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 CEI/18/0039

Date of decision: 9 January 2019

Appellant: Right to Know CLG

Body Concerned: Raheenleagh Power Designated Activity Company (Raheenleagh Power)

Issue: Whether Raheenleagh Power was justified in refusing the appellant's AIE request on the grounds that it was not a public authority within the meaning of the definition in article 3(1) of the AIE Regulations

Summary of Commissioner's Decision: The Commissioner found that Raheenleagh Power does not meet the legal definition of public authority in article 3(1) of the AIE Regulations and, therefore, is not a public authority

Right of Appeal: A party to this appeal or any other person affected by this decision may appeal this decision 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

On 19 May 2017 the appellant made a request to Raheenleagh Power for access to information under the AIE Regulations. The appellant did not receive a decision on its request and on 20 June 2017 it requested an internal review on the basis that its request had been deemed refused. On 11 July 2017 Raheenleagh Power notified the appellant that a decision on its request was made on 7 July 2017. That decision stated that Raheenleagh Power was not a public authority and, accordingly, that the AIE Regulations did not apply to it.

The appellant appealed Raheenleagh Power's decision to me on 14 July 2017 and I made a decision on that appeal (CEI/17/0030 - Right to Know CLG and Raheenleagh Power DAC) on 28 March 2018. In that decision, I found that Raheenleagh Power was not a public authority for the purposes of the AIE Regulations. The appellant appealed my decision to the High Court pursuant to article 13 of the AIE Regulations on 24 May 2018.

On 22 October 2018 the High Court, on the consent of all parties in *Right to Know CLG v Commissioner for Environmental Information*, 2018, No.216 MCA, made an order setting aside my decision in CEI/17/0030 and remitting the matter to me for further consideration.

Raheenleagh Power is a wind farm company which produces electricity. It is a private company established under the Companies Act 2014 and operates on a commercial basis.

In this regard, it is helpful to refer briefly to what Raheenleagh Power does in the context of the electricity system in Ireland and beyond. 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.

As an electricity generator, Raheenleagh Power is one of many actors playing a role in Ireland's electricity system. It is one of 349 bodies to which the CRU has granted an authorisation to construct or reconstruct generating stations (see Authorisations to Construct) and one of 380 bodies to which the CRU has granted a licence to generate electricity (see Generator Licences issued). As a licenced electricity generator, it can, like any other licenced electricity generator, sell the electricity it produces in the competitive wholesale electricity market (known as the Single Electricity Market (SEM)).

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 of the parties and 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) (the Aarhus Guide).

I have also had regard to the relevant provisions of the Electricity (Supply) Act 1927 (as amended) (the 1927 Act), the Electricity Regulation Act 1999 (as amended) (the 1999 Act), the Planning and Development Act 2000 (as amended) (the 2000 Act) and the Planning and Development Regulations 2001-2018 (the Planning Regulations).

What follows does not make comment or findings on each and every argument advanced but all relevant points have been considered.

My Office conducted the fresh review on the basis of procedures agreed with the parties. The Investigator to whom this remitted case was assigned had not been involved in the previous appeal (CEI/17/0030).

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".

Raheenleagh Power contends that it is not a public authority within the meaning of the AIE Regulations. This review is therefore limited to the question of whether Raheenleagh Power is a public authority within the meaning of the definition of public authority in article 3 of the AIE Regulations.

Definition of "public authority"

Article 3(1) of the AIE Regulations

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".

In *National Asset Management Agency v Commissioner for Environmental Information* [2015] IESC 51 (*NAMA*), available at www.courts.ie, O'Donnell J. considered the significance of that part of the definition of public authority 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 three categories of public authority within the meaning of the AIE Regulations.

Article 3(2) provides that:

"Notwithstanding anything in sub-article (1), in these Regulations 'public authority' does not include—

(a) the President,

(b) the Office of the Secretary General to the President,

(c) the Council of State,

(d) any Commission for the time being lawfully exercising the powers and performing the duties of the President, or

(e) any body when acting in a judicial or legislative capacity."

As per the Supreme Court in *NAMA* the AIE Regulations should be interpreted in light of the AIE Directive, which in turn, should be interpreted in light of the Aarhus Convention.

Article 2(2) of the Aarhus Convention

Article 2(2) of the Aarhus Convention provides that "'Public authority' means:

(a) Government at national, regional and other level;

(b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;

(c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;

(d) The institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention.

This definition does not include bodies or institutions acting in a judicial or legislative capacity".

Article 2(2) of the AIE Directive

Article 2(2) of the AIE Directive provides that "'public authority' shall mean:

(a) government or other public administration, including public advisory bodies, at national, regional or local level;

(b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; and

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

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

Court of Justice of the European Union Jurisprudence

In his decision in *NAMA*, O'Donnell J. applied the judgment of the Court of Justice of the European Union (CJEU) in *Fish Legal and Emily Shirley v Information Commissioner and Others* (C-279/12) (*Fish Legal EU*), available at www.curia.europa.eu, which considered the meaning of "public authority" and, in particular, its meaning under Article 2(2)(b) and Article 2(2)(c) of the AIE Directive. *Fish Legal EU* concerned a preliminary reference from the UK Upper Tribunal on the interpretation of the definition of "public authority" in Article 2 of the AIE Directive.

