to ensure that, as a matter of course, environmental information is made available and disseminated to the public in order to achieve the widest possible systematic availability and dissemination to the public of environmental information…

6. The directive permits Member States to exclude from the scope of their implementation measures, bodies or institutions acting in a judicial or legislative capacity.

7. As set out in the recitals, the further purposes of the directive include an increase in public access to environmental information so as to contribute to a greater awareness of environmental matters, with a view to more effective participation by the public in environmental decision-making, and thus, ultimately, to a better environment. Recital (11) reads:

> *"To take account of the principle of Article 6 of the Treaty, that environmental protection requirements should be integrated into the definition and implementation of Community policies and activities, the definition of public authorities should be expanded so as to encompass government or other public administration at national, regional or local level whether or not they have specific responsibilities for the*

environment. The definition should likewise be expanded to include other persons or bodies performing public administrative functions in relation to the environment under national law, as well as other persons or bodies acting under their control and having public responsibilities or functions in relation to the environment."

8. Article 2(1) of the directive sets out a lengthy definition of "environmental information". It is unnecessary to set it out, since the parties are agreed that the information sought in this case is environmental information.

9. Article 3 of the regulations is the interpretation provision. 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) and encompasses:

"*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)."

10. These are the exact equivalents of Article 2(2)(a), 2(2)(b) and 2(2)(c) of the directive. In the regulations, they are further accompanied by a non-exhaustive list of persons and bodies who are included within the definition, as follows: -

> "*(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;*"

11. A public authority must on request make available environmental information held by it, with no requirement for the applicant to justify the request by stating an interest.

12. It is not argued that Raheenleagh comes within paragraph (a) of the definition. Having regard to the view of this Court, expressed in *NAMA v. Commissioner for Environmental Information* ([2015] 4 IR 626 [2015] IESC 51), to the effect that the non-exhaustive list in the regulations would be *ultra vires* the provisions of the European Communities Act 1972 if it goes further than is required by EU law, the key question before the Court in this appeal is the applicability of either paragraph (b) or (c) of regulation 3(1)/Article 2(2) of the directive.

The interpretation of the directive

The Aarhus Convention and the Implementation Guide

13. According to the case-law of the Court of Justice of the European Union, the wording and aim of the Convention itself is to be taken into account in interpreting the directive designed to implement it. An implementation guide to the Aarhus Convention is produced by the United Nations Economic Commission for Europe. The observations in the Guide are expressly stated therein to have no legally binding effect. However, the CJEU has said that the Guide may be regarded as an explanatory document, capable of being taken into consideration, if appropriate, among other relevant material for the purpose of interpreting the Convention.

14. In its commentary on Article 2 of the Convention, the Guide (2nd ed., 2014) states that the Convention is intended to apply to a whole range of executive or governmental activities (not including legislative or judicial activities). It is noted that recent developments in privatised solutions to the provision of public services have added a layer of complexity to the definition, but the Convention tries to make it clear that such innovations do not take public services or activities out of the realm of public information, participation or justice.

15. All governmental authorities of whatever function (environmental or otherwise), at all geographical levels, come within paragraph (a).

16. Paragraph (b) is said to cover natural or legal persons that perform any public administrative function – "*that is, a function normally performed by governmental authorities, as determined according to national law*". This means that there must be a legal basis in national law for the performance of the function before a body can come within paragraph (b). It includes public corporations established by legislation, public utilities and quasi-governmental bodies such as water authorities. For example, the Aarhus Compliance Committee has found a state-owned enterprise with responsibilities for the atomic power industry to be a legal person performing functions under national law, including activities in relation to the environment.

17. The Guide distinguishes paragraph (c) entities in key respects. The first is the source of authority – a paragraph (c) body derives its authority, not from national legislation but indirectly through the control of a paragraph (a) or paragraph (b) body. This difference is reflected in the terminology. The concept of "*public*

responsibilities or functions" is broader than the term "*public administrative functions*" as used in paragraph (b) to denote the connection between law and State administration. Persons coming under paragraph (c) might be service providers or other companies that fall under the control of either public authorities or other bodies to whom public functions have been delegated by law.

The Court of Justice of the European Union

18. The authoritative EU analysis begins with the judgment of the CJEU in *Flachglas Torgau GmbH v. Bundesrepublik Deutschland* C-204/09. The focus in that case was on the directive's provision for exclusion from the definition of a public authority of bodies "when acting in a …legislative capacity". Flachglas Torgau, a manufacturer, unsuccessfully sought from the relevant Ministry internal memoranda and correspondence leading up to the adoption of a law on the allocation of greenhouse emission licences. One of the questions referred by the national court was whether bodies and institutions, which were not the final decision-makers in respect of a law but had certain functions and rights in the legislative process (such as tabling a draft law or giving an opinion on a draft), were acting in a legislative capacity. The Implementation Guide (2000 version) expressed a clear view on this issue – executive branch authorities engaging in such activities were not considered to be acting in a legislative capacity. The CJEU rejected the argument based on the Guide, stressing that it was not binding (and, as far as the Court was concerned, was wrong on this aspect).

19. The Court stated that, in acceding to the Convention, the EU had undertaken to ensure the principle of access to environmental information held by public authorities. Derogations must not be extended beyond what was necessary to safeguard the interest sought to be secured, and the scope of the derogation must be determined in the light of the aims of the directive.

20. However, it also noted that the right of access guaranteed by the directive only applied to the extent the requirements laid down by the directive were satisfied. It was apparent from both the Convention and the directive that in referring to "*public authorities*" the authors intended to refer to administrative authorities, since within States it was those authorities that were usually required to hold environmental information in the exercise of their functions. The purpose of the Article 2(2) reference to "*legislative capacity*" was to allow Member States to lay down appropriate rules to ensure that the process for the adoption of legislation ran smoothly.

21. The Court added that the EU legislature had taken into account the specific nature of the legislative and judicial organs of the Member States, and the fact that their legislative processes might differ significantly. Accordingly, it was necessary to apply a functional interpretation to the phrase "*bodies or institutions acting in a ... legislative capacity*" in order to ensure a uniform application of the directive amongst Member States. It was open to the Member State to regard a Ministry as acting in a legislative capacity to the extent that it participated in the legislative process, particularly by tabling draft laws or giving opinions.

22. A comprehensive interpretation of Article 2(2) is set out in the judgment of the CJEU in *Fish Legal and Shirley v. Information Commissioner & Ors* (Case C-279/12). The issue in that case was whether three water companies in the United Kingdom were to be considered public authorities. The UK Information Commissioner had found that they were not, on the basis that (i) applying a multifactorial approach, the companies did not carry out functions of public administration, and (ii) the regulatory control to which they were subject did not amount to command or compulsion and was insufficient to bring them within paragraph (c).

23. The CJEU held that, having regard the fact that the directive's recitals set out as one objective the prevention of disparities between the laws in force in different Member States from creating inequality in relation to access to information, the concept of "public administrative functions" could not vary according to national law. In accordance with the Guide, the phrase "under national law" meant that there had to be a legal basis for the performance of the entity's public administrative functions. At paragraph 48 the Court said:

> *"48. It follows that only entities which, by virtue of a legal basis specifically defined in the national legislation which is applicable to them, are empowered to perform public administrative functions are capable of falling within the category of public authorities that is referred to in Article 2(2)(b) of Directive 2003/4. On the other hand, the question whether the functions vested in such entities under national law constitute "public administrative functions" within the meaning of that*

provision must be examined in the light of European Union law and of the relevant interpretative criteria provided by the Aarhus Convention for establishing an autonomous and uniform definition of that concept."

24. The Court then referred to *Flachglas Torgau* and repeated that it was apparent that the "*public authorities*" referred to in the Convention and directive were administrative authorities. In addition, as explained in the Guide, the concept involved "*a function normally performed by governmental authorities as determined by national law*", but the function, in this context, did not necessarily have to relate to the environment.

25. In paragraphs 51 and 52 of the judgment, the Court distinguished between the entities falling within Article 2(2)(a) and those covered by Article 2(2)(b).

"*51. Entities which, organically, are administrative authorities, namely those which form part of the public administration or the executive of the State at whatever level, are public authorities for the purposes of Article 2(2)(a) of Directive 2003/04. This first category includes all legal persons governed by public law which have been set up by the State and which it alone can decide to dissolve.*

52. The second category of public authorities, defined in Article 2(2)(b) of Directive 2003/4, concerns administrative authorities defined in functional terms, namely entities, be they legal persons governed by public law or by private law, which are ***entrusted****, under the legal regime which is applicable to*

them, with ***the performance of services of public interest****, inter alia in the environmental field, and which are,* ***for this purpose, vested with special powers*** *beyond those which result from the normal rules applicable in relations between persons governed by private law."*(Emphasis added.)

26. It may be relevant to note here that the concept of a body, responsible for providing a public service and possessing special powers for that purpose, had previously featured in the Court's jurisprudence. The Advocate General's opinion in *Fish Legal* cites *Foster v. British Gas plc* (Case C-188/89), which concerned a question as to whether an employment equality directive, which had not been implemented by legislation in the United Kingdom, could be directly relied upon as against the British Gas Company. The CJEU concluded that a directive could be relied upon in a claim for damages against

"*a body, whatever its legal form, which had been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and had for that purpose 'special powers beyond those which result from the normal rules applicable to relations between individuals'".*

27. The concept of "*entrustment*" has also arisen in a different context. Article 106 of the Treaty (ex Article 86 TEC) on the Functioning of the European Union, provides as follows:

"1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States

> *shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.*
>
> *2. Undertakings* ***entrusted with the operation of services of general economic interest*** *or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.*
>
> *3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States."*(Emphasis added.)

