



Coimisinéir um Fhaisnéis Comhshaoil
Commissioner for Environmental Information

**Decision of the Commissioner for Environmental Information
on an appeal made under article 12(5) of the European Communities
(Access to Information on the Environment) Regulations 2007 to 2018
(the AIE Regulations)**

Case: OCE-93469-W3X0R6

Date of decision: 15 September 2021

Appellant: Right To Know CLG

Public Authority: Bord na Móna plc (BnM plc)

Issue: Whether BnM plc was justified in refusing access to information on the basis that it was not held by or for BnM plc, in accordance with article 7(1) and (5) of the AIE Regulations.

Summary of Commissioner's Decision: The Commissioner found that information in scope of the request held by Bord na Móna Biomass Limited was held for BnM plc. Accordingly, BnM plc was not justified in refusing access to the information on the basis of article 7(1) and (5) of the AIE Regulations.

Right of Appeal: A party to this appeal or any other person affected by this decision may appeal to the High Court on a point of law from the decision, as set out in article 13 of the AIE Regulations. Such an appeal must be initiated not later than two months after notice of the decision was given to the person bringing the appeal.



Background

1. On 19 April 2019, the appellant made an AIE request to Bord na Móna seeking:
 1. A breakdown (in excel format) of all biomass imports from January 2017 to present, to include:
 - a. The country of origin;
 - b. The amount imported (in tonnage);
 - c. The companies from whom Bord na Móna have purchased the biomass;
 - d. The name of the Grower (e.g. name of plantation, producer, etc.), Miller and others known companies along the supply chain;
 - e. Documentation to show the biomass is purchased from certified sustainable sources.
 2. The agenda, minutes (to include draft versions) and associated documents of any meetings with ESB and/or DCCAIE representatives at which imported and/or domestic biomass was discussed from June 2018 to present.
 3. All correspondence (to include attached and/or associated documents) with the Minister for Climate Action and/or the Secretary General of DCCAIE that mention imported and/or domestic biomass from June 2018 to present.
2. On 17 May 2019, Bord na Móna plc (BnM plc) responded to the request, refusing access to the information. It stated that, to the extent that it exists, the information was not held by or for BnM plc, but was held by Bord na Móna Biomass Limited (“BnM Biomass”), a subsidiary of BnM plc. It stated that BnM Biomass is not a public authority and so is not subject to the AIE Regulations. In the alternative, it stated that:
 - a. the exception in article 9(1)(c) would apply to all of the information requested;
 - b. the exception in article 9(2)(a) would apply to the information falling within parts 2 and 3 of the request; and
 - c. the exception in article 9(1)(d) would apply to the information falling within part 3 of the request (although subsequent correspondence with my Office suggests that BnM plc intended to refer to article 9(2)(d)).
3. On 17 May 2019, the appellant requested an internal review of the decision.
4. On 11 June 2019, BnM plc affirmed its decision to refuse access to the information on the ground that the information was not held by or for it, but was held by BnM Biomass. It stated that BnM Biomass is not a public authority and so is not subject to the AIE Regulations. In the alternative, it stated that:
 - a. the exception in article 9(1)(c) would apply to the information falling within parts 1 and 2 of the request; and



- b. the exception in article 9(1)(d) would apply to the information falling within part 3 of the request (although subsequent correspondence with my Office suggests that BnM plc intended to refer to article 9(2)(d)).
5. The appellant brought this appeal to my Office on 24 June 2019.
6. I have now completed my review under article 12(5) of the AIE Regulations. In carrying out my review, I have had regard to the submissions made by the appellant, by BnM plc and by BnM Biomass. I have also examined the contents of the records provided to my Office. In addition, I have had regard to:
 - [Directive 2003/4/EC](#) (the AIE Directive), upon which the AIE Regulations are based;
 - the 1998 United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the [Aarhus Convention](#));
 - [The Aarhus Convention—An Implementation Guide](#) (Second edition, June 2014) (the Aarhus Guide); and
 - the [Guidance document](#) provided by the Minister for the Environment, Community and Local Government on the implementation of the AIE Regulations (the Minister’s Guidance).
7. Both the appellant and BnM plc made lengthy submissions to my Office during the investigation of this appeal. What follows does not comment or make findings on each and every argument advanced but I have considered all materials submitted in the course of the investigation.