The CJEU in paragraph 67 of *Fish Legal EU* summarised the definition of "public authority" as follows:

"Thus, in defining three categories of public authorities, Article 2(2) of Directive 2003/4 is 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."

Regarding the meaning of "public authority" as defined in Article 2(2)(a) of the AIE Directive (the equivalent provision of article 3(1)(a) of the AIE Regulations), the CJEU stated at paragraph 51 that:

> "Entities which, organically, are administrative authorities, namely those which form part of the public administration or the executive of the State at whatever level, are public authorities for the purposes of Article 2(2)(a) of Directive 2003/4. This first category includes all legal persons governed by public law which have been set up by the State and which it alone can decide to dissolve."

The CJEU considered in detail the meaning of Article 2(2)(b) of the AIE Directive (the equivalent provision to article 3(1)(b) of the AIE Regulations). The CJEU stated at paragraph 48 that:

> "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 EU law and of the relevant interpretative criteria provided for by the Aarhus Convention for establishing an autonomous and uniform definition of that concept."

Thus, it clarified that the terms "public administrative functions" must be examined in the light of EU law and that a body, in order for it to be a public authority under Article 2(1)(b), must be empowered to perform those functions by national law.

The CJEU went on to adopt a functional approach to assessing whether a body is performing public administrative functions. It stated at paragraph 52 that:

> "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."

The CJEU went on to explain at paragraph 56 that:

> "… in order to determine whether entities ... can be classified as legal persons which perform 'public administrative functions' under national law ... it should be examined whether those entities are vested, under the national law which is applicable to them, with special powers beyond those which result from the normal rules applicable in relations between private persons governed by private law."

Therefore, in assessing whether the functions being performed by a body are public administrative functions, one should examine whether the body is tasked by national law with the performance of services of public interest, and is, for that purpose, vested by national law

with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.

In addressing the issue of whether a body is "under the control of" a public authority within the meaning of Article 2(2)(c) of the AIE Directive (the equivalent provision to article 3(1)(c) of the AIE Regulations), the CJEU stated at paragraph 73 that:

> "undertakings, such as the water companies concerned, which provide public services relating to the environment are under the control of a body or person falling within Article 2(2)(a) or (b) of Directive 2003/4, and should therefore be classified as 'public authorities' by virtue of Article 2(2)(c) of that directive, if they do not determine in a genuinely autonomous manner the way in which they provide those services since a public authority covered by Article 2(2)(a) or (b) of the directive is in a position to exert decisive influence on their action in the environmental field."

Summary of my Main Findings

This matter was remitted in its totality and I will consider whether Raheenleagh Power is a public authority under each of the three categories of public authority in article 3(1)(a), (b) and (c) of the AIE Regulations. Due to the number of arguments which have been made in this case, it is helpful for me to provide a summary of my main findings before setting out my detailed analysis below.

Article 3(1)(a) of the AIE Regulations

I do not consider Raheenleagh Power to fall within government or other public administration, including public advisory bodies, at national, regional or local level. I base my finding on the facts and on the jurisprudence of the CJEU in *Fish Legal EU* and of the Supreme Court in *NAMA.*

Article 3(1)(b) of the AIE Regulations

I do not consider that Raheenleagh Power has been vested with the powers which were conferred on ESB under the 1927 Act. Raheenleagh Power like any of the other 348 bodies granted an authorisation to construct or reconstruct a generating station by the CRU can apply to the CRU to carry out certain works, but the power to authorise such works remains with the CRU as it alone decides whether such works can proceed. Similarly, I do not consider that the ability to carry out certain exempted development works without having to obtain planning permission results in Raheenleagh Power having special powers.

Article 3(1)(c) of the AIE Regulations

I do not consider that Raheenleagh Power has public responsibilities, functions or services. Raheenleagh Power is one of 380 bodies licenced to generate electricity. As a result of the deregulation of the electricity market by the EU legislation, Raheenleagh Power, along with the other electricity generators, can sell electricity in the SEM. Raheenleagh Power produces and sells electricity for competitive purposes and it is not required by the State to do this.

Analysis and Findings

Article 3(1)(a) of the AIE Regulations

The appellant did not argue that Raheenleagh Power is a public authority within the meaning of article 3(1)(a). Ratheenleagh Power submitted that "[i]t is clear that [it] is not a government or

other public administration, including public advisory bodies, at national, regional or local level."

In *NAMA*, O'Donnell J. said that:

> "The concept of '[g]overnment at national, regional and other level' … is reasonably clear, although there may perhaps be some debate at the margins as to what is captured by that definition".

I note that the CJEU in *Fish Legal EU* stated that Article 2(2)(a) of the AIE Directive (the equivalent provision to article 3(1)(a) of the AIE Regulations) applies to bodies which are organic administrative authorities which includes all legal persons governed by public law which have been set up by the State and which it alone can decide to dissolve.

As noted above, Raheenleagh Power is a private company established under the Companies Act 2014. I find that it is not a public authority within the meaning of article 3(1)(a).

Article 3(1)(b) of the AIE Regulations

In accordance with *Fish Legal EU*, a body is a public authority under Article 2(2)(b) of the AIE Directive and, thus, under article 3(1)(b) where it is a natural or legal person which:

- national law has entrusted with the performance of a service of public interest *inter alia* in the environmental field, **and** for this purpose
- national law has vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law (which I will refer to as the 'special powers test').

