

**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/17/0001**

**Date of decision:** 13 December 2017

**Appellant:** Killross Properties Limited

**Alleged Public Authority:** ESB Networks Business Unit

**Issue:** Whether ESB Networks Business Unit is a Public Authority within the meaning of the AIE Regulations

**Summary of Commissioner's Decision:** The Commissioner found that ESB Networks Business Unit is not a Public Authority within the meaning of the AIE Regulations. He was satisfied that it is a division of ESB, which is a Public Authority within the meaning of the AIE Regulations. Accordingly, he affirmed ESB's decision that ESB Networks Business Unit is not a Public Authority.

**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**

### Electricity supply licences

This case concerns the statutory electricity supply regime that is in place in Ireland. The picture is a complicated one, and describing it is unavoidably jargon-heavy. I have endeavoured to keep the details which follow as simple as possible.

The Commission for Energy Regulation (now the Commission for Regulation of Utilities — CRU) granted licences for four key functions of the Irish electricity supply industry:

- A Transmission Asset Owner (TAO) licence was granted to ESB. This licence required ESB to designate a ring-fenced internal division of ESB, separate from all other parts of its business, to carry out its TAO functions. ESB did this and calls that division ‘ESB Networks Business Unit’ – ESNBNU.
- A Transmission System Operator (TSO) licence was granted to EirGrid plc. EirGrid is a State-owned entity that is entirely separate from the ESB group of companies.
- A Distribution Asset Owner (DAO) licence was granted to ESB. This licence required ESB to designate an internal ring-fenced division to carry out its functions as owner of the distribution system. ESB did this and calls that division ‘ESB Networks Business Unit’ – ESNBNU.
- A Distribution System Operator (DSO) licence was granted to ESB Networks DAC (ESBNDAC)(formerly ESB Networks Limited). While this is a separate legal entity to ESB, it is a wholly owned subsidiary of ESB.

### The AIE Request

On 19 August 2016 a representative of the appellant company sent a 5-part AIE request to an email address used by the ESB Group, making it clear that his request was directed at ESNBNU.

ESB acknowledged receipt of the AIE request and said that ESB was dealing with it because it was directed to ESNBNU and not to ESBNDAC.

On conclusion of a time-extension, ESB gave notice of its decision. It said that: it was unable to deal with parts 1, 2 and 3 of the request because they “do not constitute valid requests under article 6(1)(d) of the AIE Regulations”; it refused to grant parts 4 and 5; and it informed the appellant of its right to request an internal review.

The appellant sought an internal review on 16 November 2016 and asked that “the decision to transfer” the AIE request from ESNBNU to ESB be reviewed “as part of that review”. It argued that the AIE request should have been dealt with by staff of ESNBNU.

On 15 December 2016, ESB gave notice of its internal review decision to affirm the original decision. It confirmed that staff of ESNBNU had dealt with the request and explained that ESNBNU is a fully ring-fenced part of ESB.

The appellant appealed to my Office, saying:

The request was specifically submitted to ESB Networks, not to ESB or to ESBNDAC.... An email from [ESB] stated ‘Please be advised that ESNBNU is not a legal entity and is a business unit of ESB. Your request will therefore be dealt with by ESB’. I am therefore appealing the deemed refusal of the request, to include an appeal on the handling of the request and the validity of the transfer of the request from ESB Networks to ESB. Please note that Killross has recently made two similar requests, one to ESB Networks Limited and one to ESB.

When contacted by my investigator, the appellant made it clear that when it referred to “ESB Networks” it was referring to ESNBNU. That unit is also sometimes referred to as “ESB Networks Business Division”. For consistency and to avoid unnecessary confusion, I will only refer to ESB, ESNBNU and ESBNDAC.

### **Scope of Review**

In the circumstances, I decided that it was necessary to confine the scope of my review to the question of whether ESNBNU is a Public Authority within the meaning of the AIE Regulations. The appellant agreed that if I were to find that ESNBNU is not a Public Authority that would be the end of the matter. This was in the context of the appellant having also appealed to my Office against the decisions of ESB and ESBNDAC on other closely related AIE requests.