Preliminary Matters

Delay

8. This appeal is now one of the oldest appeals my Office awaiting a first instance decision, having been with my Office for more than two years. I sincerely regret the delay in reaching a decision on this appeal. In light of this delay, I gave careful consideration to the scope of my review. As I set out below, on balance I have concluded that the best way to achieve a fair and comprehensive outcome in relation to the appellant’s request for information is for me to reach a conclusion solely on the issue of whether additional information is held by or for BnM plc. However, I acknowledge that this outcome is disappointing in the context of the overall delay in this case. I continue to be committed to improving the efficiency of my Office in order to achieve timely reviews in future.

Records in scope of the review

9. BnM plc decided on internal review that it did not hold any information falling within the scope of the appellant’s request. My investigator sought further information from BnM plc about the steps taken to search for information relevant to the request, along with information about BnM plc’s records management practices insofar as they relate to the information in question.
10. Responding to these inquiries, BnM plc identified three functions that could have information relating to biomass as being its financial, legal and procurement services, which were shared with



BnM Biomass at the relevant time. As a result of further searches, BnM plc identified that it did hold some information falling within the scope of the request, contained in the following documents:

- a. EFET Confirmation of Individual Biomass Contract, dated 17 April 2017;
 - b. Chairperson's Comprehensive Report to the Minister, dated 27 June 2018;
 - c. Confidential Comparison of policies supporting biomass power in Europe and Asia, dated 16 October 2018;
 - d. Chairperson's Interim Report to the Minister, dated 30 November 2018;
 - e. Response Letter to Minister Bruton from Tom Donnellan, dated 21 December 2018; and
 - f. Response Letter to Mark Griffin from Tom Donnellan, dated 11 February 2019.
11. BnM plc also identified two documents which it did not consider to contain any information falling within the scope of the request, as they did not specifically refer to biomass. These identified documents are:
- a. Letter from Minister Bruton to Tom Donnellan, dated 7 December 2018; and
 - b. Letter from Mark Griffin (Secretary General of DCCAE) to Tom Donnellan, dated 25 January 2019.
12. Part 3 of the appellant's request seeks correspondence with the Minister for Climate Action and/or the Secretary General of DCCAE "that mention imported and/or domestic biomass" between June 2018 and 19 April 2019. The request does not, for example, seek correspondence that relates to, or bears upon, imported or domestic biomass, which might encompass a broader range of correspondence. Having considered the two documents in question, I am satisfied that BnM plc's conclusion that these two documents do not contain any information falling within the scope of the request is justified.
13. I have examined whether the steps taken by BnM plc to search for any further information were adequate in the circumstances. I consider that a standard of reasonableness must necessarily apply. It is not normally my function to search for environmental information. BnM plc submits that it does not have systems or applications that would allow its business functions to type in a search and collate the information sought. The systems are more onerous and would require a keyword search, a review of all of the results from that search and manually pulling out the relevant information from each document that is returned in order to put it into a spreadsheet or document. BnM plc's financial, legal and procurement services store their documents in separate systems which are not capable of connecting to each other and which have different search functionalities. BnM plc explained that while some of the information requested may exist on its financial services systems, it would not be possible to identify such information without first obtaining further information from BnM Biomass. For example, the financial services system is likely to contain invoices which include some of the information in part 1 of the request, but it would not be possible to identify those invoices without BnM Biomass first providing a list of suppliers or invoice numbers. BnM plc explained that there was no central repository for



procurement files before the function was centralised, and as a result many of the documents that were saved to user drives have since been deleted when staff left the company. After the function was centralised, information was stored on a shared drive. A keyword search on that drive was conducted for biomass, but it could not be limited by date and returned thousands of documents. It was not possible to identify any document or series of documents containing all or part of the information requested; such a document would need to be compiled afresh from a manual review of the documents. BnM plc also provided a detailed explanation of the other locations searched and steps taken to find records that may have been misfiled or misplaced.