28. This provision was considered by the General Court in *BUPA v. Commission* (T-289/03), where BUPA was challenging the introduction of the risk equalisation scheme in the Irish private medical insurance market. In very simplified terms, the scheme involved compulsory payments by all private medical insurance ("PMI") providers into a statutory fund, out of which compensatory payments were made to those providers who had a relatively high-risk customer base. This was likely to lead to BUPA (whose customer base had a relatively young and healthy profile) having to make equalisation payments into the fund, from which VHI (whose customer base tended to be older) was likely to benefit. The Commission decided

not to raise any objection, finding that the payments were limited to the minimum necessary to compensate providers for "SGEI" (services of general economic importance) obligations. It was relevant to the decision that the fund was established by legislation and that it came from compulsory contributions from all insurers.

29. In seeking an order annulling the Commission decision, BUPA argued *inter alia* that the concept of SGEI obligations only arose if the relevant undertakings were "*entrusted*" with the operation of SGEIs. "Entrustment" implied that an obligation to provide the service in question was imposed on the service provider, by the public authorities, through an official act. The Commission had recognised this in its own practice of finding that a mere granting of an authorisation to provide the services in compliance with regulatory conditions was not sufficient.

30. In determining whether the providers were carrying out an "*SGEI mission*" (a phrase taken from Article 14 TFEU, ex Article 16 TEC) the Court made a number of findings that, making due allowance for the different nature of the issues involved, may be relevant to the instant case.

31. The requirement for an official act imposing obligations was found to be satisfied by the legislation governing the provision of PMI. It did not involve regulation or authorisation,

> "*but must be characterised as an act of a public authority creating and defining a specific mission consisting in the provision of PMI services in compliance with the PMI obligations. Sections 7 to 10 of the Health Insurance Act, 1994, as most*

recently amended by the Health Insurance (Amendment) Act, 2001, and also the 1996 Health Insurance Regulations (see paragraph 16 above), define in detail the PMI obligations, such as community rating, open enrolment, lifetime cover and minimum benefits, to which all PMI insurers within the meaning of that legislation are subject."

32. The Court agreed that, to come within the definition, the service provided must be of general or public interest and not a private interest, even if that latter interest might be seen as more or less collective. A finding of "*general or public interest*" needed to be based on more than the fact that the market for the service was subject to rules, or that operators required authorisation by the State. However, it did not have to be a "*universal*" service in the strict sense – that is, it did not have to respond to a need common to the whole population or be supplied throughout a territory (like, for example, the public health service).

33. At paragraphs 188 - 190 the Court said:

> *"As regards the argument that the PMI services represent only optional, indeed 'luxury', financial services, intended to provide complementary or supplemental cover by reference to the compulsory universal services provided for by the public health insurance system, the Court observes that the compulsory nature of the service in question is an essential condition of the existence of an SGEI mission within the meaning of EU law. That compulsory nature must be understood as meaning that the operators entrusted with the SGEI mission by an act of a public*

authority are, in principle, required to offer the services in question on the market in compliance with the SGEI obligations which govern the supply of that service. From the point of view of the operator entrusted with an SGEI mission, that compulsory nature – which in itself is contrary to business freedom and the principle of free competition – may consist, inter alia, particularly in the case of the grant of an exclusive or special right, in an obligation to exercise a certain commercial activity independently of the costs associated with that activity (see also, to that effect, paragraph 14 of the communication on SGEIs). In such a case, the obligation constitutes the counterpart of the protection of the SGEI mission and of the associated market position by the act which entrusted the mission. In the absence of an exclusive or special right, the compulsory nature of an SGEI mission may lie in the obligation borne by the operator in question, and provided for by an act of a public authority, to offer certain services to every citizen requesting them (see also, to that effect, paragraph 15 of the communication on SGEIs).

Contrary to the applicants' opinion, however, the binding nature of the SGEI mission does not presuppose that the public authorities impose on the operator concerned an obligation to provide a service having a clearly predetermined content, as is the case of Plan P offered by the VHI…In effect, the compulsory nature of the SGEI mission does not preclude a certain latitude being left to the operator on the market, including in relation to the content and pricing of the services which it proposes to provide. In those circumstances, a minimum of freedom of

action on the part of operators and, accordingly, of competition on the quality of the services in question is ensured, which is apt to limit, in the community interest, the scope of the restriction of competition which generally results from the attribution of an SGEI mission, without any effect of the objectives of that mission.

It follows that, in the absence of an exclusive or special right, it is sufficient, in order to conclude that a service is compulsory, that the operator entrusted with a particular mission is under an obligation to provide that service to any user requesting it. In other words, the compulsory nature of the service and, accordingly, the existence of an SGEI mission are established if the service-provider is obliged to contract, on consistent conditions, without being able to reject the other contracting party. That element makes it possible to distinguish a service forming part of an SGEI mission from any other service provided on the market and, accordingly, from any other activity carried out in complete freedom…"

34. The Court observed that the nature of the obligations imposed meant that the fact that a PMI provider could voluntarily withdraw from the market did not affect the continuity of the supply of the service. Similarly, the universal nature of the obligations was not affected by the fact that individuals could choose not to seek health insurance.

35. The *BUPA* case is considered in *The EU Law of Competition* (Faull and Nikpay 3rd ed; 2014). The authors suggest that the concept of SGEI roughly corresponds to the concept of "*public service*". (Raheenleagh has specifically pleaded in these proceedings that the concepts are irrelevant to each other.) "*Entrustment*" will, they say, normally imply the imposition of certain obligations on the undertaking in question. It involves official conferral of specific responsibilities (and hence obligations), while in contrast "authorisation" simply permits the carrying out of an activity that would be prohibited in the absence of such authorisation. (RTK argues in these proceedings that "*entrustment*", as used in *Fish Legal*, is a judicial concept and is not to be equated with responsibility. Similarly, the Commissioner submits that it does not imply obligation, since if it did then any entity with a mere regulatory permission could evade the application of the regulations.)

36. Returning to the area of environmental information, it may be noted that in *Fish Legal* it was not in dispute that the water companies had been "*entrusted*" under the applicable national law with services of public interest, being the maintenance and development of water and sewage infrastructure and treatment (which were activities requiring compliance with a number of environmental directives). It was also clear that, in order to perform those functions and provide those services, they had certain powers under national law such as the power of compulsory purchase, the power to make bylaws relating to waterways and land in their ownership, and the power to decide, in some circumstances, to cut off individual customers. The Court said that it was for the national tribunal to determine whether, having regard

to the specific rules attaching to these powers under the applicable national law, these could be classified as special powers.

37. The CJEU also considered the criteria for determining whether an entity fell within Article 2(2)(c). It was not disputed that the water companies provided public services related to the environment, and one question was whether they were under the control of a body or person that fell within paragraph (a) or (b). The Court noted that the relevant legislation placed the supervision of the companies in the hands of the Secretary of State and an official regulatory body, each of which would undoubtedly be classified as a public authority. The dispute between the parties centred on the question whether this (admittedly relatively strict) supervision amounted to "*control*" as opposed to "*regulation*". The water companies argued that there was a difference between a system of "*regulation*", which included only a power to determine the objectives to be pursued by a regulated entity, and a system of "*control*" which enabled the regulator to determine the way in which the objectives were to be attained.

38. It was noted in the judgment that the Guide stated that, while Article 2(2)(c) of the Convention covered, at a minimum, legal persons that were publicly owned, it could also cover entities performing environment-related public services that were subject to regulatory control. The Court observed that the precise meaning of the concept of control must be sought by taking account also of the directive's own objectives as set out in Article 1(a) and (b). Article 2(2) was intended to cover a set of entities, whatever their legal form, that must be regarded as constituting public authority, be

it the State itself, an entity empowered by the State to act on its behalf, or an entity controlled by the State.

39. In paragraphs 68 - 70 of the judgment the Court said:

> "*68. Those factors lead to an adoption of an interpretation of "control", within the meaning of Article 2(2)(c) of Directive 2003/4, under which this third, residual category of public authorities covers any entity which does not determine in a genuinely autonomous manner the way in which it performs the functions in the environmental field which are vested in it, since a public authority covered by Article 2(2)(a) or (b) of the directive is in a position to exert decisive influence on the entity's action in that field.*
>
> *69. The manner in which such a public authority may exert decisive influence pursuant to the powers which it has been allotted by the national legislature is irrelevant in this regard. It may take the form of, inter alia, a power to issue directions to the entities concerned, whether or not by exercising rights as a shareholder, the power to suspend, annul after the event or require prior authorisation for decisions taken by those entities, the power to appoint or remove from office the members of their management bodies or the majority of them, or the power wholly or partly to deny the entities financing to an extent that jeopardises their existence.*
>
> *70. The mere fact that the entity in question is, like the water companies concerned, a commercial company subject to a specific system of regulation for*

the sector in question cannot exclude control within the meaning of Article 2(2)(c) …in so far as the conditions laid down in paragraph 68… are met in the case of that entity."