It is not disputed that Raheenleagh Power is a legal person.

<u>The appellant's submission relating to article 3(1)(b)</u>

The appellant submitted that, because Raheenleagh Power is "essentially carrying out functions" as part of the joint venture between ESB and Coillte, it is by definition performing public administrative functions under national law. It continued that Raheenleagh Power is in essence "a special purpose vehicle" through which ESB and Coillte perform some of their functions.

The appellant submitted that Raheenleagh Power has been vested with the following 'special powers':

- the power to break up streets, roads, railways and tramways in order to lay electricity lines pursuant to sections 51 and 52(1) of the 1927 Act (as applied by section 48 of the 1999 Act);
- the power to carry out certain wayleave works pursuant to section 53 of the 1927 Act (as applied by section 49 of the 1999 Act);
- the power to compulsorily acquire land and rights over land pursuant to section 45 of the 1927 Act (as amended and applied by sections 43 and 47 of the 1999 Act) and
- the power to undertake exempted development pursuant to the 2000 Act.

The appellant submitted that, as the holder of an authorisation to construct or reconstruct a generating station (the holder of an authorisation) and as an electricity undertaking within the meaning of section 2 of the 1999 Act, Raheenleagh Power may exercise the powers of ESB. It continued that these powers are special powers beyond those which result from the normal rules applicable in relations between persons governed by private law. It stated that "[t]he requirement to gain the consent of the CRU before exercising such powers does not change the position since the CRU may only give consent to the holder of an authorisation or a direct line permission, i.e. these powers are not generally available".

It also submitted that the power to make a special order authorising the compulsory acquisition of land or rights over land which was conferred on ESB by section 45 of the 1927 Act was given to the CRU and that the beneficiaries of the power to acquire land was extended to include the holder of an authorisation by section 47 of the 1999 Act. It stated that a special order by the CRU confers on the holder of an authorisation the "functions" which such an order would confer on ESB. It asserted that the word "functions" in section 47(2) of the 1999 Act "includes powers and the performance of functions includes the exercise of powers". In support of this interpretation, it cited Part 2 of the Schedule and section 21 of the Interpretation Act 2005 (the 2005 Act). It also submitted that this power is still a special power notwithstanding that a special order is required from the CRU before it can exercise it.

The appellant said that "[i]n *NAMA* the fact that NAMA had to apply to the High Court to exercise its powers of compulsory acquisition did not prevent that power being considered a special power for the purpose of [article 3(1)(b)] of the AIE Regulations." It stated that the Upper Tribunal in [*Fish Legal and another v Information Commissioner and others* [2015] UKUT 52 (AAC) (*Fish Legal UK)]* when addressing the issue of "tandem powers" observed that such tandem powers were special powers as they gave the water companies practical benefits.

In addition, the appellant submitted that, pursuant to section 2(2) of the 2000 Act, Raheenleagh Power is a 'statutory undertaker' vested with the power to carry out exempted development under the 2000 Act. It cited sections 4(g), 182A(5)(b) and (6) and 254(2)(c) of the 2000 Act and said that "[t]hese provisions make certain works relating to the construction and maintenance of electricity lines exempt from the need to obtain a grant of planning permission or to obtain a licence from a planning authority". It stated that these are "special powers beyond those which result from the normal rules applicable in relations between individuals". It argued that this resulted in Raheenleagh Power having been conferred with special powers "which enable it to carry out certain works intended to facilitate its objective of providing electricity generated from wind". It contended that bodies are conferred with the status of statutory undertaker "in recognition of the public need for the construction of electricity lines and the generation and supply of electricity".

<u>Raheenleagh Power's submission relating to article 3(1)(b)</u>

Raheenleagh Power submitted that, applying the 'special powers test' set out by the CJEU in *Fish Legal EU,* "it is clear that Raheenleagh Power is not vested with special powers beyond the normal rules that apply between persons governed by private law and therefore does not undertake public administrative functions within the meaning of paragraph (b) of the definition".

Raheenleagh Power submitted that it is not vested with powers that may be exercised by ESB. It stated that any holder of an authorisation, including Raheenleagh Power, may apply to the CRU for consent to break up roads under sections 51 and 52(1) of the 1927 Act and to exercise certain

wayleaving and entry powers under section 53 of the 1927 Act but that Raheenleagh Power does not automatically have those powers. In respect of section 45 of the 1927 Act, it submitted that this section is similar to sections 51, 52(1) and 53 in that a holder of an authorisation may apply to the CRU for a compulsory acquisition order. Raheenleagh Power said that, as the consent of the CRU is necessary before those powers can be exercised, they are not special powers within the meaning of *Fish Legal EU*. It stated that "it is not correct to equate a right to apply for consent to exercise a power with a special power as contemplated by Fish Legal, particularly as the power in question ... is a power that any authorised generator of electricity may apply to the CRU to exercise". It added that to the extent that a special power as contemplated within *Fish Legal EU* is involved, the special power, if any, is vested in the CRU.

Raheenleagh Power stated that the Upper Tribunal in *Fish Legal UK*, in considering whether a body had special powers, said the matter was a practical one and asked if the powers "give the body an ability that confers on it a practical advantage relative to the rules of private law?" It noted that I have considered the Upper Tribunal's decision in *Fish Legal UK* in other decisions. In particular, it cited CEI/15/0011 (Dr Edward Fahy and the Irish Fish Producers Organisation), available at www.ocei.ie.