14. In relation to the information held on the procurement shared drive, I consider that the AIE Regulations give a right of access to information that is held, not information that may be created from a review of information that is held. Overall I am satisfied that BnM plc's searches for information were adequate in the circumstances.

Whether the matter should be referred to the High Court under article 12(9)(a)

15. BnM plc has submitted that, if I disagree with its submissions on whether or not information held by BnM Biomass is held by or for BnM plc, I should refer a question of law to the High Court for determination under article 12(9)(a) of the AIE Regulations. Having carefully considered the matter, my view is that, in this particular case, whether or not the information is held by or for BnM plc is a question of mixed law and fact, such that it is difficult to identify a clear question of law for consideration of the High Court. I consider that the conclusions that I have reached below are consistent with the AIE Regulations and the AIE Directive, as well as with the judgments of the Irish Superior Courts in their broader consideration of the AIE regime. Of course, appeal to the High Court on a point of law under article 13 of the AIE Regulations remains available to the appellant, to the public authority and to any other person affected by my decision.

Scope of Review

16. In accordance with article 12(5) of the AIE Regulations, my role is to review the public authority's internal review decision and to affirm, annul or vary it. Where appropriate in the circumstances of an appeal, I will require the public authority to make available environmental information to the appellant.
17. As set out above, BnM plc holds some information within the scope of the request, but submits that any additional information within the scope of the request is held by BnM Biomass. The parties provided submissions to my Office as to whether BnM Biomass is itself a public authority under the AIE Regulations, such that BnM plc would be under a duty to transfer the request to BnM Biomass under article 7(6)(a). I consider that it is first necessary to address the question of whether the information is held by or for BnM plc, as it is only if it is not so held that the duty under article 7(6) arises. As such, in relation to any additional information not identified by BnM plc as described above, the question before me is whether such information is held by or for BnM plc.
18. In relation to the information that BnM plc accepts that it holds, BnM plc submitted to my Office that the information may be withheld by BnM plc on the basis of articles 9(1)(b), 9(1)(c) and/or 9(2)(d), depending on the document in question. I have carefully considered whether I should make a decision on whether BnM plc's application of exceptions to this information is justified. However,



on balance, my view is that the best way to achieve a fair and comprehensive outcome is to confine this review to the question of whether any additional information is held by or for BnM plc.

Analysis and findings

19. The AIE Directive was adopted to give effect to the first pillar of the Aarhus Convention in order to increase public access to environmental information so that an informed public can participate more effectively in environmental decision-making. It replaced Council Directive 90/313/EEC, the previous AIE Directive.
20. Recital (1) of the AIE Directive sets out its underlying purpose as follows:

“Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment.”
21. Recital (16) informs the approach that must be taken to the Directive, providing that: “The right to information means that the disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for environmental information in specific and clearly defined cases. ...”
22. Public authorities are only required by the AIE Regulations to make available environmental information which is held by, or for, the public authority (see article 7(1) and (5) of the AIE Regulations). Those provisions implement Article 4(1)(a) of the Directive, which enables Member States to provide for a request to be refused if the information requested is not held by or for the public authority to which the request is addressed. In accordance with the second paragraph of Article 4(2), this ground for refusal “shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure.”
23. Article 3(1) of the AIE Regulations provides:

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

“environmental information held for a public authority” means environmental information that is physically held by a natural or legal person on behalf of that authority;”.
24. These definitions mirror the definitions in Article 2(3) and (4) of the AIE Directive. I note that there is a clear difference in the language used in each definition.
25. The definition of ‘held by’ refers to possession, denoting ownership or control. The United Kingdom Upper Tribunal in *Holland v Information Commissioner and University of Cambridge* [\[2016\] UKUT 260 \(AAC\)](#) found that held ‘by’ must mean more than just physically held. It found (paragraph 48):

“The question is whether the information was produced or received by means which were unconnected with the authority, for example by an individual in their personal or other independent capacity; or whether it was produced or received by means which were



connected with the authority, for example by someone acting in their professional capacity in relation to the authority (such as an employee of the authority). The connection must be such that it can be said that the production or receipt of the information is attributable to (“by”) the authority.”