40. The Court continued:

"*71. If the system concerned involves a particularly precise legal framework which lays down a set of rules determining the way in which such companies must perform the public functions related to environmental management with which they are entrusted, and which, as the case may be, includes administrative supervision intended to ensure that those rules are in fact complied with, where appropriate by means of the issuing of orders or the imposition of fines, it may follow that those entities do not have genuine autonomy vis-à-vis the State, even if the latter is no longer in a position, following privatisation of the sector in question, to determine their day-to-day management*."

41. *Friends of the Irish Environment v. Commissioner for Environmental Information* (C-470/19) concerned a request to the Courts Service of this State for court records of a challenge to a grant of planning permission for a wind farm. The central issue in the case, unsurprisingly, related to the exclusion provided for under both the directive and regulations of bodies acting in a judicial capacity.

42. The CJEU again said that Article 2(2) was to be interpreted in a functional manner and that it was intended to cover only *administrative authorities*. The courts were clearly not part of the government or other public administrations referred to in

paragraph (a). The Court stated that the provision made in the directive for specific exclusion of "*bodies or institutions acting in a judicial or legislative capacity*" did *not* mean that without such express exclusion the courts and legislature would be considered to be public authorities within the meaning of the Directive. Its purpose, rather, was to recognise that in some Member States certain independent administrative authorities might occasionally be called upon to act in the exercise of judicial powers without themselves having the nature of a court, and to make provision for their exclusion when acting in that capacity in circumstances where they would, in a different context, meet the definition under the directive. This was analogous to the issue in *Flachglas Torgau*, which concerned a minister required to exercise legislative powers without personally forming part of the legislature.

43. Nor could the courts be assimilated to the natural or legal persons performing "*public administrative functions…, including specific duties, activities or services in relation to the environment*" referred to in paragraph (b). That paragraph designated the bodies or institutions which, although not forming part of the government referred to in paragraph (a), performed executive functions related to the environment or assisted in the performance of those functions. Paragraph (c) concerned only persons or bodies acting under the control of one of the bodies covered by (a) or (b), and having public responsibilities or functions related to the environment. It could not include either courts or the legal or natural persons under their control.

44. The Court considered that this interpretation was supported by reference to the objectives of the directive, read in the light of the Convention. The purpose of the

directive was to promote increased access to environmental information and more effective participation by the public in environmental decision-making, with the aim of making better decisions and applying them more effectively and, ultimately, promoting a better environment. Thus, while the implementation of that objective meant that the administrative authorities must give public access to environmental information in their possession, in order to give an account of the decisions they take in that field and to connect citizens with the adoption of those decisions, the same was not true of pleadings and other documents adduced in court proceedings on environmental matters. The EU legislature had not intended to promote public information or public involvement in decision-making in judicial matters.

Interpretation of the Irish regulations

45. In this jurisdiction the leading authorities are the decisions of this Court in *National Asset Management Agency v. Commissioner for Environmental Information* [2015] IESC 51, [2015] 4 I.R. 626 (hereafter "*NAMA*") and in *Right to Know CLG v. Commissioner for Environmental Information* [2022] IESC 19 hereafter "*RTK 2022*").

46. In *NAMA*, the issue before the Court was whether the entity established by the National Asset Management Agency Act 2010 was a public authority within the meaning of the regulations. The judgment of O'Donnell J. (with which all members of the Court agreed) noted that NAMA had been established as part of the country's response to the financial crisis. Its function was described as involving the acquisition of bank assets from participating institutions and holding, managing and

realising the value of the acquired assets. It was obliged to manage its acquired assets with a commercial mandate and its aim was to obtain the best achievable financial return for the State. None of its duties related directly to the environment, and its functions would not be considered "*administrative*" in nature in the sense of pertaining to the executive or governmental power. On the other hand, it was a major vehicle deployed as part of the executive and legislative response to the financial crisis.

47. It was observed in the judgment that the concepts of administrative law and public law could differ substantially as between member states. The regulations could not, in that context, be interpreted solely according to national law but must be understood as implementing the directive (and, indirectly, the Convention).

48. The Court applied the analysis in *Fish Legal* in holding that NAMA was clearly a public authority exercising public administrative functions. Although obliged to act commercially, it was undoubtedly vested with special powers that went well beyond those resulting from the normal rules applicable in relations between persons governed by private law. It was established by a statute that conferred upon it substantial powers of compulsory acquisition and enforcement, and the statute expressly excluded or restricted the remedies that might otherwise be available against it.

49. In *RTK 2022*, this Court dealt with two appeals involving claims that the Office of the President, his Secretary General and the Council of State were public authorities under the regulations. While the judgment is mostly concerned with presidential

immunity and an issue as to whether there was a conflict between the relevant constitutional provisions and EU law, the Court also found that the President did not come within the definition of a “public authority”. On this issue the Court saw the key question as being whether the person or body concerned had a power to make decisions that affected the environment or policies relating to the environment. Since the President was outside the realm of policy and had no decision-making functions in respect of the environment, he was not a “public authority” within the meaning of the regulations.

Background Facts of the Appeal

50. Raheenleagh is a company that owns and operates a wind farm, supplying electricity to the national grid. It is an electricity generator, holding a licence issued in February 2015 pursuant to the terms of s.14 of the Electricity Regulation Act, 1999 as amended ("the 1999 Act"). It was also authorised under s.16 of the Act to construct the wind farm. The evidence in the case was that, as of the date of the proceedings, some 380 bodies were licenced to generate electricity and 349 entities had been authorised to construct generating stations. The Act confers certain powers on an entity holding such an authorisation, including the power to make a compulsory purchase order, subject to an application for the consent of the Commission for the Regulation of Utilities (“the CRU”).

51. It seems that the terms of the authorisation and the licence were not considered by the Commissioner and were not put into evidence in the High Court or the Court of Appeal. However, the licence has been provided to this Court. In those

circumstances it would not be appropriate to base any findings thereon but nonetheless it will be described here, as being of some potential relevance. For present purposes, the notable features include the fact that the licence is to last for 15 years unless earlier revoked. (It will be seen that 15-year periods are widespread in this field, which appears to relate to the expected lifespan of the capital assets.) The licensee may determine it, but only by giving 15 years notice. Such notice cannot be served earlier than the 15th anniversary of the date on which the licence came into force. The licensee is obliged to submit all available generation units and interconnector transfers for central dispatch by the transmission system operator (Eirgrid), where that is required by the Grid Code. (The Grid Code is also drawn up pursuant to the Act.) The licensee must be party to the Trading and Settlement Code (provided for in s.9 of the Act of 1999) and to the Single Electricity Market Trading and Settlement Code (provided for in the Single Electricity Market Regulations, which created a single market on the island of Ireland). It is obliged to keep its accounts in a specified form, and must report annually on its environmental performance.

52. The licence may be revoked if, *inter alia*, the licensee ceases to carry on the generation business for a period of six months unless this is due to circumstances beyond its control. Under s.19 of the Act, the terms of the licence may in certain circumstances be modified without the consent of the licensee.

53. Raheenleagh was originally set up in November 2013 by ESB Wind Development Limited. Coillte Teo, which owned the site upon which the wind farm was

constructed, became a 50% owner in June 2015. Construction of the wind farm began during that month.

54. ESB Wind Development is a wholly owned subsidiary of the Electricity Supply Board, which was established under the Electricity (Supply) Act 1927. Prior to the establishment of the ESB electricity was supplied by a variety of private commercial undertakings, only in some areas of the State. Extensive statutory powers were conferred on the ESB that enabled it to bring about a monopoly position in respect of all aspects of the supply of electricity to consumers, with the objective of making electricity available throughout the State. It acquired the businesses and assets of any existing commercial suppliers, built and maintained the national grid and networks, and built and operated generating stations. Of particular note for present purposes was its power under s.47 of the Act of 1927 to compulsorily acquire land and/or rights over land for the various purposes of its activities. It was obliged to consult with the Minister for Industry and Commerce before exercising certain powers, but the Minister's consent was not required.

55. Since the "unbundling" of activities brought about by the Act of 1999 and the creation of the single electricity market, the market is open to competition between electricity generators and electricity suppliers (although the ESB still retains ownership and control of the transmission and distribution systems). The ESB group now consists of a variety of different entities operating in the electricity industry.

56. Coillte is a statutory company of the sort described as a semi-State commercial body. It was formed under the provisions of the Forestry Act 1988 with the object

of carrying on the business of forestry and other related activities, and in that context owns significant areas of land. It is controlled by two Government Ministers – the Minister for Public Expenditure and Reform and the Minister for Agriculture, Food and the Marine.

57. Coillte and ESB Wind Development held equal shares in Raheenleagh and had a right to nominate an equal number of directors to the board. The wind farm has at all times been operated on a day-to-day basis by ESB Wind Development on foot of a "management and operations agreement", and for that reason Raheenleagh has no employees of its own.

58. In 2017, RTK sought from Raheenleagh certain data relating to wind turbine noise that had been supplied in the course of the planning process by which permission had been obtained to construct and operate the wind farm. Raheenleagh refused, saying that it was not a public authority within the meaning of the regulations.