From the outset, the question arose as to who I should regard as speaking for ESNBNU. This presented something of a dilemma, since this question arose before I had determined the main question of whether ESNBNU is a Public Authority. If ESNBNU is a Public Authority it should have its own voice. If it is not a Public Authority but is a part of ESB (which is a Public Authority), it is ESB’s voice that I should wish to hear from. I could not oblige ESNBNU to speak for itself, neither would it be appropriate for me to have attempted to do so.

I considered the following:

- ESB made a submission, and no matter what the outcome of this review might be, ESB’s views are relevant and ought to be taken into account.
- I received no submission from ESNBNU in its own right. ESB stated that it is obviously qualified to speak on behalf of itself, and in so doing to speak to matters related to any of its business divisions, including the networks business division [i.e. ESNBNU].
- My investigator informed the appellant that he would put the appellant’s arguments to ESB and the appellant did not object.

Accordingly, without making any preliminary decision which might amount to prejudging the primary question for this review, I am satisfied that it is appropriate for me to consider all of the submissions which my Office received in relation to this case; i.e. those of the appellant and ESB.

Both the appellant and ESB made very detailed submissions. Due to their length, I will not reproduce them here. However, it is important to note here that my decision followed consideration of the complete arguments made by the parties and not merely the summarised arguments set out below.

I also had regard to the following: 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 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, 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 three 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 'categories (a), (b) and (c)'.

### **The appellant's argument**

The key points of the appellant's first submission may be summarised as follows:

The Electricity Regulation Act 1999, as amended, established the office of the Commission for Energy Regulation (CER) (now the Commission of Regulation of Utilities) and empowered it to grant various licences. CER granted a TAO licence to ESB. Condition 13 of that licence required ESB to "designate a division of the Board to exercise the functions of transmission system owner" under the European Communities (Internal Market in Electricity) Regulations 2000 (Statutory Instrument 445/2000). ESB did this and calls that division 'ESBNBU'. Therefore ESBNBU has been formed by and under statute and, as such, is a Public Authority.

ESBNBU is responsible for carrying out the functions and activities of the TAO's Business which includes the right to enter onto privately owned lands in order to construct high-voltage electricity lines and pylons thereon. In order to do this, ESBNBU utilises statutory powers of access to land and the rights under the Electricity Supply Acts to issue statutory Wayleave Notices under the Electricity Supply Acts. These statutory powers place ESBNBU in a category of entity with special powers which make ESBNBU a Public Authority in itself.

ESBNBU is managed by a managing director and staff who have been appointed by and under statute to act independently of the ESB.

My investigator asked the appellant to clarify whether it believed that ESBNBU is a natural or legal person and to explain why. In response, the appellant made a second submission, which may be summarised as follows:

ESBNBU and/or the personnel operating therein must have some legal and/or administrative status that allows it to carry out certain activities, independently of ESB, which are set out under legislation and licence from CER.

ESBNDAC is in full control of all aspects of ESBNBU's operations and personnel. This control has been set out in a number of legal agreements between ESB and

ESBNDAC. Under an Asset Management Agreement, ESNBNU is separate and distinct from ESB. ESNBNU is ‘the organisational division of the Board responsible for performing the Board’s roles as DSO and TAO’. The TAO role is carried out by ‘relevant personnel’ within ESNBNU who are under the control, direction and management of ESBNDAC’s Senior Management Team.