26. By contrast, information ‘held for’ a public authority will, by its very definition, be in the physical possession of a natural or legal person *other than* the public authority to whom the request was made.
27. The preparatory documents for the AIE Directive, available [here](#), provide some assistance in interpreting the words ‘on behalf of’ in the definition of ‘held for’. The European Commission's [First Proposal for the AIE Directive](#) defined information held for a public authority as meaning “environmental information which is held by a legal or natural person on behalf of a public authority under arrangements made between that authority and that person”. The First Proposal explained:
- “In many cases, experience shows that environmental information which public authorities are entitled to hold on their own account is kept physically on their behalf by other entities. Access to such information may be requested by the public. Public authorities should not be entitled to refuse access to this information simply on grounds that it is not physically in their possession. The proposal ensures that, if such information exists and is kept for the public authority concerned under arrangements with another person or body, it should be made available by the public authority in the normal way.”
28. The Commission’s First Proposal was later amended by the European Council in its [Common Position](#) to the current wording now in the AIE Directive. In making its amendments, the European Council explained that “information held” means “physically held” and it deleted the First Proposal's limitative requirement for an arrangement between the holder and an authority. The European Commission, in its [declaration on the Common Position](#), noted that by the European Council's amendments the definition was simplified, but the “underlying principle of the definition in the Commission proposal is however ensured”. The omission of that limitative requirement from the final text of the AIE Directive indicates that the legal relationship (or the existence of ‘arrangements’ for holding information) between the public authority and the person holding the information is not determinative of the question of whether information is held ‘for’ a public authority. Rather, one must look at the overall factual position and come to a conclusion in the particular case as to whether or not the requested information is ‘physically held on behalf of’ the public authority.
29. Consistent with the separate treatment of the concepts of held ‘by’ and ‘for’ under the AIE Regulations and the AIE Directive, I will consider separately whether the requested information was held by BnM plc or held for BnM plc.

Statutory context relating to BnM plc

30. Bord na Móna was originally established as a statutory corporation under the Turf Development Act 1946. In light of the changes in the activities of that corporation and in the commercial environment over the following decades, Part 2 of the Turf Development Act 1998 (the 1998 Act)



provided for the formation of a new company, 'Bord na Móna plc', and for the transfer to it of the functions of the existing Bord na Móna statutory corporation. As a result, BnM plc is subject both to the general powers and duties outlined in the Turf Development Acts 1946-1998 and to all of the legal obligations and responsibilities which apply under general company law.

31. Part 3 of the 1998 Act provided for the formation and registration by BnM plc of subsidiaries for the purpose of enabling its principal activities to be carried on by the subsidiaries. "Bord na Móna Allen Peat Limited" was registered on 11 March 1999 as a private company limited by shares. On 21 September 2016, it changed its name to "Bord na Móna Biomass Limited". BnM Biomass is governed by its own constitution, which was updated in accordance with the Companies Act 2014 on 11 January 2017.

Was the information held 'by' BnM plc?

32. Apart from the information in the six documents identified during the course of the investigation by my Office, BnM plc submits that the information requested is not held by BnM plc, but by its subsidiary, BnM Biomass.

Position of the parties

33. BnM plc provided my Office with detailed submissions as to the nature of the legal relationship between BnM plc and BnM Biomass and the significance of their separate legal personalities. BnM plc submitted that BnM Biomass is a standalone company with its own management and personnel. Since 2018, legal, human resources and procurement functions for BnM Biomass are provided from within BnM Biomass itself. Although BnM Biomass is included on BnM plc's website, the content of the relevant webpage is determined by BnM Biomass. BnM Biomass is self-funding based on the commercial contracts that it negotiates and enters into on its own behalf. In relation to the information requested in this case, BnM plc submits that such information was created by BnM Biomass, which is also responsible for adding to, removing, editing and storing the information. BnM plc submits that, at all times, the information has simultaneously been in the ownership and physical possession of BnM Biomass.
34. BnM plc points to paragraph (c) of the definition of a public authority in article 3(1) of the AIE Regulations. That paragraph provides for persons "having public responsibilities or functions, or providing public services, relating to the environment under the control of" a public authority under paragraph (a) or (b) of the definition to be treated as a separate public authority. BnM plc submits that this aspect of the definition of a public authority recognises that subsidiaries are not automatically encompassed by the definition of a public authority in paragraph (a) or (b) solely on the basis of their relationship with their parent company. Rather, subsidiaries must meet the additional requirements of "having public responsibilities or functions, or providing public services, relating to the environment".
35. BnM Biomass confirmed its agreement with the submissions made by BnM plc.
36. The appellant submits that state owned entities are often constituted as group structures. As such, the entire group must be a public authority, taking into account the purpose of the AIE Directive and the Aarhus Convention. The appellant submits that it would undermine the objectives of the