59. RTK appealed that refusal to the Commissioner for Environmental Information. At some stage while the appeal process was ongoing Coillte sold its half share in Raheenleagh to GR Windfarms 1 Limited, a wholly owned subsidiary of a plc that invests in renewable energy projects.

Decision of the Commissioner

60. The Commissioner's decision, issued on the 9th January 2019, sets out the legal and factual matters considered relevant by the Commissioner. Helpfully, it describes the context of the issues in the course of a general introduction:

> "*In summary, the electricity system comprises, on the one hand, physical infrastructure including electricity generators, a transmission system and a distribution system, and on the other hand, the electricity market which includes electricity generators (bodies which produce electricity), electricity suppliers, transmission system operators, distribution system operators and electricity consumers. The generation and supply of electricity are activities that take place in a competitive marketplace across the European Union (EU). In contrast to the generation and supply areas where competition is required by EU law, the State has retained ownership and operation of the transmission and distribution systems. In effect, those two aspects of the electricity system are a monopoly. The electricity system is regulated by the Commission for the Regulation of Utilities (CRU), which implements the requirements of EU and national energy law.*"

61. The first substantive finding made by the Commissioner is not the subject of dispute in the appeal. Raheenleagh did not come within regulation 3(1)(a) ("government or other public administration, including public advisory bodies, at national, regional or local level").

62. Next, the Commissioner addressed regulation 3(1)(b) ("any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment").

63. RTK had submitted that Raheenleagh was carrying out functions as part of a joint venture between the ESB and Coillte, arguing that it was essentially a special purpose vehicle through which they were performing some of their functions. It was further submitted that the company had been vested with "*special powers*", within the meaning of the CJEU judgment in *Fish Legal*, by virtue of its status as a statutory undertaker pursuant to the Act of 1999. The requirement to obtain the consent of the CRU for the exercise of those powers was said not to be determinative, since consent could only be given to an authorised entity. A comparison was drawn with NAMA – the fact that NAMA had to apply to the High Court to exercise its powers of compulsory purchase had not been held to change the fact that it had special powers. RTK also argued that Raheenleagh had been entrusted with the performance of a service of public interest.

64. Having considered the regulations, the directive, the Convention, *Fish Legal* and the judgment in *NAMA*, the Commissioner decided that it would be more useful to commence with the question of special powers than to start with the question whether or not the company provided services of public interest. The reasoning was explained as follows:

> "*It can be argued, as the appellant has, that since the CRU has granted Raheenleagh Power an authorisation to construct or reconstruct a*

> *generating station and a licence to generate electricity under sections 16 and 14 of the 1999 Act, it has been entrusted by law with the performance of a service of public interest. However, many services are provided throughout the State which are of interest to the public - and indeed, may be seen as essential by some - but are not services of public interest in the context of public administrative functions being performed under national law.*"

65. The decision then addressed the submissions made on behalf of the parties on the issue of the legal powers exercisable by Raheenleagh. RTK had submitted that as the holder of an authorisation and as an electricity generator, the company had the same powers as those conferred on the ESB under the Electricity (Supply) Act 1927 with regard to matters such as breaking up streets and roads or laying electric lines above or below ground. The Commissioner disagreed. Raheenleagh had only a *right to apply* to the CRU for consent, whereas by contrast the ESB was obliged, under the statute, only to *consult* with relevant bodies before exercising its powers.

66. RTK also relied upon the compulsory purchase powers vested in the ESB under the Act of 1927 which, by virtue of the provisions of the 1999 Act, are now exercisable by the CRU on the application of either the ESB or the holder of an authorisation. Again, the Commissioner found that Raheenleagh had only a right to apply to the CRU. This was distinguishable from, for example, the powers conferred on NAMA.

67. Under the Planning and Development Act 2000, as amended, the carrying out of certain works by an electricity generator is exempted development. Given the wide

variety of works included by that statute as being within the range of exempted development, this did not, in the Commissioner's view, vest in electricity undertakings a "*power*" beyond the normal rules of private law. Any person with the requisite interest in lands could carry out works specified by the Act to be exempted development.

68. RTK also referred to s.182A (5) of the Act of 2000, which provides for a particular procedure in relation to a proposed electricity transmission development. Again, the Commissioner did not see this as a special power.

> "*Turning to section 182A(5) of the 2000 Act, this provides that An Bord Pleanala may, where appropriate, require an "undertaker" who has applied for approval for a proposed electricity transmission development, to furnish it with certain information relating to the environmental effects of the development. Section 182A(5)(b) provides that An Bord Pleanala may indicate to the undertaker that it would be appropriate for it to provisionally approve the proposed development subject to certain specified alterations.*
>
> *Section 182A(6) provides that where an undertaker submits altered plans in accordance with section 182A(5)(b), permission will be deemed to be granted in those terms. Section 182A(l) provides that an "undertaker" who intends to carry out an electricity transmission development must prepare, or cause to be prepared, an application for approval for the proposed development to An Bord Pleanala and it must*

apply to An Bord Pleanala for such approval. In my opinion, section 182A of the 2000 Act does not permit Raheenleagh Power to carry out an electricity transmission development without having to obtain planning permission. Rather, section 182A sets out a specific planning approval procedure for electricity transmission developments which are defined as strategic infrastructure developments under section 2 of the 2000 Act. There are exceptions to this obligation to apply to An Bord Pleanala for approval for an electricity transmission development in section 22(3) of the Energy (Miscellaneous Provisions) Act 2006. However, those exceptions only apply where a development has already obtained planning permission under section 34 of the Act of 2000 or where a planning application had already been lodged under the previous procedure before section 22 of the 2006 Act had commenced. Accordingly, I am satisfied that section 182A(5)(b) and (6) of the 2000 Act does not vest in Raheenleagh Power the power to carry out works without the need to obtain a grant of planning permission from a planning authority."

69. The final matter considered in relation to the question of "*special powers*" was the right of a statutory undertaker (which includes a person authorised to provide or carry out works for the provision of electricity) under s.254(2)(c) of the Act of 2000 to carry out certain works (the erection, construction, placing or maintenance under a public road of a cable, wire or pipeline) on the roadway without a licence. As with the issue relating to exempted development, the Commissioner considered this to

be a freedom conferred on statutory undertakings rather than a power. It also noted that, again, the consent of the CRU would be required.

70. The Commissioner therefore concluded that Raheenleagh was not vested with special powers beyond those resulting from the normal rules applicable in relations between persons governed by private law, and so could not be considered to be a public authority within the meaning of Article 2(2)(b).

71. Accordingly, the Commissioner then turned to Article 2(2)(c). The three questions seen as arising were whether the body had public responsibilities or functions or provided public services; whether those public responsibilities related to the environment; and whether the body was under the control of a public authority coming within either (a) or (b) – that is, government or other public administration body or any natural or legal person performing public administrative functions under national law. All three elements had to be present for a body to come within paragraph (c).

72. RTK submitted that the supply of electricity was a matter of public interest and that, despite the unbundling of the market, the high level of regulation indicated the public nature of the service. It also argued that the company had specific public functions in connection with the Renewable Energy Feed-in Tariff (REFIT), an approved State aid scheme for the incentivisation of the production of renewable energy. It was argued that by participating in the scheme the company took on a responsibility to contribute towards meeting the State's target for renewable electricity generation.

73. It is necessary to give some brief indication here of the nature of REFIT. The term actually refers to a series of schemes, the last of which closed to new applications some years ago and was replaced by a system based on competitive bidding. However, they have a continuing life span in view of the fact that they cover periods of 15 years for the participants, including Raheenleagh. They are based on the power to impose public service obligation levies under s.39 of the Act of 1999. That section provides, *inter alia*, that the Minister may order the CRU to impose public service obligations on the holders of licences and authorisations. These may include obligations relating to security of supply, regularity, quality and price of supplies, environmental protection and the use of indigenous energy sources. Such an order is to provide for the recovery of the additional costs incurred by way of a levy on the final customers. A large number of statutory instruments have been made under this section, which cannot be considered in any detail here. However, it is worth noting that the Electricity Regulation Act 1999 (Public Service Obligations) (Amendment) Order 2008 established a mechanism through which electricity suppliers entering into a power purchase agreement (a "PPA") with an electricity generator using renewable energy could be compensated, in accordance with the REFIT scheme, for the fact that they would be paying above the market rate for electricity.

74. The scheme relevant to Raheenleagh was REFIT 2. State aid approval for that scheme was conveyed by the EU Commission on the 12th January 2011. For present purposes, the following may be considered relevant. The objective was noted by the Commission as being the increase in renewable energy capacity from *inter alia* wind power, in order to help Ireland to meet its obligations under Directive

2009/28/EC ("the Renewables Directive"). The beneficiaries of the aid would be generators operating new plants, to be built and operational by 2020. It was to be financed by a levy on all electricity customers.

75. It was further noted that the aid money would be payable to those retail suppliers of electricity who entered into a power purchase agreement ("PPA") with generators of electricity from renewable sources. However, the latter were the indirect beneficiaries. PPAs, which were not compulsory but were in practice availed of by all eligible generators, had a term of 15 years and involved an undertaking by the supplier to purchase all of the output from a selected plant at fixed prices negotiated between the generator and the supplier, irrespective of market price. The contract could be terminated on 12 months' notice. REFIT payments become payable to the supplier according to a formula, to be applied by the energy regulator, taking account of the market prices and the technology costs involved.