While the staff within the ESNBNU may be paid by ESB, it appears from the Asset Management Agreement between ESB and ESBNDAC and the definitions therein that those staff have no internal management structure and have no decision making capabilities themselves in respect of the TAO functions. The Asset Management Agreement defines those staff working within ESNBNU as being ‘relevant personnel’. It defines that expression to mean those ESB personnel who, on the day before the ‘effective date’ [which was 1 January 2009], were employed or otherwise engaged by the Board and who are assigned exclusively within ESNBNU to activities falling within the scope of the DSO, DAO or TAO functions. It excludes all personnel, whether or not assigned on that day to ESNBNU who were engaged in the provision of services to that Business Unit on behalf of any other Business Units or other entity within ESB Group. A key phrase from the definition of ‘relevant personnel’ is ‘on the day before the effective date are employed or otherwise engaged by the Board’. This is key because it indicates that on the day of the ‘effective date’ and thereafter those personnel were assigned or seconded to the ESNBNU, under the control and direction of the Managing Director and the Senior Management Team [of ESBNDAC] and were effectively ‘cut adrift’ from the control of ESB.

ESNBNU cannot be considered to be a part of ESB for the purpose of access to environmental information regarding TAO functions, which are the subject matter of this AIE request. At the time of making the request, ESNBNU can only act and operate when it receives instructions and directions from the Senior Management Team within ESBNDAC and it must act on those instructions and directions without any interference or oversight from ESB. This independent execution of the TAO functions is the reason why ESNBNU was formed and the reason why the personnel therein have been placed under the control and management of the Managing Director and the Senior Management Team within ESBNDAC.

ESNBNU personnel, at the direction of the Managing Director and the Senior Management Team, carry out statutory TAO functions which are defined and controlled under legislation and by government licence. No other legal entity is allowed to carry out similar functions to those carried out by ESNBNU personnel, as managed by ESBNDAC management team. Regulation 4(1)(c) of SI 445/2000 specifies that “Any person who (c) carries out functions of the transmission system owner specified in these Regulations,... without being duly authorised to do so, shall be guilty of an offence...”.

ESNBNU administers the instructions and directions of the Managing Director and the Senior Management Team within ESBNDAC. The personnel within ESNBNU are

clearly identified under the Asset Management Agreement and have specific tasks assigned to them by their management in ESBNDAC i.e. to carry out TAO or DAO functions.

In relation to what form of Public Authority the appellant believes that ESNBU is, it submitted several alternative arguments, which are summarised below:

Category (a): ‘Government or other public administration, including public advisory bodies, at national, regional or local level’.

ESNBU and/or the staff therein are controlled and directed by a form of Public Administration in the form of the Managing Director and/or the Senior Management Team and/or ESBNDAC. All of the foregoing operate at local, regional and national levels.

Further or in the alternative, ESBNDAC, as the legal entity which has been contracted to control, manage and direct the activities of ESNBU and its personnel, is a form of government or other public administration operating at national, regional and local level.

The Managing Director and the Senior Management Team of ESBNDAC are positions established by or under statute as a form of Public Administration to carry out the statutory TAO functions.

Category (b): ‘Any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment’.

Further or in the alternative, ESBNDAC and/or the Senior Management Team which controls and directs the activities of ESNBU, as appointed under Condition 13 of the TAO licence, are either legal persons (ESBNDAC) or natural persons (the Managing Director and the Senior Management Team) who perform public administrative functions under national law and/or carry out specific duties and services in relation to the environment. As such, ESBNDAC and/or the Senior Management Team appointed to control and manage ESNBU appear to be a Public Authority.

Further or in the alternative, ESNBU personnel, either individually or as a group of ‘relevant personnel’, perform public administrative functions under national law and/or carry out specific duties and service in relation to the environment and are both legal and natural persons (when considered individually or as the ESNBU) sufficient to describe ESNBU ‘relevant personnel’ as a whole and/or the individual staff therein, as a Public Authority.

Category (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)’.

Further or in the alternative, ESNBU and/or the ‘relevant personnel’ therein are natural and/or legal persons having public responsibilities and functions, providing

public services relating to the environment and are under the control of a body (ESBNDAC) and/or persons (the Managing Director and the Senior Management Team) each of which fall within paragraph (a) or (b) above. ESNBNU staff, either individually or as a group, is a legal entity sufficient to describe ESNBNU and/or the individual staff therein as a Public Authority.