AIE Directive if access to environmental information depended on the internal structure of a public authority. If that were the case the objectives of the Directive could easily be defeated through holding environmental information in subsidiaries. It submits that the letter and spirit of the AIE Directive mean that public authorities cannot choose to carry out their functions by structuring themselves in such a way that environmental information held by certain group entities is outside the scope of the right of access.

Conclusions

37. Although they are related companies, BnM plc and BnM Biomass are separate legal entities with separate legal personalities. I accept BnM plc's submission that the scheme of the AIE Regulations makes a clear distinction in the definition of public authority between parent companies and their subsidiaries, such that information held 'by' a subsidiary is not automatically considered to be information held 'by' its parent company. This position does not necessarily undermine the objectives of the AIE Directive. Information held by a subsidiary may, in some circumstances, be held 'for' the parent company. Equally, the subsidiary may, in some circumstances, be itself a public authority to whom an AIE request may be made.
38. In this case, I am satisfied that any additional information within the scope of the request which is held by BnM Biomass is not held 'by' BnM plc.

Was the information held 'for' BnM plc

39. While BnM plc has not specified what information within the scope of the request is held by BnM Biomass, it accepts that BnM Biomass does hold some information within the scope of the request.

Position of the parties

40. The principal submissions of the parties are summarised below to enable my factual findings to be understood. However, I wish to assure the parties that I have taken into account all materials submitted during the course of the investigation, including matters not summarised below.
41. BnM plc submitted, in summary:
- a. The only basis upon which environmental information held by BnM Biomass could be deemed to be held on behalf of BnM plc would be in circumstances where the separate legal personality of BnM Biomass was disregarded.
 - b. The inclusion of 'held for' in the AIE Directive is intended to capture environmental information which a public authority is entitled to hold on its own account, but which is physically kept elsewhere. The typical example would be where information is stored at an archive storage facility or electronically on a document cloud system. BnM Biomass does not hold the requested information on behalf of BnM plc, but holds it in its own right. BnM plc has no power to decide what information is retained, altered or deleted by BnM Biomass.
 - c. BnM Biomass is not under the unfettered control of BnM plc. The business of BnM Biomass is carried out at a separate location to BnM plc, at Edenderry, Co. Offaly and it is responsible for dictating its own trading terms, hiring its own employees and negotiating its



- own commercial contracts. It is solely responsible for its own operational issues and conducts operational meetings without any input from BnM plc, which is not involved in the day-to-day running of the business.
- d. BnM Biomass is not performing any delegated functions on behalf of BnM plc such that an agency relationship could be deemed to exist. The principal activities of BnM plc are, pursuant to section 9(2) of the 1998 Act, the functions conferred on the statutory corporation, Bord na Móna, by the Turf Development Acts 1946-1998. The statutory corporation Bord na Móna was formed (as per the short title to the Turf Development Act 1946) to make provision for the development in the national interest of the production, distribution and supply of turf. BnM Biomass is not involved in any activities involving the production, distribution or supply of turf. Rather it is engaged in an independent commercial activity, namely the sourcing and purchase of biomass feedstock (i.e. organic, plant-based material used as a fuel) for the generation of electricity.
 - e. Section 32 of the 1998 Act provides that confidential information shall not be disclosed by officers or staff of, or advisers or consultants to, BnM plc or its subsidiaries unless duly authorised by BnM plc or, as appropriate by the subsidiary, or unless required by law to do so. Regulation 49 of BnM Biomass's constitution requires all persons engaged in the business of BnM Biomass not to disclose confidential information otherwise than solely for the benefit of BnM Biomass in the course of his duties or as may be required by law. BnM Biomass has refused consent to the disclosure of any relevant information to BnM plc for the purpose of responding to this AIE request and BnM plc has no legal entitlement to obtain the information without consent.
42. BnM Biomass confirmed its agreement with the submissions made by BnM plc. In particular, it confirmed that BnM plc does not have any power to require BnM Biomass to provide BnM plc with the requested environmental information and that BnM Biomass does not hold any environmental information for or on behalf of BnM plc.
43. The appellant submitted, in summary:
- a. The appellant made the request to Bord na Móna and not to any specific company because, until the request was answered, the appellant had no knowledge of the internal organisation of Bord na Móna. The appellant could not find any information about how to contact BnM Biomass directly. Bord na Móna only provides a single point of contact for AIE requests and does not provide any information as to how environmental information may be accessed from the subsidiaries.
 - b. BnM plc's annual report shows that BnM Biomass is fully integrated with the BnM group and does not appear to have an independent existence outside of that. That report repeatedly references the use of biomass, including as a component of the extension and expansion of BnM plc's existing low carbon business. Biomass is further referenced as an integral part of the Bord na Móna group operations under its reports on sustainability and corporate responsibility and governance.