76. Raheenleagh entered into a PPA with an ESB subsidiary, Independent Energy Ireland. This company trades under the name "Electric Ireland". S.I. 556/2015 lists Raheenleagh in the schedule of approved PPAs for REFIT. As it happens, the supplier in question was designated by the CRU as the "*supplier of last resort*". In a consultation paper explaining why such a supplier was necessary, the CRU referred to electricity as "*essential*" and said that there was a need for a universal service.

77. In its State aid assessment, the Commission accepted that the costs associated with the production of energy from renewable sources were higher than those for non-

renewable sources. It was recorded that the Government submission stated that, because of that fact, would-be producers would have difficulty obtaining the necessary funding to commence generation. Accordingly, there would be insufficient incentive to produce electricity from renewable sources without the aid. The Commission found that the compensation paid to the suppliers indirectly benefited the producers, because they would be able to sell their electricity at a price they would not otherwise have achieved (that is, a price, higher than the market average, that would enable the producers to recoup their construction and generation costs and to trade profitably). The aid was compatible with the 2008 Community Guidelines on State Aid for Environmental Protection.

78. In 2014 the Commission issued new guidelines on State aid for environmental protection and energy, which include consideration of aid for energy from renewable sources. (These guidelines were replaced in 2022 but were in force at the time relevant to these proceedings). State aid for activities under these headings is, in principle, compatible with the internal market if it leads to an increased contribution to the Union environmental or energy objectives. Paragraph 3.2.1.1 of the Guidelines states that the general objective of environmental aid is to increase the level of environmental protection compared to the level that would be achieved in the absence of the aid.

> *"A low carbon economy with a significant share of variable energy from renewable sources requires an adjustment of the energy system and in particular considerable investment in energy networks. The primary objective of aid in the energy sector is to ensure a competitive,*

sustainable and secure energy system in a well-functioning Union energy market."

79. RTK's final submission to the Commissioner was that the company came within paragraph (c) because it was controlled by the two public authorities that owned it, adding (in circumstances where Coillte was disposing of its half-share) that it would be sufficient for the "*control*" test if one public authority had a significant share.

80. The Commissioner distinguished between the generation and supply of electricity, on the one hand, and its transmission and distribution on the other. Transmission and distribution remained under State control but the market for generation and supply did not. In Ireland, any person who was authorised and licenced by the CRU to generate electricity could now sell electricity in the Single Electricity Market. The Commissioner took the view that the result was that while electricity generation might once have been a public service, or have involved public responsibilities or functions as part of the State monopoly under the 1927 Act, that was no longer the case. The liberalisation of the electricity market had resulted in the opening up of the generation of electricity to competition.

81. The REFIT scheme was not seen as relevant to the issue. While the PPA provided certainty to the renewable energy producers by guaranteeing them a minimum price, the money from the PSO levy went to the supplier.

82. Having found that Raheenleagh did not provide a public service and did not have public functions or responsibilities, the Commissioner did not consider that there was any purpose in examining the question whether it was controlled by a public authority.

The High Court

83. RTK appealed the Commissioner's decision under article 13 of the Regulations, which provides for an appeal on a point of law to the High Court. The trial judge (Owens J.) described the respective roles of the Commissioner and of the Court in the following terms in paragraphs 18 to 20 of his judgment:

> "*18. Under article 12 of the Regulations the Commissioner carries out an investigation in relation to any matter which is referred to him and he can call for material which may be relevant to his decision. A problem may arise on appeal to the High Court on a point of law if some error is identified which can only be corrected following consideration of further material. The parties are agreed that the Commissioner had sufficient material before him to make a determination on all points.*
>
> *19. My jurisdiction on appeal is limited. I can review whether legal conclusions are supported by material available to the Commissioner and whether those legal conclusions are correct. I can also review whether the Commissioner has failed to consider materials which he ought to have considered. I do not have*

any power on appeal on a point of law to decide disputed factual matters and I have no investigatory role.

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

84. Owens J. took the view that where it was 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. Essentially, he considered that the Commissioner had erred in breaking down the tests for paragraphs (b) and (c) into their component parts and coming to his conclusions on that basis. These were both composite tests, in the sense that it was not conceptually possible to assess their separate parts on a stand-alone basis.

85. He concluded that the Commissioner had erred in finding that Raheenleagh was not a paragraph (b) public authority. The error here, as he saw it, lay in the Commissioner's analysis of the purpose and functional effect of the statutory powers. The test set out in paragraph 52 of *Fish Legal* required an examination of any relationship between the performance of any services of public interest with which an entity may have been entrusted and the public law powers which enabled it to perform those services. In finding that Raheenleagh did not have "*special powers*", the Commissioner had failed to engage with the first part of the paragraph and had not given sufficient consideration to the purposes and functional effects of

the powers conferred. He had not considered other rights and powers having a public law element such as the rights to access and supply the national grid. The *Fish Legal* test did not require that powers such as compulsory purchase should actually be exercised, since the fact of their existence would often be enough to bring about the desired result.

> "*The para. 52 test requires examination of any relationship between performance of services of public interest which an entity may be "entrusted" with under the national legislation and the public law powers which enable it to perform those services. "Special powers " within the test set out in para. 52 may include monopoly powers or other privileges. However, para. 52 does not require that the public entrustment be a monopoly or that "special powers" accompanying that entrustment be granted exclusively to a single entity or a small number of entities.*"

86. Owens J. considered that it was in the nature of important services such as railways, canals, water, sewage, waste disposal, electricity, gas and telecommunications that organs of the State might be engaged in their establishment, regulation, pricing and upkeep. The State might "*entrust*" responsibility for the provision of such services to entities that met defined criteria, which might include environmental criteria. State powers of licencing, intervention and regulation could be seen as indicia of "*entrustment*" with the performance of services of public interest. The entities so entrusted would usually be given powers not enjoyed by persons governed by

private law, such as the right to operate as suppliers of utilities, powers of compulsory purchase and a right of access to public infrastructure.

87. Owens J. then examined the regime created by the Act of 1999. He noted that under s.39 public service obligations could be imposed for purposes including security and regularity of supply, environmental protection, climate protection and the production of electricity using renewable, sustainable or alternative forms of energy. The costs of compliance were met by a levy that formed the basis for the REFIT scheme. The trial judge observed that, whether commercial generators of electricity were private (responsible only to private sector shareholders) or directly or indirectly under the control of semi-State companies, the focus of para. 52 of the *Fish Legal* test was on "*entrustment*" and on "*services of public interest*". It was not on issues such as monopoly status, or the number of entities carrying on the activity, or the ownership or control of the entity. He considered that these features meant that Raheenleagh had been entrusted with the performance of services of a public nature.

88. Turning to the powers available to the company, Owens J. found the compulsory purchase power to be a vital part of the legislation. It made it possible for an entity that was still at the stage of applying for an authorisation to seek approval for a compulsory purchase scheme. Given that most land in the State was in private ownership, an authorisation to construct could be useless without such a power.

89. Owens J. rejected the argument by Raheenleagh that it should be compared to the other holders of authorisations for the purpose of determining whether its powers should be considered "*special*". Persons governed by private law had no such powers. The role of the CRU as an independent regulatory supervisor did not alter the nature of the power, because the functional effect of the legislation was that the company could use public law compulsion to interfere with the property rights of others, in a manner not available to those operating exclusively within private law.

90. The company was also found to be a paragraph (c) public authority. Again, Owens J. held that it was a composite test. The decision-maker, he said, should look at what the entity did and where it operated, to assess whether any of its activities, purposes, rights or obligations could carry with them public responsibilities or public functions, or the provision of public services, relating to the environment. The word "public" did not connote "the public good" or "the public interest" but was a reference to the public law sphere of functions, obligations and the provision of services. It was therefore necessary to examine whether any of the provisions of the Act of 1999, or other rules of public law, or the conditions of a permit or licence, involved such responsibilities, functions or services. In his view, the regime within which Raheenleagh operated was the public law regime that secured the electricity supply. The exploitation and control of energy resources and other resources were aspects of the human environment and were included in the definition of "environmental information" in Article 2 of the directive. An applicant for an authorisation was obliged to satisfy the CRU that it either had or would apply for all necessary consents, including consents related to the protection of the

environment such as planning permission. Therefore, the information relating to wind turbine noise provided in a planning application touched upon the discharge of public responsibilities relating to the environment.

91. Having regard to the test set out in *Fish Legal,* Owens J. found that each of the two controllers of the issued shares was a public authority. Each of them, either acting together or acting alone, was in a position to exert decisive influence over actions of the company in the environmental field. The replacement of Coillte by a private operator did not change the fact that the ESB held half of the shares through a subsidiary and also provided the day-to-day management. Those facts led to an "inexorable" conclusion that the company was under the control of the ESB.

The Court of Appeal

92. Raheenleagh appealed the decision of the High Court to the Court of Appeal. The appeal was opposed by RTK. The Commissioner opted not to participate, having already informed the High Court that he would accept its findings. In the sole judgment (delivered by Costello J.) the decision of the High Court was reversed.

93. It was accepted by the Court of Appeal that, as proposed by RTK, the test for determining whether Raheenleagh was a public authority within the meaning of Article 2(2) of the Directive raised five specific questions. The questions, and the answers given by the Court, are summarised here.