Regarding the power to carry out exempted development pursuant to the 2000 Act, Raheenleagh Power accepted that it is a statutory undertaker within the meaning of the 2000 Act. It explained that the "primary consequence of this is that it may construct grid connection works as exempted development pursuant to Classes 26 and 27 of Schedule 2, Part 1 [of the Planning Regulations]". It submitted that "the decision to designate certain matters as exempt from the normal planning process should not be regarded as equivalent to conferring a special power on a body that may avail of such an exemption". It noted that this designation applies to many different limited companies in the State and is not unique to Raheenleagh Power.

Has Raheenleagh Power been entrusted with the performance of services of public interest pursuant to national law?

"Services of public interest" is not a term used in the Directive. It appears to have been used for the first time by the CJEU in the context of providing guidance on "public administrative functions under national law" in *Fish Legal EU*. I note that the bodies at the centre of *Fish Legal EU* and *NAMA* are of a very different character to Raheenleagh Power. Raheenleagh Power is one of hundreds of commercial bodies generating electricity across the State, whereas NAMA is the sole body of its kind established under statute and entrusted with a service of public interest. While the water companies at the centre of Fish Legal are commercial companies, they are, as described by the Upper Tribunal in *Fish Legal UK*, "effectively monopoly suppliers to most users of their services in their areas of appointment". Each water company had been entrusted with the maintenance and development of water and sewerage infrastructure as well as water supply and sewerage treatment for specified areas in England and Wales pursuant to a 25 year licence.

It can be argued, as the appellant has, that since the CRU has granted Raheenleagh Power an authorisation to construct or reconstruct a generating station and a licence to generate electricity under sections 16 and 14 of the 1999 Act, it has been entrusted by law with the performance of a service of public interest. However, many services are provided throughout the State which are of interest to the public - and indeed, may be seen as essential by some - but are not services of

public interest in the context of public administrative functions being performed under national law.

I therefore consider it more useful to examine whether Raheenleagh Power has been vested with special powers under Irish law for the purpose of determining whether it performs public administrative functions.

Does national law vest Raheenleagh Power with 'special powers'?

In its submission in CEI/17/0030, the appellant questioned the level of applicability of the *Fish Legal EU* special powers test to Raheenleagh Power as the CJEU "did not consider the status of a subsidiary, joint venture or other entities of a group structure". I believe that *Fish Legal EU* is applicable in this case. I note that the Supreme Court applied the 'special powers test' in *NAMA*, notwithstanding that the bodies at the centre of *Fish Legal EU* were commercial companies which were established by private law, whereas NAMA, although it acts commercially, was established pursuant to a statute. In addition, I note that, in its submission on this case, the appellant stated the Supreme Court held in *NAMA* that the CJEU's decision in *Fish Legal EU* is an authoritative interpretation of the AIE Directive.

Sections 45, 51, 52(1) and 53 of the 1927 Act (as applied by the 1999 Act)

Section 51 of the 1927 Act provides that ESB (referred to throughout the 1999 Act as "the Board" but in this decision as "ESB") may break up streets, roads, railways and tramways in order to lay electricity lines. Section 52(1) of the 1927 Act provides that ESB shall not break up any road without previous consultation with the local authority in whose district such road is situated and shall not break up any railway or tramway without previous consultation with the Minister. Section 48 of the 1999 Act provides that the power conferred on ESB by sections 51 and 52(1) may, with the consent of the CRU, also be exercised by the holder of an authorisation.

Section 53 of the 1927 Act provides that ESB or any authorised undertaker may "place any electric line above or below ground across any land not being a street, road, railway, or tramway". Section 49 of the 1999 Act provides that a holder of an authorisation may, with the consent of the CRU, exercise the powers conferred on ESB by section 53 of the 1927 Act, for the purposes of such authorisation, and that references to ESB in subsections (1) to (5) and (9) shall be construed as including references to a holder of an authorisation.

Having examined sections 51, 52(1) and 53 of the 1927 Act, I consider that the powers in those sections are expressly and unequivocally conferred on or vested in ESB. It is solely within ESB's discretion whether to exercise those powers. While section 51 of the 1927 Act is subject to consultation with the relevant local authority or the Minister, the Act does not give either the local authority or Minister a veto on ESB using its power to break up streets in order to lay electricity lines. Neither section 48 nor section 49 of the 1999 Act expressly provides that the powers conferred on ESB are conferred on Raheenleagh Power or any holder of an authorisation. Rather, sections 48 and 49 permit the holder of an authorisation to exercise the powers conferred on ESB only after it has applied to, and obtained the consent of, the CRU to do so. The discretion as to whether the holder of an authorisation can exercise ESB's power lies solely with the CRU and not with the holder of an authorisation.

Furthermore, I note that Raheenleagh Power submitted that the 1999 Act confers on a holder of an authorisation a right to apply for consent to exercise the powers. I accept that characterisation of the powers set out above. While a holder of an authorisation may, pursuant to sections 48 and

49 of the 1999 Act apply to the CRU for consent to exercise certain powers which are vested in ESB, that does not give Raheenleagh Power or any other holder of an authorisation a right to receive, or indeed an expectation of receiving, consent to exercise the powers in sections 51, 52(1) and 53 of the 1927 Act. The CRU may refuse to grant consent for the exercise of those powers. Thus, I am satisfied that the power in sections 51, 52(1) and 53 of the 1927 Act (as applied by sections 48 and 49 of the 1999 Act) in this instance resides in the CRU and not in Raheenleagh Power.