- c. It is clear that the decision-makers at both stages in BnM plc had access to the requested information because they both made reasoned decisions in the alternative based on the contents of the information.
- d. Even if it didn't have access to the information, BnM plc could have directed BnM Biomass to provide the information to it for the purpose of handling the request or could have directed BnM Biomass to answer the request.
- e. In any event, the Court of Justice of the European Union in [C-261/18 Commission v Ireland \(Derrybrien Wind Farm\)](#) found that duties under Directive 85/337/EEC apply to wholly-owned subsidiaries of semi-state companies (see paragraph 91). As a result, BnM Biomass is under a duty as a matter of EU law not to refuse consent in order to facilitate access to environmental information, pursuant to the AIE Directive.
- f. BnM plc retains effective control over BnM Biomass. It would be remarkable if the legislature passed legislation permitting the establishment by BnM plc of subsidiaries to carry out its principal activities and for those activities to be then conducted completely outside the supervision and control of BnM plc or the State.

Approach to the issue

44. In support of its submissions above, BnM plc referred me to case law in relation to the following principles of Irish company law and about discovery, which it submits are relevant to the meaning of the term 'held for' in article 3(1) of the AIE Regulations:
 - a. A company is not to be regarded as an agent or trustee of its members¹;
 - b. A subsidiary remains a separate legal entity in circumstances where all of its directors are nominees of the parent company²;
 - c. The fact that the activities of subsidiaries may be reflected in the accounts of a group does not mean that the assets of one company within the group may be liable for the debts of another³;
 - d. The courts do not have jurisdiction to order discovery which would require a third party (even where the third party is a related company of a party to the proceedings) to itself engage in what would be a form of delegated discovery⁴; and
 - e. A party to litigation has a document within his 'power' for the purpose of discovery only if he has a presently enforceable legal right to obtain inspection of the document from whoever actually held it without the need to obtain consent from anyone else, and

¹ *Saloman v Saloman & Co* [1897] AC 22.

² *Irish Permanent Building Society v Cauldwell (sued as Registrar of Building Societies) and others* [1981] ILRM 242.

³ *Allied Irish Coal Supplies Ltd v Powell Duffryn International Fuel Ltd* [1998] 2 ILRM 61.

⁴ *Thema International Fund plc v HSBC Institutional Trust Services (Ireland) Limited* [2013] IESC 3.



documents in the possession of subsidiaries which cannot be obtained without their consent are not within the power of the parent⁵.

45. The appellant also referred me to case law in support of the ‘single corporate entity principle’, which enables a parent company and its subsidiary to be treated as a single corporate entity where justice so requires⁶.
46. While I note all of this case law with interest, I do not consider that it assists with the interpretation of the term ‘held for’ under the AIE Regulations and the AIE Directive. The term ‘held for’ must be given an autonomous interpretation under EU law that is applied consistently across all Member States. It would be inconsistent with that principle if the meaning of ‘held for’ were to depend on complex concepts which are particular to the national law of a Member State.
47. As set out above, I consider that I must look at the overall factual position in a particular case and come to a conclusion as to whether or not the requested information is ‘physically held on behalf of’ the public authority, taking into account the interpretative assistance provided by the preparatory documents to the AIE Directive. Where there is any doubt, I must give an expansive meaning to the term ‘physically held on behalf of’ a public authority, given the duty on me under Article 10(2) of the AIE Regulations and Article 4(2) of the AIE Directive to interpret grounds for refusal in a restrictive way.