A) Was Raheenleagh entrusted with the provision of services of public interest?

94. Costello J. noted that the Commissioner had posed this question but had decided not to answer it, and that the trial judge had answered it emphatically in the affirmative. She saw the question as containing two elements:- had the company been entrusted with a function relating to the environment under national law, and was the function the performance of a public service? Having noted that the company had been granted a licence and an authorisation to construct the wind farm under the Act of 1999, Costello J. found that Raheenleagh had a permission to generate electricity but was under no legal obligation to do so. It was operating in competition with hundreds of other licenced and authorised entities. It could sell the electricity to a supplier on whatever terms were agreed between them. It was free to cease the supply of electricity if it wished. It therefore could not be said to have a "*responsibility*" to generate electricity. Such a situation was inconsistent with the performance of a public function or the provision of a service of public interest. It had not, therefore, been "*entrusted*" with the generation and sale of electricity.

95. The Court agreed with the company's submission that while electricity remained an essential utility, the nature of the service provided did not of itself determine the question whether what was being performed was a service of public interest. It had been conceded by RTK that, for example, the microgeneration and sale of electricity did not come within the regulations. Changes in the electricity market meant that the generation of electricity had been "*unequivocally privatised*" and converted into a voluntary, although heavily regulated, activity in a competitive market. It was no

longer the provision of a service in the public interest. The test for paragraph (b) was a functional one, focussed here on the activity of the generation and sale of electricity, in respect of which the legal structure (and identity of shareholders) of the entity in question was irrelevant. The analysis had to apply to all generators, regardless of their legal structure.

96. On this aspect of the appeal, the Court rejected an argument by RTK that the combination of the licence held by Raheenleagh and the nature of the activity of generating electricity meant that the company had been entrusted with the performance of services of public interest. This case had not been made to the Commissioner. Further, the Commissioner had not been asked to consider the terms of the licence and had made no findings as to its effect. The argument could not be raised at this stage.

97. The Court disagreed with the trial judge in relation to the s.39 public service obligations provision in the Act. There was no evidence that any such order had been made which applied to Raheenleagh, and the provision was therefore irrelevant to the issues to be determined.

98. The Court also considered that Owens J. was mistaken as to the operation of the REFIT scheme, holding that the obligations arising under it were imposed on suppliers and not on generators. The benefit to the generator was that the suppliers could purchase renewables with the benefit of the subsidy, but the generator did not thereby undertake to deliver any public services. The Court distinguished the

position of electricity generators from that of the water companies under consideration in *Fish Legal*. The latter were operating in a system far closer to the vertically integrated model of a utility which previously applied to the generation and provision of electricity in the State.

B) Did Raheenleagh enjoy special powers?

99. The statutory powers pointed to by RTK derived in part from the Act of 1927 and in part from the Act of 1999. It argued that Raheenleagh had the power to:

(i) Cut trees, shrubs or hedges under s.98 of the Act of 1927 as amended.

(ii) Exercise the functions of the ESB in relation to compulsory purchase orders under s.45 of the Act of 1927 and s.47 of the Act of 1999

(iii) Exercise the powers of the ESB to lay electric lines under ss.51 and 52(1) of the Act of 1927 pursuant to s.47 of the Act of 1999.

(iv) Exercise the powers of the ESB under s.48 subs. (1) to (5) and (9) of s.53 of the Act of 1927, as applied by s.49 of the Act of 1999, in relation to wayleaves across land for electric lines (including the power to enter on land or buildings for specific purposes).

100. It was also pointed out that the company was a "public authority" for the purposes of the Acquisition of Land (Assessment of Compensation) Act 1919, pursuant to s.45(5) of the Act of 1999.

101. The Court of Appeal accepted that Raheenleagh was indeed vested with special powers beyond the normal rules applicable under private law. The appropriate comparators here were not (as argued by Raheenleagh) the other holders of licences and authorisations, but other private enterprises. Raheenleagh had powers not available to such other enterprises. The Court also rejected the argument to the contrary effect based on the fact that the company had to obtain the consent of the CRU to exercise the powers in question, finding that many similar statutory powers were subject to oversight by an independent body. That did not alter the exceptional nature of the powers.

C) Was Raheenleagh controlled by a public authority falling within the Article 2(2)(a) or (b)?

102. The Court of Appeal noted that the Commissioner had made no factual finding as to whether or not the company was under the control of a public authority. It considered that in those circumstances it had not been open to the High Court to make an affirmative finding on this aspect. If that Court had not been able to conclude, as a matter of law, that the company could not have been under such control, the issue could only have been resolved by remitting the matter for further consideration.

103. Referring to paragraph 68 of *Fish Legal*, Costello J. observed that "*control*" had an autonomous meaning and that the manner in which control was achieved was irrelevant. It was not sufficient, for the purpose of finding that a public authority

was in control of a particular entity, to show that it was "*in a position to exert decisive influence*", as Owens J. had put it. It must also be shown that the entity did not determine in a genuinely autonomous manner the way in which it performed the functions vested in it in the environmental field. It was therefore necessary to show that the public authority had an actual, as opposed to potential, impact on the entity's decision-making.

104. In this case, the company had been set up as a joint venture with no majority shareholder, and the Court considered that, as a matter of law, neither shareholder could exert decisive influence. The agreement between the shareholders had not been put in evidence and the Commissioner had made no findings of fact regarding the position of the parties to it. There was, in the circumstances, no evidential basis for the High Court's finding. The management and operations agreement under which ESB Wind provided the day-to-day management of the wind farm did not relate to the control of the company and there was no evidence as to how it operated in practice.

105. Costello J. then turned to the question whether Raheenleagh had been vested with the performance of functions in the environmental field, as referred to in paragraph 68 of *Fish Legal*. She considered that a resolution of this issue was not necessary to determine the appeal, given the finding that the control test was in any event not shown to have been met. However, given that the trial judge had held that the Commissioner had erred in his interpretation of the concept of "*public responsibility or functions*", it was nonetheless appropriate to address it. She held that the High Court had erred in linking the concept with the obligation to provide

information relating to the environment in connection with applications for planning permission, or for the purpose of complying with regulations authorising activities that might touch on environmental matters. The question was whether any functions had been vested by law, and not whether the company had public functions or responsibilities as a result of being given a statutory consent. For the reasons already discussed, the Court of Appeal found that the company did not have such functions or responsibilities.

D) When is the question of control to be assessed?

106. This question was said to arise if it was found that the issue of control by a public authority was altered by the sale of Coillte's shareholding. On the facts of the case, the Court did not consider that there was any difference and accordingly the question did not require to be addressed.

E) Depending on the court's conclusions on these issues, whether (i) it should remit any part of the case back to the Commissioner for determination or (ii) refer any questions of law to the Court of Justice of the European Union.

107. For the reasons given, the Court did not consider that either a reference or remittal to the Commissioner was necessary.

The Grant of Leave to Appeal

108. Both RTK and the Commissioner applied for leave to appeal to this Court. A single determination was issued in which leave to appeal was granted to both, while Raheenleagh was granted leave to cross-appeal the finding of the Court of Appeal that it was vested with special powers ([2023] IESCDET 2).

109. In granting leave, the Court set out the issues required to be addressed in the hearing as being:

(i) Whether a party is entitled to appeal a decision of the Court of Appeal in which he/she did not participate;

(ii) Whether in any event, a party can appeal against a decision made in its favour on the basis that the party disagrees with the reasoning by which the result was reached; and

(iii) Whether the Commissioner was correct to conclude that Raheenleagh was not a public authority within the meaning of the Regulations and Directive. It was stated, for the avoidance of doubt, that this would include a consideration of the questions of

a. Whether Raheenleagh has been vested with special powers; and

b. Whether Raheenleagh was under the control of a body satisfying Article 2(2) (b) or (c).

110. The Court added, for the avoidance of doubt, that it would be necessary to consider the further question whether the High Court and Court of Appeal had had

jurisdiction to consider the questions as to whether the company was entrusted with the performance of public functions in the environmental field for the purposes of Article 2(2)(b), and/or was vested with public responsibilities or functions or the provision of public services relating to the environment within the meaning of Article 2(2)(c).

Submissions on the Commissioner's entitlement to appeal/participate

111. The Commissioner says that, notwithstanding its decision not to participate in the Court of Appeal, it is a proper party to the proceedings and must in principle be entitled to seek to appeal to this Court if it satisfies the constitutional criteria under Article 34.5.3°. It submits that the outcome of the appeal in the Court of Appeal has a direct bearing on its interests and the performance of its functions. It takes the view that the interpretation of the regulations by the Court of Appeal was not consistent with EU law, and may therefore leave the Commissioner in the position of having to disapply that interpretation in order to give effect to EU law. The Commissioner is, in any event, a respondent to RTK's appeal.

112. It is also submitted that, having regard to the broad discretion of this Court in relation to the grant of leave, the fact that the Court of Appeal reached the same conclusion as the Commissioner does not absolutely preclude it from appealing, in circumstances where that Court reached its conclusions on a different basis and determined issues of fact and or law that were either not before, or determined by, the Commissioner. It is submitted that the Court's reasoning has, potentially,

significant implications. The right of appeal is nowhere expressly precluded, and the Commissioner seeks to appeal in the interest of clarity and legal certainty.