### **ESB's position**

The following is a summary of ESB's arguments:

ESBNBU is a business division within, and forming part of, ESB. ESNBNU does not have a separate legal personality from that of the statutory corporation, ESB. This was acknowledged by the Court of Appeal in *ESB & EirGrid plc v Killross Properties Ltd*. [2016] IECA 210. In that case, Killross Properties Ltd advanced similar or related arguments to those advanced in this appeal to the Commissioner and these were unambiguously rejected by the Court of Appeal.

ESBNBU is not a separate or subsidiary company or legal entity. An added layer of complexity arises because of the existence of a separate, but similarly-named legal entity, ESBNDAC, and because of the ring-fencing arrangements that must be applied to ESNBNU in order to comply with EU legal requirements regarding the 'unbundling' of the electricity market. These matters obviously give rise, to some extent, to the issues in this appeal. But they do not alter the legal status of ESNBNU as an internal division of ESB.

Clause number 1 in condition 13 of the TAO Licence provides as follows:

The Licensee shall as soon as practical and in any event not later than 28 days after this Licence has come into force, designate a division of the Board, to be approved by the Commission, to exercise the functions of the transmission system owner under the Regulations and this Licence to be known as the Transmission System Owner's Business. (Emphasis added).

There is an almost identical provision regarding the DAO function in condition 7 of ESB's DAO Licence.

As is clear from these clauses, the division is not required to be a legally separate entity from ESB, but is in fact to be a division of ESB. Accordingly, ESB designated a division of its business called ESNBNU to carry on ESB's TAO and DAO functions. ESNBNU is not a separate company: it cannot, for example, enter into contracts, acquire or dispose of property or initiate lawsuits in its own name.

The personnel who work in ESNBNU are employees of ESB. With the approval of CRU, ESB has entered into a voluntary agreement with ESBNDAC whereby the personnel who work in ESNBNU and carry out ESB's functions as TAO and DAO are managed by ESBNDAC. Pursuant to arrangements approved by CRU, staff in ESNBNU also provide services for the DSO, and as such, the ring-fencing of staff in the ESNBNU also supports compliance with the DSO licence.

In accordance with Directive 2003/54/EC and as explicitly required by the European Communities (Internal Market in Electricity) (Electricity Supply Board) Regulations 2008, ESB established a subsidiary company, ESBNDAC, to discharge the functions of the DSO. Unlike the asset owner functions, the DSO is required by law to be carried out by a legally separate undertaking. Article 15 of EU Directive 2003/54/EC required the DSO to be independent in its legal form from other activities of ESB not relating to distribution.

The Managing Director and the Senior Management Team of ESBNDAC (comprising nine people) are employed by ESBNDAC. In addition, and in accordance with Regulation 6 of the 2008 Regulations, ESB has agreed to make available to ESBNDAC relevant personnel to assist ESBNDAC in carrying out its functions as the DSO. These personnel are employed by ESB and work in ESNBU; they are made available to ESBNDAC but are not seconded to it. Separately—with the approval of CRU—ESB has agreed with ESBNDAC that ESBNDAC will carry out a management function in respect of the discharge by ESB (via its internal division, ESNBU) of ESB's functions as DAO and TAO. This arrangement was not required by law, but was put in place by ESB following the establishment of ESBNDAC in 2009, and approved by CER at that time, in the interests of economic efficiency. This arrangement is governed by an 'Asset Management Agreement' between ESB and ESBNDAC which was approved by CER. For the avoidance of doubt, this agreement is concerned only with ESB's functions as DAO and TAO.

These two relationship strands mean that ESB staff working in the internal division of ESB known as ESNBU perform two different types of function on a day-to-day basis. First, they perform ESB's DAO and TAO functions, and are managed in this regard by ESBNDAC pursuant to a contractual arrangement between ESBNDAC and ESB. Second, separately, and also pursuant to a separate contractual arrangement between their employer (ESB) and ESBNDAC, they perform DSO functions for the DSO, ESBNDAC. Thus, staff within the ESNBU have not been seconded to ESBNDAC. They are ESB employees, albeit that they are managed on a day-to-day basis by ESBNDAC. For some of their work, they are performing ESB functions for ESB. At other times they perform DSO functions for ESBNDAC. However, at all times, they remain a group of staff employed by, and working in an internal division of, ESB. They do not comprise a distinct legal entity.