Conclusions

48. I am satisfied that information within the scope of the request which is held by BnM Biomass is held for BnM plc for the reasons set out in the following paragraphs.
49. First, although BnM Biomass has a separate legal personality and operates independently of BnM plc in relation to its commercial operations, there is a very close connection between the two companies, closer than the usual relationship between a parent company and a wholly owned subsidiary. This close connection is expressly envisaged by the 1998 Act. Section 34(1) of the 1998 Act provides that subsidiaries shall be formed by BnM plc “for the purposes of enabling its principal activities to be carried on”. BnM plc has a 100% shareholding in, and has guaranteed the liabilities of, BnM Biomass (see section 41 of the 1998 Act and the [2020 Annual Report](#), p.58). BnM plc and BnM Biomass share the same Board members and Company Secretary (see the [2020 Annual Report](#), p.10). BnM plc appoints the chairperson and directors of BnM Biomass, determines their terms and conditions and remuneration and is responsible for their removal (sections 42 to 44 of the 1998 Act). BnM plc retains an express power to direct BnM Biomass to carry out its activities in any way that BnM plc sees fit (section 37(5) of the 1998 Act). The debates in the Oireachtas during passage of the Bill support the continuing close connection between the companies, as they indicate that the purpose of forming subsidiaries was not to create wholly independent commercial

⁵ *Lonrho Ltd v Shell Petroleum* [1980] 1 WLR 627; see also *Bula v Tara Mines* [1994] 1 ILRM 111 and *Johnston v Church of Scientology* [2001] 1 IR 682.

⁶ *The State (McInerney) v Dublin County Council* [1985] IR 1; *DHN Ltd v Tower Hamlets* [1976] 1 WLR 860; and *Fyffes plc v DCC plc* [2005] IEHC 477



entities, but to ensure compliance with European law on state aid and competition, should state financing of BnM plc take place in future.⁷

50. Second, BnM Biomass presents no separate face to the public. The Bord na Móna website presents the group as a single entity. The [‘Who We Are’](#) section of its website makes no distinction between the parent and its subsidiaries. The [2020 Annual Report](#) refers throughout to the activities of the “Group”. For example, in the Director’s Report, under “Principle activities, Business Review and Future Developments” (p.8), it states: “The Group supplies electricity generated from peat, wind and biomass at its generating stations and supplies peat as a fuel to other electricity generating stations. The Group develops and operates wind farms and renewable energy projects. It also supplies waste management and high value recycling and resource recovery services, manufactures peat briquettes and horticultural products.” The only contact details provided in the [‘Contact us’](#) section of the website are for BnM plc. A member of the public seeking information held by BnM Biomass, whether in reliance on a statutory access regime or outside it, has no option but to contact BnM plc to seek that information.
51. Third, while I accept the submission that BnM Biomass created and holds the information requested for its own commercial purposes, I am satisfied that it also holds the information for BnM plc’s commercial purposes. The commercial aims of both companies are inextricably linked. This is evidenced by regulation 4.3 of BnM Biomass’s Constitution, which states that “the business of the Company shall be conducted in accordance, and in a manner consistent, with the functions of Bord na Móna as set out in the Turf Development Acts, 1946-1998 and in accordance with the Turf Development Acts...” Bord na Móna Group’s 2015 [“Sustainability 2030”](#) statement relies heavily on the development of biomass in achieving the reorientation of “Bord na Móna from being nearly solely focused on energy peat into other business areas” (p.1). In that statement, the Group CEO states that Bord na Móna’s future beyond 2030 will not be in energy peat. He states: “Our land is a huge asset and we will to continue to produce energy but it will be through biomass, solar, landfill gas, wind and waste to energy.” The interview continues: “Biomass is central to Bord na Móna’s sustainability agenda for the future – already, the company is the largest user of biomass in Ireland, consuming 320,000 tonnes last year. The company is also developing a biomass briquette. ... As an illustration of the centrality of biomass for the business, the company has created a new division lead by a Head of Biomass, Patrick Madigan, who reports directly to the CEO. ... Biomass already contributes significantly to Bord na Móna’s bottom line. ...” (see pp.2-5). I cannot accept that BnM plc, as the parent company in the Group, has no commercial interest in the development of biomass as a central part of the whole Group’s business, particularly in circumstances where energy peat, which BnM plc professes to be its core function, will no longer be the Group’s future beyond 2030.
52. Fourth, while I accept that the board of BnM Biomass may, in accordance with section 32(1) of the 1998 Act and regulation 49.1 of its constitution, refuse consent to disclosure of information to persons outside BnM Biomass, I do not consider that it could realistically refuse consent to disclosure of information to BnM plc. As set out above, BnM plc has an express power under section 37(5) of the 1998 Act to direct BnM Biomass as to the performance of its functions. That