Turning to section 45 of the 1927 Act (as applied by section 47 of the 1999 Act), this provides that ESB may by special order compulsorily acquire land or rights over land. Section 47 of the 1999 Act provides that the power to make a special order for the purposes of compulsory acquisition of land or rights over land conferred on ESB by section 45 of the 1927 Act shall be exercisable by the CRU, and not ESB, upon application by ESB or a holder of an authorisation or a person who has applied for an authorisation. Section 47(2) of the 1999 Act states that "[a] special order made by the Commission shall operate to confer on an applicant for an authorisation under section 16 the functions which such an order would confer on ESB".

I note that, similar to sections 51, 52(1) and 53 of the 1927 Act, section 45 expressly states that ESB may acquire compulsorily land or rights over land. I also note that section 47 of the 1999 Act provides that "the power to make a special order conferred on ESB by section 45(1) of the Principal Act shall be exercisable by the Commission and not by [ESB]". It does not state that the power to make a special order conferred on ESB by section 45(1) is conferred on, or exercisable by, the holder of an authorisation (such as Raheenleagh Power). As with sections 48 and 49 of the 1999 Act, I consider that section 47 of that Act permits Raheenleagh Power and any other holder of an authorisation to apply to the CRU for a special order under section 45 of the 1927 Act authorising it to compulsorily acquire land or rights over land. The decision, or, in other words, the power to grant or refuse that special order lies with the CRU. Section 47 of the 1999 Act does not give rise to an expectation that Raheenleagh Power will receive such consent from the CRU. Thus, I am satisfied that the power in section 45 of the 1927 Act (as applied by section 47 of the 1999 Act) in this instance resides in the CRU and not in Raheenleagh Power.

As I have stated above, the appellant argued that, in accordance with Part 2 of the Schedule of the Interpretation Act 2005, the reference to functions in section 47(2) of the 1999 Act should be read as including "powers". I am not persuaded that Part 2 of the Schedule to the 2005 Act applies in this case. Having examined the 1927 Act, I consider that it treats "functions" differently to "powers". On my reading of the 1927 Act, ESB's functions, at the time the Act was enacted, included the generation and supply of electricity and the ownership and operation of the transmission and distribution systems and its powers were the tools which enabled it to fulfil its functions.

The appellant submitted that the requirement on NAMA to apply to the High Court for an acquisition order did not affect the Supreme Court's finding that its power to compulsorily acquire land was a 'special power'. However, I note that section 158 of the National Asset Management Agency Act 2009 states that "NAMA may compulsorily acquire land if in its opinion it is necessary to do". I consider that NAMA's power to compulsorily acquire land is distinguishable from the circumstances of this case as the power to compulsorily acquire land is expressly and unequivocally vested in NAMA. In this case, the power was conferred in the first instance on ESB by section 45 of the 1927 Act and then on the CRU by section 47 of the 1999 Act. Furthermore, any one of the 349 holders of an authorisation (such as Raheenleagh Power)

can apply to the CRU for a special order pursuant to section 47 of the 1999 Act. This can be distinguished to the situation under the 2009 Act where NAMA is the only body which has been conferred with and can avail of the power to compulsorily acquire land under section 158 for the purpose of enabling it to perform its statutory function under that Act.

For the reasons above, I am satisfied that Raheenleagh Power is not vested with the power to carry out certain works under sections 51, 52(1) and 53 of the 1927 Act (as applied by sections 48 and 49 of the 1999 Act). I am also satisfied that it is not vested with the power to compulsorily acquire land or rights over land under section 45 of the 1927 Act (as applied by section 47 of the 1999 Act).

Exempted development under the 2000 Act

An exempted development is a development which, pursuant to section 4 of the 2000 Act, does not require planning permission. Section 4(g) of the 2000 Act provides that an exempted development includes works carried out by a statutory undertaker for the purpose of inspecting, repairing, renewing, altering or removing any sewers, mains, pipes, cables, overhead wires, or other apparatus, including the excavation of any street or other land for that purpose. Section 2 of the 2000 Act defines "statutory undertaker" as including a person authorised by or under any enactment or instrument under an enactment to provide, or carry out works for the provision of electricity.

Section 4(2)(a) of the 2000 Act provides that the relevant Minister may, by regulation, provide for classes of exempt development where:

(i) by reason of the size, nature or limited effect on its surroundings ... the carrying out of such development would not offend against principles of proper planning and sustainable development, or

(ii) the development is authorised, or is required to be authorised, by or under any enactment (whether the authorisation takes the form of the grant of a licence, consent, approval or any other type of authorisation) where the enactment concerned requires there to be consultation (howsoever described) with members of the public in relation to the proposed development prior to the granting of the authorisation (howsoever described).

The classes of development which are an exempted development for the purpose of the 2000 Act are set out by the Minister in Schedule 2 of the Planning Regulations. Classes 26 to 28 of Part 1 of Schedule 2 of the Planning Regulations provides that the carrying out of certain works, including laying underground pipes and cables and constructing over-head transmission or distribution lines by any undertaker authorised to provide an electricity service is an exempted development for the purposes of the 2000 Act. Classes 26 to 29 of Part 1 of Schedule 2 of the Planning Regulations provides that the carrying out of certain works by any electricity undertaking is an exempted development.

