

**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 2014  
(the AIE Regulations)**

**Case CEI/17/0030**

**Date of decision:** 28 March 2018

**Appellant:** Right to Know CLG

**Alleged Public Authority:** Raheenleagh Power DAC (RPDAC)

**Issue:** Whether Raheenleagh Power DAC is a public authority within the meaning of article 3 of the AIE Regulations

**Summary of Commissioner's Decision:** The Commissioner found that Raheenleagh Power DAC is not a public authority within the meaning of article 3 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 2 months after notice of the decision was given to the person bringing the appeal.

**Background**

**Raheenleagh Wind Farm**

This case concerns a wind farm located at Raheenleagh in County Wicklow. The website <https://raheenleaghwindfarm.ie/> says that;

Raheenleagh is a wind energy project owned in equal partnership by Coillte and ESB. It is located within the Raheenleagh forest, Ballinvalley, County Wicklow and it became operational on the 20<sup>th</sup> September 2016.

In a related AIE appeal case, ESB told my investigator that Raheenleagh wind farm is owned by RPDAC, which is itself “50/50 owned” by Coillte Teoranta and ESB Wind Development Ltd. It said that ESB Wind Development Ltd is 100% owned by ESB Financial Enterprises Ltd, and ESB Financial Enterprises Ltd is in turn 100% owned by ESB. ESB also explained that the day to day operation of the wind farm is contracted out by RPDAC to ESB Wind Development Ltd. RPDAC confirmed to my investigator that it sells the electricity it produces to ESB Independent Energy Ltd, which in turn sells it to domestic and business customers while trading as “Electric Ireland”.

### **The AIE request**

On 19 May 2017 the appellant sent an AIE request to RPDAC. It wrote again on 20 June 2017, saying that “since no response was received we request an internal review on the basis of a deemed refusal”. On 11 July 2017 RPDAC responded to the appellant, saying that it is not a public authority within the meaning of the AIE Regulations, and accordingly those Regulations do not apply to it.

### **The appeal**

The appellant appealed to my Office on 14 July 2017.

### **Scope of Review**

Article 12(3) of the AIE Regulations provides a right of appeal to my Office where a decision by a public authority has been affirmed under article 11. Article 11 deals with internal reviews by public authorities of their decisions on AIE requests. Article 11(5)(a) provides that I may review refusal decisions made "on the grounds that the body or person concerned contends that the body or person is not a public authority". RPDAC contends that it is not a public authority within the meaning of the Regulations. This review is therefore limited to the question of whether RPDAC is or is not a public authority within the meaning of the AIE Regulations

In conducting my review I took account of the submissions made by the appellant and RPDAC. I had regard to: 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); 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); and *The Aarhus Convention—An Implementation Guide* (Second edition, June 2014).

### **Relevant AIE provisions**

Article 3(1) of the AIE Regulations provides that “public authority” means, subject to sub-article (2)—

- (a) government or other public administration, including public advisory bodies, at national, regional or local level,
- (b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment, and
- (c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within paragraph (a) or (b),

and includes—

- (i) a Minister of the Government,
- (ii) the Commissioners of Public Works in Ireland,
- (iii) a local authority for the purposes of the Local Government Act 2001 (No. 37 of 2001),
- (iv) a harbour authority within the meaning of the Harbours Act 1946 (No. 9 of 1946),
- (v) the Health Service Executive established under the Health Act 2004 (No. 42 of 2004),

(vi) a board or other body (but not including a company under the Companies Acts) established by or under statute,

(vii) a company under the Companies Acts, in which all the shares are held—

(I) by or on behalf of a Minister of the Government,

(II) by directors appointed by a Minister of the Government,

(III) by a board or other body within the meaning of paragraph (vi), or

(IV) by a company to which subparagraph (I) or (II) applies, having public administrative functions and responsibilities, and possessing environmental information;

Article 3(2) provides that “Notwithstanding anything in sub-article (1), ‘public authority’ does not include any body when acting in a judicial or legislative capacity.” This provision is not relevant to the current case.

In *National Asset Management Agency v Commissioner for Environmental Information* [2015] IESC 51 (*NAMA*), O'Donnell J. considered the significance of that part of the definition which follows the words "and includes", and concluded that "it was not here intended to operate as extending the meaning of the prior paragraphs", i.e. paragraphs (a), (b) and (c). There are therefore just 3 categories of ‘public authority’ within the meaning of the AIE Regulations. Since they are listed in article 3 of those Regulations in paragraphs (a), (b) and (c), I will refer to them as public authorities of types (a), (b) and (c).