⁷ See the comments of the Minister for Public Enterprise during the Second Stage in both [Dáil Éireann](#) and [Seanad Éireann](#).



power is not subject to any limitation. BnM plc could, if it wished to do so, exercise that power to require BnM Biomass to take steps in relation to information that it holds, including requiring it to provide BnM plc with information for BnM plc's own purposes.

53. Fifth, although BnM plc refused access to the requested information primarily on the basis that the information was not held by or for it, BnM plc nonetheless had sufficient knowledge of the information at issue and of the activities of BnM Biomass to offer its view in the alternative that the exceptions in articles 9(1)(c) and 9(2)(d) of the AIE Regulations apply. It is difficult to see how any finding that the information is not held for BnM plc could be consistent with this state of affairs.
54. Sixth, the AIE Directive is directed at improving how public authorities approach the issue of openness and transparency and it emphasises the need for effective and easy access to environmental information by members of the public (see recitals 2 and 15). As set out above, Bord na Móna Group presents itself to the public not as a group of linked companies but as a single entity. Members of the public are not offered the option of contacting the subsidiaries of BnM plc separately to make a request for information, under the AIE regime or otherwise. If they were, a member of the public could seek information directly from BnM Biomass and, if refused on internal review (whether on the ground that BnM Biomass does not consider itself to be a public authority or otherwise), appeal that decision to my Office. In those circumstances, my conclusion that the relevant information is held by BnM Biomass on behalf of BnM plc is consistent with the purposes of the AIE Directive.
55. Taking into account all of these factors, I am satisfied that, on the particular facts of this case, the information requested is held by BnM Biomass for BnM plc.

Decision

56. Having carried out a review under article 12(5) of the AIE Regulations, I find that:
 - a. Six documents held by BnM plc fall within the scope of the request, while two documents do not; and
 - b. Information within the scope of the request which is held by BnM Biomass is held for BnM plc.
57. I therefore annul BnM plc's decision. I expect BnM plc to notify the appellant of a fresh decision on whether it will provide access to the withheld information, within the statutory timeframe provided under article 7 of the AIE Regulations.
58. I note BnM plc's position that the exceptions in article 9(1)(b), 9(1)(c) and 9(2)(d) of the AIE Regulations would apply to the information requested. If BnM plc decides to refuse access to the information on these or any other grounds, I would remind BnM plc that the requirements of the AIE Regulations must be substantively and procedurally adhered to. This includes carrying out the balancing exercise required by article 10(3) and (4) of the AIE Regulations (see *Right to Know CLG v An Taoiseach (No. 2)* [2018] IEHC 372, paragraphs 67-71) and identifying whether information which may be withheld may be separated from information which may not, in accordance with article 10(5) of the AIE Regulations.



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Appeal to the High Court

59. A party to the appeal or any other person affected by this decision may appeal to the High Court on a point of law from the decision. Such an appeal must be initiated not later than two months after notice of the decision was given to the person bringing the appeal.

Peter Tyndall
Commissioner for Environmental Information
15 September 2021