In my decisions in CEI/16/0007 (Mr. L and Wexwind Limited) and CEI/15/0011, available at www.ocei.ie, I considered whether the power to carry out works as exempted development is a special power. I stated that the exemption of certain types of development, which is done by the Minister pursuant to section 4(2)(a)(i) of the 2000 Act, is a commonplace mechanism which ensures the proper functioning of the planning system by setting appropriate thresholds for the requirement of planning permission. I also stated that I do not consider that the classification of

certain works as exempted development vests in electricity undertakings a power beyond the normal rules of private law.

I also considered whether the ability of Raheenleagh Power to carry out exempted development was a special power in CEI/17/0012. I stated:

> "As regards, exempted development, I can see that legislative power is required in order to declare certain developments to be exempt from the requirement for planning permission. Clearly [Raheenleagh Power] does not have such a power. As for exercising a freedom to undertake exempted development, I do not regard that as being the equivalent to the exercising of a "special power". It seems to me that any person with the requisite interest in lands can carry out works specified to be exempted development under the Act of 2000."

I see no reason to depart from that position. In effect, I consider that section 4(2)(a)(i) of the 2000 Act confers on the Minister the power to provide, by regulation, that a development falling below a certain threshold which would not be contrary to principles of proper planning and sustainable development is exempt from the requirement to have to obtain planning permission from the planning authorities under the 2000 Act. The Minister has provided for numerous exempted developments in Schedule 2 of the Planning Regulations. These include, for example, rear extensions to private homes provided they are less than $40m^2$. As I stated in CEI/17/0012, it seems to me that any person with the requisite interest in lands can carry out works specified to be an exempted development under the 2000 Act. I also note that, any person who purports to avail of an exemption in contravention of the 2000 Act and the Planning Regulations will be subject to enforcement proceedings. Accordingly, I do not accept that Raheenleagh Power's freedom or ability to carry out exempted development under section 4 of the 2000 Act is a power.

Turning to section 182A(5) of the 2000 Act, this provides that An Bord Pleanála 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 Pleanála 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(1) 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 Pleanála and it must apply to An Bord Pleanála 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 Pleanála 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.

As regards section 254 of the 2000 Act, this provides that a person shall not carry out certain works on, under, over or along a public road unless it is in accordance with a licence which has been granted under this section. Pursuant to section 254(2)(c), this prohibition on carrying out certain works without a licence does not apply to the erection, construction, placing or maintenance under a public road of a cable, wire or pipeline by a statutory undertaker.

As with the ability to carry out an exempted development pursuant to section 4 of the 2000 Act, I would characterise the ability to carry out certain works relating to public roads under section 254 as the freedom to carry out those works rather than a power to do so. Furthermore, I note that a person is freed from the requirement to obtain a licence to carry out certain works on public roads by section 254(2)(c) due to their status as a statutory undertaker. As I have set out above, section 2 of the 2000 Act defines a statutory undertaker as including a person authorised by or under any enactment or instrument under an enactment to provide, or carry out works for the provision of electricity. Raheenleagh Power holds an authorisation under section 16 of the 1999 Act. Sections 48 and 49 of the 1999 Act require Raheenleagh Power, as the holder of an authorisation, to obtain the CRU's consent before carrying out certain works on streets and roads. Therefore, while it may have freedom to carry out those works under section 254 of the 2000 Act, I consider that this is because it must get authorisation to do those works under the 1999 Act. Accordingly, I am satisfied that the ability to carry out certain works on public roads under section 254 of the 2000 Act is not a power.

For the reasons above, I am satisfied that Raheenleagh Power has not been vested with special powers and, therefore, that it does not perform public administrative functions within the meaning of article 3(1)(b). Accordingly, I find that Raheenleagh Power is not a public authority within the meaning of article 3(1)(b).

Article 3(1)(c) of the AIE Regulations

There are three elements to consider when determining whether a body is a public authority within the meaning of article 3(1)(c). They are:

1. Does the body have public responsibilities or functions or provide public services?
2. Do those public responsibilities, functions or services relate to the environment?
3. Is the body under the control of a public authority falling under paragraphs (a) and (b) of the definition e.g. government or other public administration body or any natural or legal person performing public administrative functions under national law?

All three elements must be met for a body to be a public authority under article 3(1)(c).

<u>The appellant's submissions relating to article 3(1)(c)</u>

The appellant submitted that Raheenleagh Power is involved in electricity generation which is a public responsibility, function or service relating to the environment. It asserted that:

> "The public would reasonably assume that electricity generation and supply, if not provided by private entities would be carried out by the state. This expectation is expressed under the legislative provision for the appointment of a supplier of last resort and public electricity

supplier to ensure a universal supply of electricity. In that sense the activities of [Raheenleagh Power] come within category (c) of the definition as a generator of electricity."

It added that, despite the unbundling of the electricity market, the high level of regulation of it indicates "the public nature of the service and associated functions and responsibilities".