On 26 March 2018 I made a decision on another appeal case, CEI/17/0012, (which will shortly be available on my website at [www.ocei.ie](http://www.ocei.ie)). In that decision I found that Raheenleagh Power DAC is not a public authority within the meaning of the AIE Regulations. As the same issue arises in this case, I will consider the matter afresh in light of the arguments advanced by the current appellant.

### **The appellant's position**

The appellant made a submission which may be summarised as follows:

It said that because RPDAC is a 50:50 joint venture between 2 public authorities, namely ESB and Coillte, it is therefore a public authority.

It submitted that RPDAC is quite different to any other private company operating a wind farm in Ireland since:

- It is owned, controlled and financed by 2 public authorities;
- Company filings list an “esb.ie” email address as the contact for RPDACs company secretary;
- The AIE request was ultimately answered using an “esb.ie” email address;
- The person who answered it is listed on LinkedIn as an employee of ESB;
- The most recent annual return lists the ESB legal department as the company solicitors;
- RPDAC’s registered office is at ESB HQ in Dublin; and
- The refusal letter sent was signed by a current and former director/secretary of numerous ESB entities.

The appellant suggested that the above shows that RPDAC is entirely integrated into the ESB group as a joint venture between it and Coillte.

It submitted that the definition of type (b) public authorities concerns public administrative bodies defined in functional terms, regardless of whether governed by public law or private law and irrespective of the nature of those functions, regardless of how the entity is financed and regardless of whether it operates on a market or for profit.

It said that since RPDAC is essentially carrying out functions as part of an ESB/Coillte joint venture it is by-definition performing public administrative functions under national law and it is essentially a special purpose vehicle through which 2 public authorities have decided to perform some of their functions. It submitted that there is a basic principle that a public authority may not put environmental information outside of the scope of the AIE Regulations merely by choosing to hold it in a subsidiary.

The appellant further submitted that RPDAC has the benefit of the special powers vested in ESB and/or Coillte. It noted that as of the end of 2015 RPDAC had no employees other than its directors and seems to rely entirely on the ESB and Coillte for the performance of its operations.

The appellant submitted that “it would be entirely impractical and absurd for each entity in enormous groups such as the ESB or Coillte to be evaluated individually in terms of special

powers or performance of public administrative functions”. It claimed that this would be completely contrary to the letter and spirit of the AIE Regulations, Directive and Aarhus Convention.

The appellant maintained that if the whole is a public authority then the parts must also be.

It added that the CJEU judgment in Case C-279/12 (*Fish Legal & Emily Shirley v. Information Commissioner, United Utilities Water Plc, Yorkshire Water and Services Ltd and Southern Water Services Ltd*) (*Fish Legal*) is not determinative in this case. It said that, in that case, the CJEU did not consider the status of a subsidiary, joint venture or other entities of a group structure. The appellant argued that a close reading of the operative part of that judgment reveals that the court’s finding is confined to entities “such as *United Water Utilities plc, Yorkshire Water Services Ltd and Southern Water Services Limited*” and the Court merely indicated that national courts should examine whether those entities have special powers. The appellant submitted that the Court did not say that the special powers test is what determines the matter in all cases.

The appellant submitted that the present request can be distinguished from *Fish Legal* by the fact that RDPAC is a joint venture company wholly owned by 2 public authorities. It argued that this places it outside the scope of the operative part of the *Fish Legal* judgment which in any event did not find that the special powers test was determinative.

The appellant submitted that the CJEU therefore has therefore not provided guidance to me in this instance.

In addition and in the alternative, the appellant argued that RPDAC is a public authority of type (c) since it is involved in power generation which is public responsibility, function or service relating to the environment and it is controlled by ESB and Coillte which are persons falling within paragraph (b) of the definition of public authority in the AIE Regulations. It submitted that given that RPDAC is owned by Coillte/ESB and it appears that its directors are all ESB or Coillte staff or nominees, then “it is obvious that it is controlled” by public authorities of type (b).

In conclusion, the appellant submitted that “If it looks like a public authority and quacks like a public authority it must be a public authority”.

### **The public authority's position**

RPDAC made a detailed legal submission to my Office. I have not repeated it here in full, but I have considered it in full. RPDAC maintained that it is not a public authority within the meaning of the AIE Regulations because it does not fall within the meaning of any of the 3 types of public authority provided by the AIE Regulations.