Moreover, any request for access to environmental information related to ESNBU's activities will, of necessity, relate to either one of the two types of activity referred to above. Either it will concern the performance by them of ESB's TAO and DAO functions—in which case the request for information will be a matter for ESB—or it will concern the performance of ESBNDAC's DSO functions—in which case the request should be made to ESBNDAC, or, if made to ESB, will be transferred to ESBNDAC in accordance with the AIE Regulations. Thus, there could never be a situation in which the staff in ESNBU hold environmental information that is not being held by or for either ESB or ESBNDAC. Further, an AIE request made to ESB

covers all of ESB's internal divisions and business units. Where an AIE request is made to ESB and concerns, relates to or incorporates activities carried out in performance of ESB's TAO and/or DAO functions, ESB will process that request with the input of its staff in ESNBU.

In ESB's view, ESNBU clearly cannot be a Public Authority, and any interpretation to the contrary would be inconsistent with the case law of both the European and Irish Courts, and could lead to chaos in the administration of the AIE Regulations.

In *ESB & EirGrid v Killross Properties Ltd.* [2014] IEHC 635, Killross argued that an employee in ESNBU who served a wayleave notice under section 53(3) of the Electricity (Supply) Act, 1927, could not be regarded as having served the notice on ESB's behalf. The High Court rejected that argument, stating:

“This body [i.e. ESB Networks Business Unit] is a part of ESB and quite separate from the limited company of the same name” [i.e. ESB Networks DAC].

The appellant appealed that decision to the Court of Appeal, and was again unsuccessful in relation to this aspect of the case (although it succeeded on another ground not relevant to the legal status of ESNBU). In his judgment ([2016] IECA 210), Cregan J. stated (at paragraph 59):

“I am satisfied that there is a clear legal distinction between ESB and ESB Networks Limited and that there is a clear distinction between the ESB Networks Business Unit (as a division within ESB) and ESB Networks Limited”.

Cregan J. also made the following observation at paragraph 63:

“One of the errors which pervades the appellant's submissions in this regard appears to be its unwillingness to accept the distinction between the role of ESB Networks Ltd as the separate contractual entity carrying out certain functions under the new regulatory structure and the entirely separate and distinct role of ESB Networks Ltd in managing the ESB Networks Business Unit of the ESB. The appellant has conflated both of these roles and sought to argue that ESB has delegated its power to issue wayleave notices to ESB Networks Ltd when there is simply no evidence that this is so and indeed all the contractual documents appear to point in the opposite direction.”

As regards a second facet of Killross' argument, that because an employee of ESB working in ESNBU, Mr Waldron, was being managed by ESNBNDAC, he must be regarded as having served the relevant statutory notice on behalf of ESNBNDAC rather than on behalf of ESB, Cregan J. stated:

“67. The source of the confusion in relation to this issue arises because ESB, in addition to having an internal business unit entitled ESB Networks, also set up an independent company called ESB Networks Ltd to carry out functions

of the transmission asset manager. In addition, however, ESB also contracted in ESB Networks Ltd to manage the internal ESB Networks business unit and to manage Mr. Waldron and his fellow ESB employees within the ESB Networks business unit. ESB Networks Ltd performed that management function on behalf of ESB and ESB paid them to do so.

68. Despite this confusion of nomenclature and of overlapping functions, it is clear that Mr. Waldron is and was at all material times acting for and on behalf of the ESB in signing and serving the wayleave notice on 28th June 2013 pursuant to s. 53(3) of the 1927 Act.

69. In these circumstances I am of the view that the appellant's argument under this heading is not sustainable.”

ESB argues that, in light of the above, it is indisputable as a matter of fact and law that ESNBU is an internal division of ESB and does not have a distinct legal personality of its own.