The appellant also submitted that Raheenleagh Power is tasked with specific public functions under the Renewable Energy Feed in Tariff (REFIT) scheme, which has received State Aid approval from the European Commission. It stated that Raheenleagh Power "generates electricity for supply to Electric Ireland under a state-approved Power Purchase Agreement [PPA] that is part of a REFIT scheme". It contended that, as a result, Raheenleagh Power has "a public responsibility to contribute to Ireland meeting its target of 40% renewable electricity generation by 2020". It stated that Raheenleagh Power "is compensated for the supply of this electricity (which is considered not to be viable at market rates) through a guaranteed minimum pricing funded by a public service obligation which is levied on all consumers of electricity in Ireland".

In addition, the appellant asserted that, as Raheenleagh Power is 50:50 owned by two public authorities, it is controlled by those authorities. It also contended that, if one public authority had a significant shareholding in it, it would be under that authority's control. The appellant also submitted that "ESB as the controlling entity is an emanation of the State". In support of this it cited the CJEU's judgments in Case C-188/89 *Foster and Others v British Gas* (*Foster*) and Case C-413/15 *Farrell v Whitty* (*Farrell*), available at www.curia.europa.eu.

Raheenleagh Power's submission relating to article 3(1)(c)

Raheenleagh Power rejected the assertion that it has public responsibilities or functions, or provides public services. It stated that "as a commercially operated wind farm operating in the competitive electricity generation market, [it] does not fall within any of the three elements of the definition". It also stated that, on a purposive interpretation of the definition of 'public authority, "electricity generators, and particularly small scale wind farms, cannot be regarded as exercising public responsibilities or functions, or providing a public service". In addition, it rejected that it is under the control of a public authority falling under article 3(1)(a) or (b).

Deregulation of the electricity market

Raheenleagh Power noted that, in CEI/16/0007, I stated that the concept of a public service is not static and that what constitutes a public service is often a matter of social consensus. It submitted 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". It stated that European electricity markets, including the Irish market, have been "progressively liberalised" pursuant to EU law and that, prior to the liberalisation of the electricity market, "a vertically integrated State owned utility company had a monopoly on certain electricity related activities including generation, transmission, distribution and supply".

Distinction between the activities of generation and supply of electricity and the activities of transmission and distribution of electricity

Raheenleagh Power submitted that, when assessing whether a body has public responsibilities or functions or provides a public service, "a distinction must be drawn between the activities of generation and supply which are subject to competition and the activities of transmission and distribution of electricity which are not". It stated that the generation and supply of electricity has progressively been opened to competition and that the generation market has been "fully

liberalised" and has been subject to "full competition" for a number of years and that the supply market has been deregulated since 4 April 2011. In addition, it stated that electricity generation activities are subject to a licensing and authorisation framework pursuant to the 1999 Act. It cited my decision in CEI/16/0007 in which I noted that the licensing and authorisation framework which Raheenleagh Power operates under is "not a particularly precise set of rules which determine the manner in which [a wind farm] carries out its generation activities". It also stated that "[t]his system of regulation allows multiple independent electricity generators, operating a wide range of generating assets, to meet the demand for electricity in Ireland through the operation of a competitive market." In addition, it stated that "the regulation of an industry should not be considered to be indicative of, or synonymous with, that industry being regarded as providing a public service".

Regarding the transmission and distribution of electricity, it stated that the State owned former monopoly retained the ownership and operation of the transmission system and the distribution system which remain regulated and are not open to competition. It said that the services provided by the operators of the transmission system and the distribution system are "essential to the operation of the electricity market". It continued that "[t]he electricity sector has therefore been structured such that these entities operate under stricter regulation, and the services are undertaken by designated companies rather through a competitive market place. It is therefore these elements of the previously vertically integrated state utility that have been identified as providing an essential service, and which might more properly be regarded as providing a public service."

In addition, Raheenleagh Power submitted that while an electricity generator may indirectly benefit from a PPA for the purposes of the REFIT, it is the electricity supplier which the public service obligation is placed on and who benefits via support payments. It stated that Raheenleagh Power "does not undertake, and has no obligation to deliver, any public services as a consequence of REFIT".

Does Raheenleagh Power have public responsibilities or functions or provide public services?

I am not aware of any case law directly on the issue of when a body has public responsibilities or functions or provides public services within the meaning of article 3(1)(c).

As noted above, the appellant submitted that Raheenleagh Power is tasked with specific public functions under the REFIT. The purpose of the REFIT scheme is to assist the State in meeting its renewable energy usage targets under EU law by incentivising the development of renewable electricity generation. Pursuant to REFIT, electricity suppliers are paid a minimum price for electricity generated by renewable units contracted to them. In order to avail of that minimum price, an electricity supplier must enter into a PPA with a qualified REFIT generator. The PPA provides certainty to renewable electricity generators by guaranteeing them a minimum price for each unit of electricity. The REFIT schemes are funded by the Public Service Obligation (PSO) levy which is paid for by electricity consumers. While Raheenleagh Power indirectly benefits from REFIT, at no stage does the electricity generator receive funding from the State through its participation in REFIT. The money from the PSO levy goes to the electricity supplier to cover the costs of the minimum price they have to pay the electricity generator under the PPA. I consider that the PSO obligation is imposed on the electricity supplier and not the electricity generator. Accordingly, I am not satisfied that Raheenleagh Power is tasked with public functions under the REFIT.