**Type (a): “government or other public administration, including public advisory bodies, at national, regional or local level”.**

RPDAC stated that it is “clearly not a government or public administration”.

**Type (b): “any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment”.**

RPDAC submitted that it is not vested with “special powers” as considered by the CJEU in its judgment in case *Fish Legal* and that it does not undertake public administrative functions within the meaning of the AIE Regulations. It further submitted that this view is consistent with my decision in case CEI/16/0007 (Mr. L and Wexwind Limited).

**Type (c): “any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within paragraph (a) or (b)”.**

RPDAC submitted that “the CJEU has not yet considered this element of the definition of public authority”. It stated that, in order to fall within this type of public authority, 3 requirements would have to be met: RPDAC would have to be a natural or legal person having public responsibilities or functions or providing public services; those responsibilities, functions or services would have to relate to the environment; and RPDAC would have to be under the control of a body or person falling within categories (a) or (b). RPDAC denied that it meets any of these requirements. It maintained that “post deregulation of the electricity market, electricity generation is not a public service and does not involve the exercise of public responsibilities or functions”.

RPDAC added that a body may be found to be under the control of a public authority of type (a) or (b) where the legal framework and regulations governing the public functions of the body is such that it results in the entity losing genuine autonomy vis-à-vis the State: it denied that

RPDAC does not have genuine autonomy and that it is under the control of a type (a) or (b) public authority.

### **Analysis**

I identified 2 arguments in the submissions made by the appellant. It argued that RPDAC is a public authority because:

1. RPDAC is a public authority of type (b) because it is, as an ESB/Coillte joint venture, by definition performing public administrative functions under national law. It is essentially a special purpose vehicle through which 2 public authorities have decided to perform some of their functions.
2. RPDAC is a public authority of type (c) because it is “involved in power generation which is a public responsibility, function or service relating to the environment and it is controlled by ESB and Coillte” which are public authorities of type (b).

The appellant did not argue that RPDAC is a public authority of type (a), i.e. “a government or other public administration, including public advisory bodies, at national, regional or local level”. Having considered whether it might be, I am satisfied that it is not.

### **Whether RPDAC is a public authority of type (b)**

A public authority of type (b) is “any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment. Clearly RPDAC is a legal person and a separate legal person from both ESB and Coillte. I cannot see that RPDAC performs any public administrative function. Moreover, even if it does (and that has not been shown) it does not perform any functions under national law. It was permitted by “an authorisation” to construct a power station and it is licensed to generate electricity but it is not required by law to perform a public administrative function.

The appellant’s argument here is essentially that there is no difference between ESB/ Coillte and RPDAC. I believe there is a difference, not least in the fact that RPDAC has separate legal personality. The appellant argued that it would be impractical and absurd for an entity such as RPDAC to be assessed individually for special powers. I do not agree. I note that RPDAC is not vested by law with special powers. The appellant did not argue that it is, but instead argued that it “benefits” from special unidentified powers vested in ESB and Coillte. I am satisfied that what

may be relevant is not whether an entity *benefits* from a power exercised by another, but whether it is *itself* vested with special powers.

Accordingly, I find that RPDAC is not a public authority of type (b).

### **Whether RPDAC is a public authority of type (c)**

A public authority of type (c) is a natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within paragraph (a) or (b). Clearly RPDAC is a legal person. I have no reason to believe that RPDAC has public responsibilities or functions. I do not agree that the generation of electricity can any longer be described as a public function. Also, I am satisfied that RPDAC does not provide a public service. It is not, for example, licensed to supply electricity to the public.

As that is the case, no useful purpose would be served by considering whether RPDAC is “under the control of a body or person falling within paragraph (a) or (b)”

### **Conclusion on the issue**

I have found no reason to regard RPDAC as a public authority within the meaning of types (a), (b) or (c) of the AIE Regulations.

### **Decision**

Having completed my review, I find that RPDAC is not a public authority within the meaning of article 3 of the AIE Regulations. Accordingly, RPDAC is not obliged to process the appellant’s request for access to environmental information and I have no further jurisdiction in relation to this matter.

### **Appeal to the High Court**

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 2 months after notice of the decision was given to the person bringing the appeal.

**Peter Tyndall**  
**Commissioner for Environmental Information**  
28 March 2018