113. RTK supports the position of the Commissioner on this aspect, and submits that a prohibition on appealing the reasoning of a judgment would be a limitation on the right of access to the courts. In the circumstances of this case, the issue should be viewed within the framework of Article 47 of the Charter.

114. Raheenleagh objects to the participation of the Commissioner, arguing that to permit it in circumstances where a choice had been made not to participate in the ordinary appeal to the Court of Appeal risks undermining the division of roles between that Court and this. The nature and importance of the points of EU law did not alter between the High Court and Court of Appeal. The Commissioner should, therefore, have appeared in the latter and should not now be heard to complain that the Court of Appeal did not consider matters it now says are significant.

Conclusion on the participation of the Commissioner

115. There may well be cases in which an appellate Court could take the view that the participation in an appeal by a party who did not engage with proceedings in the courts below would be inappropriate and should not be permitted. That might arise where, for example, a party named as a respondent or notice party did not lodge any pleadings and did not seek to make submissions in the courts below. However, in my view, the situation here is quite different. The Commissioner filed a response and argued the case in the High Court. It is still a party to the proceedings and is a

respondent to RTK's appeal. It does not seek to make new arguments not arising from the decision of the Court of Appeal. A significant feature is that the Commissioner is the statutory authority charged with the primary decision-making role under the regulations, and hence has a broader interest in their interpretation than any private person or entity. I propose, therefore, to give full consideration to the Commissioner's submissions on the substantive issue.

Whether Raheenleagh is a public authority within the meaning of the regulations

RTK

116. RTK submits that the company comes within both paragraph (b) and paragraph (c). It proposes that the Court's interpretation should favour a broad, teleological approach. The corporate status of Raheenleagh should not, on this approach, be seen only through the prism of domestic company law or of market analysis but must be considered in the light of the directive's purpose – to facilitate a broad right of access to environmental information.

117. The finding that the company did not come within paragraph (b) because it had not been "entrusted" with the provision of services of public interest is seen by RTK as elevating the concept of "entrustment" to the status of a separate test that must be met for an entity to come within paragraph (b). Further, it is argued that the Court wrongly equated entrustment with "obligation", with the consequence that an operator in a competitive market could never be found to be a public authority, notwithstanding any requirement for sanction or regulatory licence. RTK says that the terms "entrustment", "services of public interest" and "special powers" are not

used in the directive, but are, rather, judicial concepts. It points out that in *Fish Legal* there was no dispute about the fact that the water companies had been entrusted with services of public interest, and, for that reason, the CJEU did not go into detail on the issue. The judgment does not provide a basis for deeming only monopolies to have been entrusted with public responsibilities, functions or services. RTK submits that the High Court judge was correct in characterising the services performed by Raheenleagh by reference to the question "Are those functions 'public' in nature?". It is submitted that it is irrelevant that the electricity market has been de-regulated and opened up to competition, because that fact, and the commercial nature of the entities performing the functions, do not change the public nature of the service or functions. It simply facilitates the participation of more service-providers.

118. RTK further submits that the Court of Appeal erred in separating out the entrustment issue from the special powers issue, arguing that in the context of this case, the holder of an authorisation from the CRU is given special powers because it is deemed to be in the public interest to do so. Reference is made to the opinion of the Advocate General in *Fish Legal*, where it was proposed that the referring court should determine whether the companies concerned could, by virtue of a formal, express legal act conferring official powers, impose on individuals obligations for which they do not require the consent of those individuals, with the result that they are in a position substantially equivalent to that of the administrative authorities of the State. RTK adopts this as the appropriate test, and says that "entrustment" refers to the effect of the act that confers the powers for the purpose of the performance of specific services relating to the environment.

119. It is said to be irrelevant whether the powers so conferred are direct, as in the case of the ESB, or indirect in that the entity is obliged to go through a particular legal mechanism before exercising them.

120. Turning to the control test, RTK acknowledges that the Commissioner made no findings and that further evidence might be necessary, for example in relation to the terms of Raheenleagh's licence. It nonetheless argues that there is sufficient evidence of ownership to determine the issue. The company was established by, and, at the time of the request by RTK, was owned by, two semi-State bodies that are public authorities in their own right. In *Fish Legal*, the CJEU appeared to suggest that ownership was sufficient without the need for further assessment of the nature or characteristics of the control exerted. Even if it is necessary to consider the latter, the company meets the definition. It was established for the purpose of generating electricity, which is a public responsibility, function or service and relates to the environment. It was, at the relevant time, under the control of two public authorities and, indirectly under the control of the State. After the sale of Coillte's shareholding, the company remains half-owned by the ESB, which gives that body a veto over ordinary and special resolutions.

121. RTK submits that if there is doubt about the proposition that a 50% shareholding is sufficient to establish control, and that there need not be evidence of actual control, the Court should either remit the matter to the Commissioner for further evidence or should refer the issue to the CJEU.

The Commissioner

122. The Commissioner expresses a general concern about the manner in which both the High Court and the Court of Appeal reached certain of their conclusions. It is submitted that, since what is involved is an appeal on a point of law, the court should not seek to make factual findings on matters not decided by the Commissioner. It is noted that the Court of Appeal referred to this principle, but it is said that it did so in a way that suggests that the problem arises only in respect of disputed "critical" factual matters. Thus, for instance, the Court determined the question of control, which the Commissioner had not, in this case, found it necessary to address. Because he had taken that view, the potential evidence on the issue had not been investigated by him. It could be that in a future case different evidence might be put before him on the question of control, but he would be bound by the finding of the Court of Appeal in this case.

123. The Commissioner takes issue with the view of the High Court that he was obliged to consider all aspects of a test even if satisfied that one element of that test had not been established. It is submitted that there is no rule of law to this effect. In the instant case, the definition of "*public authority*" consists of multiple elements which are cumulative, but which have internal alternatives. His position is that if a test requires the satisfaction of a series of criteria, and he finds that one of them is not satisfied, it is not necessary for him to consider the other limbs of the test. However, he says that if he is wrong in relation to that, then the matter should have been remitted to him so that the necessary primary facts could be established. The Court of Appeal was wrong to deal with the control issue on the basis of its view

that there was no evidence of control, just as the High Court had been wrong to find that there was in fact control. Similarly, if the terms of Raheenleagh's licence were relevant to the question of public service, the matter should have been remitted so that he could consider it.

124. The Commissioner is concerned that the approach taken by the Court of Appeal creates a potential scenario whereby he will in future have to address new arguments in an appeal to the courts, based on evidence that was not considered before him and in respect of which he had made no findings.

125. The Commissioner also submits that there are a number of substantive legal errors in the judgment. He identifies the errors in respect of the paragraph (b) category as follows:

a. The Court of Appeal erred in stating (in paragraph 61 of the judgment) that the functions "entrusted" to the entity in question must, under paragraph (b), relate to the environment.
b. The functions do not need to be entrusted by national law – the question is whether the legal regime applicable results in the performance of public service functions under national law. There must be a legal basis, specifically defined in national law, for the performance of the function.
c. The *Fish Legal* test does not require the body to be under an *obligation* to provide services under Irish law, simply that the body is entrusted with the performance of services of public interest. The Commissioner submits that the approach of the Court of Appeal in this respect will affect the

interpretation of the concept of environmental information. It is inconsistent with the view that the directive creates not just a right to information but a duty on the public in relation to the environment. It will allow entities to evade the directive because they have a regulatory permission rather than an absolute obligation.

126. The Commissioner submits that the Court of Appeal also erred in law in its interpretation and application of the test for control under Article 2(2)(c) of the Directive.

(i) The test does not require proof of actual influence but is intended to cover situations where a public authority "*is in a position to exert decisive influence on the entity's action in that field*". The focus is on powers and capacity.

(ii) The legal framework within which the entity operates may be such that it has no genuine autonomy vis-à-vis the State, even if the State is not involved in day-to-day operations.

(iii) In the case of a body owned by a public authority the capacity for control may be self-evident, as noted in the Aarhus Implementation Guide.

(iv) The Court's conclusions on this issue will affect the exercise of the Commissioner's power to require the furnishing of environmental information.

(v) Assuming the Court was correct in saying that as a matter of law a 50% shareholder could not be regarded as exerting decisive influence, the fact that ESB Wind owned half the share capital, appointed half of the board of directors and was responsible for the day-to-day operations would nonetheless be relevant to an assessment of the question whether the company was operating in a genuinely autonomous manner.

(vi) The Court should not have assumed that the case law concerning the concept of an "emanation of the State" was irrelevant.

(vii) The Court should not have relied on an analogy with the analysis of the domestic Court in *Fish Legal*, which did not involve any aspect of public ownership.

Raheenleagh

127. Raheenleagh describes itself as "*a private limited company which has no public roles or responsibilities and whose sole function is to operate a single wind farm*". It says that, overall, the decision of the Court of Appeal that it is not a public authority is faithful to the aims and purpose of the directive and Convention. It does, however, maintain an appeal in respect of the finding that it has "*special powers*" within the meaning of the case law.

128. For the most part, the company supports the reasoning and overall conclusion of the Court of Appeal as being faithful to the aims and purposes of the Convention and directive – to give a right of access to information in respect of bodies that have a decision making or policy role relating to the environment. The directive is not intended to apply to private entities which do not form part of the State and do not engage on public administration or the provision of public services.