As I stated in CEI/16/0007,"[t]he concept of a public service is not static, and what constitutes a public service is often a matter of social consensus". The electricity market in Ireland and the EU has changed significantly in recent years as a result of EU energy legislation. In the past the electricity markets in Member States were often dominated by quasi-monopolistic companies. Prior to the establishment of ESB under the 1927 Act, electricity was not a public service and bodies which provided it did not have public responsibilities or functions. As noted by the appellant, before ESB was established, a number of local electricity generation and distribution corporations and companies were already in existence. Over time, ESB, through its acquisition of those corporations and companies, became a monopoly which was responsible for electricity throughout the State.

As part of its plans to complete the internal energy market, the EU gradually opened up the electricity market to competition. This was done through Directive 96/92/EC on the common rules for the internal market in electricity, Directive 2003/54/EC on the common rules for the internal market in electricity (which repealed Directive 96/92/EC) and Directive 2009/72/EC on the common rules for the internal market in electricity (which repealed Directive 2003/54/EC). These common rules required Member States to ensure that private or competitive electricity generators could access the electricity market, in other words, to ensure that the electricity they produce can be accommodated on transmission and distribution systems and sold on the electricity market. Features of this liberalised electricity market include the unbundling of electricity generation, supply and the transmission and distribution network. The generation and supply of electricity is open to competition but the operation of the transmission and distribution networks is non-competitive. The purpose of the 1999 Act was to enable effect to be given to Directive 96/92/EC; in order to provide for the implementation of the common rules set out in that Directive.

In Ireland, any person who is authorised and licenced by the CRU to generate electricity can sell electricity in the SEM. While the generation of electricity may once have been a public service or involved public responsibilities or functions as part of the State monopoly under the 1927 Act, I consider that is no longer the case where liberalisation of the electricity market has resulted in opening up the generation of electricity to competition. The competitive nature of the generation of electricity can be contrasted with the transmission and distribution systems, which are solely owned and operated by State bodies. ESB owns the transmission and distribution systems in Ireland. ESB Networks DAC operates the distribution system. EirGrid operates the transmission network. Each of those three bodies are owned by the State. Thus, I am willing to accept Raheenleagh Power’s proposition that the transmission and distribution systems might more properly be regarded as providing a public service.

In addition, in CEI/17/0015 (Mr. T and RPS Consulting Engineers Ltd), available at www.ocei.ie, I stated that:

> “'Public services' exist to, as the term itself suggests, provide the public with particular goods or services. Thus, the relevant service must be provided to the public. Such public services generally exist because there is a public need for them or there is a general interest in the service being provided. The need or interest is that of the people as a collective, either nationally or locally.”

Raheenleagh Power is one of 349 bodies authorised to construct or reconstruct a generating station and one of 380 bodies licenced to generate electricity.

I stated in CEI/17/0012 that Raheenleagh Power "operates as part of a system which ultimately provides electricity to the public and that such a supply is of significant public interest." Being a part of a system which is of significant public interest does not mean, however, that every actor which plays a part in that system provides a public service. If Raheenleagh Power were to stop generating electricity, the electricity system in Ireland would continue functioning through the electricity generated by the other 379 bodies licenced to generate electricity.

I accept that, post deregulation, the generation of electricity is not a public service nor does it involve the exercise of public responsibilities or functions. Accordingly, I am satisfied that Raheenleagh Power does not have public responsibilities or functions or provide a public service within the meaning of article 3(1)(c).

As I have found that Raheenleagh Power does not have any public responsibilities or functions and does not provide a public service, I must therefore find that Raheenleagh Power is not a public authority under article 3(1)(c). In light of this conclusion, no useful purpose would be served by considering whether the service Raheenleagh Power provides relates to the environment or whether Raheenleagh Power was or is under the control of a body or person falling within paragraph (a) or (b) of the definition of public authority.

The AIE Regulations, the AIE Directive and the Aarhus Convention set out a specific legal test as to what constitutes a "public authority". The boundaries of that definition can sometimes be unclear but, in all cases, in order for a body to be a 'public authority' it must meet the legal definition as set down in article 3(1) of the AIE Regulations. In accordance with the principle of harmonious interpretation and the Supreme Court's judgment in *NAMA*, when interpreting the AIE Regulations, including the definition of "public authority" I do so in light of the aims and purposes of the AIE Directive and the Aarhus Convention. I also note that the CJEU in *Fish Legal EU* stated that the term "public administrative function" in Article 2(2)(b) of the AIE Directive must be given an "autonomous and uniform definition". So too should the definition of "public authority".

I have not seen anything during the course of my review to indicate that private commercial electricity generators in EU Member States or Aarhus Convention Contracting Parties are public authorities within the meaning of the definition. On the contrary, it appears to me that the deregulation of the electricity market, which required Member States to ensure that private or commercial electricity generators could access the electricity market, means that it is likely that such bodies would not be considered public authorities in other Member States. I consider that a purposive reading of the AIE Regulations supports my findings above that Raheenleagh Power is not a public authority within the meaning of Article 3(1) of the AIE Regulations.

Decision

Having carried out a review under article 12(5) of the AIE Regulations, I find that Raheenleagh Power Designated Activity Company is not a public authority within the meaning of the definition in article 3(1) of the AIE Regulations. Accordingly, it was 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 **two months** after notice of the decision was given to the person bringing the appeal.

Peter Tyndall

Commissioner for Environmental Information

9 January 2019