ESB’s submission went on to address whether ESNBU, if it is not a legal person, could nonetheless be a ‘Public Authority’ for the purposes of article 3 of the AIE Regulations.

ESB argues that:

In essence, this question asks whether a group of individual employees within an entity which is a Public Authority can, without any distinct legal personality and merely grouped together as a group of natural persons, comprise a ‘Public Authority’ of their own, distinct from their employer. The answer must be that they cannot.

ESB said that it is telling that the appellant cannot clearly identify under what category of the definition in article 3 of the AIE Regulations ESNBU qualifies as a ‘Public Authority’.

The appellant advanced a series of alternative propositions in this respect, including the clearly unsustainable proposition that ESNBU qualifies as “government or other public administration” under category (a) of the definition. As regards categories (b) and (c), all of its submissions grounded on ESNBU comprising a legal person are unsustainable for the reasons outlined above. One is left, therefore, with the proposition that the group of employees in ESNBU—what it refers to as the ‘relevant personnel’—qualify as a ‘Public Authority’ as a group of natural persons.

ESB submits that this cannot be correct for two reasons.

First, by reference to the decision of the Court of Justice of the European Union in Case C- 279/12, *Fish Legal v Information Commissioner* [2014] Q.B. 521, [2015] All ER 795, and that of the Irish Supreme Court in *NAMA v the Commissioner for Environmental Information* [2015] IR 626, what characterises “natural or legal persons performing public administrative functions under national law” is the fact that they 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”.

This, ESB contends, is hugely significant.

As unambiguously confirmed by the decisions of the High Court and Court of Appeal referred to above, these [special] powers are vested, by statute, in ESB. They are not vested in a group of individual employees or in an internal division of ESB. Neither they, nor the internal division can, therefore, as a group of natural persons, constitute a ‘Public Authority’ for the purposes of the AIE Regulations. The separation of the business division is simply a function of regulatory ring-fencing. ESB notes that the appellant does not advance any compelling argument that the networks business unit or the employees within it are conferred with any special powers, nor does it advance any argument for its proposition that those personnel “have some legal and/or administrative status – it merely states that it ‘appears’ that they must have’.

The second reason why the suggestion that staff within the ESNBU comprise a ‘Public Authority’ cannot be correct arises from practical or policy considerations. ESB contends that if it were the case that an individual group of employees within a legal entity that was a ‘Public Authority’ themselves constituted a ‘Public Authority’ in their own right, simply by virtue of being employees of a Public Authority, the administration of the procedures for ensuring adequate access to environmental information would be thrown into chaos. Persons making requests for access to environmental information to entities found by the Commissioner to be ‘public authorities’ could elect not to make the reference to the entities or bodies themselves, but to named individual employees or groups of employees working in internal divisions of those bodies. This cannot have been what the EU Directives intended and would be so unworkable as to undermine the efficiency and integrity of the system of access to environmental information.

ESB submits that to interpret the AIE Regulations in this manner would be wholly inconsistent with the proper rules of statutory interpretation.

### **Analysis**

The appellant argued that ESNBU might fall within any one of the three categories of Public Authority, either as a legal person or as a collection of natural persons. As a result, I had to consider the status of ESNBU in the light of each of the categories of Public Authority provided in the AIE Regulations.

I began by considering if ESNBU is a legal person. The appellant argued that ESNBU was formed under statute and must have “some legal and/or administrative status”. ESNBU was formed as a result of a legal requirement for ESB to designate a division, but that requirement did not require the establishment of an entity with its own legal personality. The law requires ESNBU to be separate from the other business divisions of ESB: it does not require ESNBU to be separate from ESB itself. Furthermore, ESB’s actual designation of ESNBU did not create an entity with its own legal personality. ESB is a legal person and ESB subsidiary companies are legal persons. I am satisfied from this that ESNBU is a division of ESB and is not a legal person.

I next considered the argument that ‘relevant personnel’ (i.e. ESB members of staff who work in ESNBU) might constitute a Public Authority as natural persons, and began by considering category (a) public authorities.