129. Raheenleagh rejects the criticisms made by the Commissioner as being overly focussed on individual sentences in the judgment in circumstances where it was clear from the rest of the judgment that the Court had applied the correct test.

130. It is submitted that Raheenleagh is permitted, but not obliged, to produce electricity and has no responsibility for its provision to the public. It does not meet either an institutional or a functional test for the status of public administrative authority, since it has no power to make decisions or policies, whether capable of affecting the environment or otherwise. It simply operates the windfarm.

131. In its cross-appeal against the finding that it had been vested with special powers, the company submits, firstly, that the Court of Appeal erred in holding that the hypothetical comparator is a private enterprise with no statutory powers. It is argued that the terminology used by the CJEU – "*special powers beyond those applicable in relations between persons governed by private law*" – does not imply a comparison between those who have a licence or authorisation and those who do not. Raheenleagh contends that for windfarm owners the "normal" rules are those

set out in the statutory framework. Special powers would have to go beyond, or be in excess of, those which arise by virtue of holding a licence.

132. Secondly, it is argued that the powers are not special. They are only relevant and available during the construction phase, to facilitate construction, and depend on the consent of the CRU.

Discussion and conclusions

133. I have come to the conclusion that this matter should be remitted to the Commissioner for further consideration. That being so, and in deference to the role of the Commissioner, I do not intend to express decided or binding views on issues that were not previously argued before and decided by the Commissioner at first instance. However, I consider it appropriate to indicate the approach that should be taken.

134. It may be helpful to commence by repeating here the *Fish Legal* analysis of the features of bodies coming within paragraph (b) of Article (2)(2) of the directive.

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

135. While I have sympathy with the view of the Commissioner that it should be possible to reduce the test to its elements, and to determine that the test is not satisfied on the basis that one element has not been established, I think that this approach risks missing the relationship between the elements and the overall context of the test. The issue of "special powers" is an example here. The basic requirement is not simply that the entity has powers, but that the powers are vested **for the purpose** of performing services of public interest. In those circumstances, there seems to me to be little point in examining the disputed powers without regard to the nature of the purpose for which they have been conferred. I would therefore consider that the Commissioner and the Court of Appeal erred in the approach they each took to the consideration of paragraph (b).

136. The CJEU, in dealing with this aspect, referred to legal persons, whether governed by private law or public law, which have been "entrusted" under the legal regime applicable to them, with the performance of services of public interest. In its ordinary meaning, the word "entrustment" carries connotations of responsibility or duty. It is perhaps possible that the Court used the word without being conscious of its use in the Treaty, or of the associated jurisprudence relating to services of general economic importance, but that possibility seems to me to be highly unlikely. The CJEU takes considerable trouble to ensure that words used in judgments are deployed and translated consistently. I consider, therefore, that it implies some level of obligation in relation to the performance of a service of public interest. However, I would not see it as necessarily implying compulsion to provide a predetermined

level or form of service, in the same way that the medical insurance providers in the BUPA case did not all have to offer a predetermined product.

137. The Court of Appeal saw the question whether Raheenleagh was providing a service of public interest as having two elements – had the company been entrusted with a function in relation to the environment, and, separately, whether the function was the performance of a service of public interest. (In my view, this approach does not accurately reflect the *Fish Legal* test, which referred to "*the performance of services of public interest, inter alia in the environmental field.*") In determining that the answer in relation to both elements was negative, the Court stated that Raheenleagh's licence permitted it to generate electricity but that it had no obligation or responsibility to do so. A finding on this issue seems to me to require consideration of the terms of the licence, including its expected duration, the lengthy notice period for termination, the terms on which it can offer electricity to the market and the obligations to adhere to the statutory Codes referred to. Account should also be taken of the surrounding circumstances including the statutory power of the CRU to modify the licence.

138. The Court of Appeal also found that, because of the changes brought about in the market, the generation of electricity was no longer a service in the public interest but was a "voluntary or optional" activity so far as individual licence-holders were concerned. If this means that a service can only be considered to be in the public interest if it is, in effect, compulsory, I would consider that it goes too far. Looking at, for example, the PMI companies in BUPA, it was undoubtedly the case that (with one exception related to VHI) they were not compelled to offer any particular insurance product. That did not mean, however, that they were not providing

services of general economic importance. I am not clear why it should be thought that the concept of "public service" requires a different analysis, where that would result in very few entities of any sort being regarded as offering a service in the public interest beyond, perhaps, the health service and statutory bodies with mandatory obligations.

139. It seems to me that the analysis in the judgment misses what may be a key feature of the Raheenleagh's operations – it does not simply generate electricity, it generates electricity from a renewable source. That means that there are aspects of the national and EU legal regime under which it is treated quite differently to a producer using non-renewables. It was eligible for a State aid price support regime that was specifically approved by the Commission because its activities furthered the environmental policies of the EU in respect of energy provision and supply. That support was, in all probability, what made many if not all such generators viable. It is, I think, not particularly relevant that the actual payments under the scheme go to the electricity suppliers. The scheme did not simply give the producers a degree of security but ensured that they could achieve a particular level of price which suppliers would not otherwise have paid and without which their business might not have been viable. It seems to me that this State aid feature could be relevant to any determination as to whether the company is engaged in the provision of a public service, and that, therefore, account should be taken of the terms of the applicable REFIT scheme and associated statutory instruments. I would also see this aspect as potentially relevant to the broader concept of public services and functions in paragraph (c).

140. However, the paragraph (b) test requires the additional element of special powers. Here, I take a different view to that of the High Court and Court of Appeal. Leaving to one side the significance of the fact that the consent of the CRU is required, it appears to be the case that most of the statutory powers referred to, including the compulsory purchase power, arise under the Act of 1999. In general, they relate to the authorisation to construct the generating station and not to the licence to generate electricity. The powers associated with the authorisation are vested in the person authorised *for that purpose*. It may be, therefore, that these powers, such as they are, lapse once their purpose has been fulfilled and the station has been constructed. Not having seen the terms of the authorisation, the Court does not know whether this is so.

141. The requirement to obtain the consent of the CRU is undoubtedly a significant feature. However, it does not appear to me to be necessarily decisive. It remains the case that the authorised person can invoke a process that may lead to the making of a compulsory order against a party in circumstances where no person governed by normal private law can access any equivalent process. So, for example, a farmer who wishes to acquire additional land, or a right of way, must operate under the normal, voluntary law of contract. It is in my view wholly misconceived to suggest that the word "normal" in this context refers only to the statutory rules governing other electricity producers – that interpretation ignores the meaning of the words "private law".

142. The High Court held that the company had powers of a public law nature because it could, *inter alia*, access the national grid and sell electricity into it. It

seems to me that great care is necessary in making such an assessment. The point of most licensing systems is that a holder can do things that a person without a licence cannot. A great many occupations and businesses can only be pursued with a licence, under a statutory scheme of regulation, but they will not necessarily be covered by the directive. As the CJEU pointed out, the directive is concerned with the improvement of public participation in decision-making that affects the environment, and not all licenced activities will come within that.

143. Finally, there is the issue concerning paragraph (c) and the control test. Again, it may be helpful to repeat the paragraph and the analysis of the CJEU. Paragraph (c) reads:

> *(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)."*

144. The CJEU gave this explanation in *Fish Legal*:

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

69. The manner in which such a public authority may exert decisive influence pursuant to the powers which it has been allotted by the national legislature is irrelevant in this regard. It may take the form of, inter alia, a power to issue directions to the entities concerned, whether or not by exercising rights as a shareholder, the power to suspend, annul after the event or require prior authorisation for decisions taken by those entities, the power to appoint or remove from office the members of their management bodies or the majority of them, or the power wholly or partly to deny the entities financing to an extent that jeopardises their existence.

70. The mere fact that the entity in question is… a commercial company subject to a specific system of regulation for the sector in question cannot exclude control within the meaning of Article 2(2)(c) …in so far as the conditions laid down in paragraph 68… are met in the case of that entity."

145. As the Commissioner did not consider that Raheenleagh had any public responsibilities or functions, and was not providing a public service, he did not address the question of control. The trial judge held that each of the two controllers of the issued shares was in a position to exert decisive influence. The Court of Appeal found that, as a matter of law, a 50% shareholder could not "control" a company, and that to demonstrate control it would be necessary to show that a public authority had had an actual impact on the entity's decision-making. The Commissioner complains that both of these findings were made in the absence of evidence and of an investigation on his part.

146. As framed by the CJEU, the test for the "control" of a company is a mixed question of fact and law. It cannot in my view be determined by reference simply to the question whether a shareholder owns more than 50% of the issued shares. I agree with the Commissioner that it is a matter that should not have been determined by the courts on appeal, in circumstances where no investigation of the relevant factual matters had been addressed at first instance. It should be remitted to the Commissioner for reconsideration, in the light of the above discussion of the concepts of public responsibilities, functions and services and in the light of an investigation into the ownership, management and actual operation of the company at the relevant time.

Conclusion

147. In summary, I consider that the Commissioner erred in separating out the components of the relevant tests for paragraphs (b) and (c) of Article 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. The nature of the errors was such that it was not appropriate for the High Court and Court of Appeal to reach their own determination on these issues, without sufficient factual findings having been made by the commissioner.

148. In those circumstances I would remit the entire matter to the Commissioner.