The Supreme Court, in *NAMA v Commissioner for Environmental Information* [2015] IESC 51, considered category (a) public authorities and said:

“The concept of government 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.”

Clearly, the members of staff who work in ESNBU do not constitute a government of any sort. I considered whether they might form a ‘public administration’ as described in the definition of category (a) public authorities or perform public administrative functions under national law as described in the definition of category (b) public authorities. In my view, for a group of natural persons to constitute a public administration or perform public administrative functions, it would be necessary, amongst other things, for the natural persons in question to be empowered by law to make decisions in the public arena. In the current case, members of staff who work in ESNBU carry out TAO and DAO-related work on behalf of ESB and DSO-related work on behalf of ESBNDAC. I note that the power to exercise these functions is allocated to specific licence-holders: ESB and ESBNDAC. Members of staff who work in ESNBU have not been granted any licence to perform any functions. It is ESB and ESBNDAC, in each case, which takes, and is responsible for, decisions made in the exercise of those functions. I am satisfied from this that members of staff who work in ESNBU, as natural persons, do not constitute a Public Authority within the meaning of either categories (a) or (b) of the definition set out in the AIE Regulations.

I next considered whether the members of staff who work in ESNBU might constitute a Public Authority of type (c). The appellant argued that, according to the definition of “relevant personnel” provided in the Asset Management Agreement between ESB and ESBNDAC, members of staff of the ESB who, on ‘the effective date’, were assigned or seconded to ESNBU, came under the control and direction of the Managing Director and the Senior Management Team of ESBNDAC and were ‘cut adrift’ from the control of ESB. I wish to say several things about this. First, ESB denies that staff were ‘seconded’, and it is not necessary for me to make any determination on this point. Second, and more importantly, if the appellant’s argument were correct, it would not mean that members of staff assigned to ESNBU constituted a Public Authority: it would be more likely to simply mean that such natural persons worked for ESBNDAC, which, as is not disputed, is a Public Authority. Third, I do not accept that those who work in ESNBU are cut-off from ESB. ESNBU was established to separate ESB’s TAO and DAO business from business carried out by ESB’s other divisions: it did not separate the ESB employees who are assigned to ESNBU from ESB itself.

The appellant has not satisfied me that the members of staff of ESNBU, of themselves, have public responsibilities or functions or provide public services relating to the environment. All of the information available to me shows that it is legal persons (in the form of ESB and

ESBNDAC) which perform the licensed functions outlined earlier. ESB and ESBNDAC are no doubt assisted by those members of ESB's staff who are assigned to work in ESBNBU. But those employees are no more legally *responsible* for the proper performance by ESB and ESBNDAC of their licensed functions than are the members of staff of any other Public Authority responsible for the performance of their employers. I am therefore satisfied that the members of staff of ESBNBU, as natural persons, do not constitute a Public Authority within the meaning of category (c) of the definition of Public Authority set out in article 3 of the AIE Regulations.

Nothing in the appellant's arguments has persuaded me that ESBNBU is a Public Authority.

I note that the appellant has been granted leave to appeal the Court of Appeal judgment which was cited by ESB in the course of this review to the Supreme Court. I note also that ESB has been granted leave to pursue a cross appeal in that regard. I appreciate that ESB's reliance on passages from both the High Court judgment and the Court of Appeal judgments on that case have to be understood in the light of those pending appeal hearings.

### **Decision**

I find that that ESB Networks Business Unit is not itself a Public Authority within the meaning of the AIE Regulations. I am satisfied that it is part of ESB, and ESB is a Public Authority within the meaning of the AIE Regulations. Accordingly, I affirm ESB's decision that ESB Networks Business Unit is not a Public Authority.

I note with approval ESB's assurance that there could never be a situation in which the staff working in ESBNBU could hold environmental information that is not being held by or for either ESB or ESBNDAC. There is therefore no question of environmental information being held by or for a public authority without it being subject to the AIE Regulations. I trust that the appellant will also be assured on this point.

### **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**

13 December 2017