Coimisinéir um Fhaisnéis Comhshaoil
Commissioner for Environmental Information

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

Case OCE-93421-T8F8W7
(Legacy reference: CEI/20/0017)

Date of decision: 21 September 2020

Appellant: Right to Know CLG

Public Authority: Celtic Roads Group (Dundalk) DAC (CRG)

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

Summary of Commissioner's Decision: The Commissioner found that CRG is a public authority within the meaning of article 3(1)(b) of the public authority definition. He annulled CRG's decision and directed that a fresh decision-making process be undertaken in accordance with the AIE Regulations.

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

Background

CRG is a private toll company responsible for the operation and maintenance of the Dundalk Western By-Pass under the Public Private Partnership (PPP) Programme. On 4 May 2017, the appellant made a request to CRG on 4 May 2017 under the AIE Regulations seeking access to a full set of data from the traffic counters installed in the vicinity of the M1 toll to cover the period from when the road opened to the date of the request. Following a deemed refusal of the original request, CRG replied to the appellant stating that it was not a public authority. The matter was appealed to my Office on 6 June 2017.

In a decision made in Case CEI/17/0025 19 March 2019, I found that CRG was not a public authority within the meaning article 3 of the AIE Regulations. The appellant appealed my decision to the High Court under article 13 of the AIE Regulations. The matter was subsequently remitted on consent by order of the High Court, as perfected on 26 May 2020. Accordingly, the review was reopened under a new reference number for the purpose of making a fresh determination on the question of whether CRG is or is not a public authority within the meaning of the AIE Regulations.

I have now completed my review in this remitted case under article 12(5) of the Regulations. In carrying out my review, I have had regard to the submissions made by the appellant and CRG on 24 June 2020 and 20 July 2020, respectively, as well as to the submissions previously made in relation to Case CEI/17/0025, including the appellant's submissions to the High Court. I have also had regard to: the Guidance document provided by the Minister for the Environment, Community and Local Government on the implementation of the AIE Regulations (the Minister's Guidance); Directive 2003/4/EC (the AIE Directive), upon which the AIE Regulations are based; the 1998 United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention); and The Aarhus Convention—An Implementation Guide (Second edition, June 2014) ('the Aarhus Guide').

Scope of Review

I note that in its submissions, CRG has raised the alternative arguments that the requested information is not environmental information and that it is not, in any event, accessible to it because it is provided to TII directly. However, this appeal is before me on the basis of CRG's primary claim that it is not a public authority. Article 12(3) of the Regulations provides for a right of appeal to my Office where a decision by a public authority has been affirmed under article 11, i.e. on internal review. Article 11(5)(a) of the Regulations clarifies that a decision to refuse a request, which may in turn be appealed to my Office, includes a request that "has been refused on the ground that the body or person concerned contends that the body or person is not a public authority within the meaning of these Regulations". Accordingly, this review is limited to the question of whether CRG is a public authority within the meaning of the Regulations.

Analysis and Findings

The definition

Article 2(2) of the Directive and article 3(1) of the Regulations define "public authority" as:

"(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)."

The definition set out in the AIE Regulations adds that it "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 subparagraphs (I) or (II) applies, having public administrative functions and responsibilities, and possessing environmental information".

Fish Legal & *NAMA*

The relevant judgments addressing the public authority definition under AIE are the judgment of the Court Justice of the European Union (CJEU) in C-279/12 *Fish Legal and Emily Shirley v Information Commissioner and Others (Fish Legal)*, available at Fish Legal; and the judgment of the Supreme Court in *National Asset Management Agency v Commissioner for Environmental Information* 2015 IESC 51 *(NAMA)*, which is available on the Courts Service website, www.courts.ie. In sum, an entity is a public authority where

a) It is an administrative authority, i.e. where it forms part of the public administration or the executive of the State, and this includes all legal persons government by public law which have been set up by the State and which it alone can decide to dissolve;

b) It is empowered to perform public administrative functions, i.e. where it 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; or

c) It has public responsibilities or functions, or provides public services, relating to the environment, and it is a body under the control of a public authority falling under paragraphs (a) or (b) of the definition.

I note at the outset, though, that it has never been argued that CRG is public authority within the meaning of paragraph (a) of the definition.

Invitation for submissions in reference to *Rieser*

In reactivating the review in this case, my Investigator invited the parties to make submissions in relation to any matter that they considered relevant to the review. In particular, however, my Investigator asked the parties to address the potential relevance of the judgment of the CJEU in Case 157/02 *Rieser Internationale Transporte GmbH and Autobahnen- und Schnellstraßen-Finanzierungs-AG (Asfinag)*. She noted that the *Rieser* judgement had previously been referred to by the appellant in support of the argument that CRG is an emanation of the State and qualifies as a public authority on that basis. She observed that an entity does not qualify as a public authority for the purpose of the AIE Directive simply by virtue of being an emanation of the State, but that, as the CJEU indicated at paragraph 64 of *Fish Legal*, it may be an indication of control for the purposes of paragraph (c) of the definition. She further observed that at the time the *Rieser* judgment was issued, the emanation of the State requirements were very similar to the tests set out in *Fish Legal* for finding that an entity is a public authority under (b) or (c) of the AIE definition.

As the CJEU stated in paragraph 24 of *Rieser*: "A body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for the purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon." The CJEU subsequently clarified in Case C-413/15 (*Farrell v Whitty and Ors*) that the requirements of the emanation of the State test are not conjunctive. Nevertheless, in *Rieser*, the toll company concerned, Asfinag, was found to be an emanation of the State on the basis that it was both under the control of the Austrian State and that it "possesses special powers beyond those resulting from the normal rules applicable in relations between individuals". Specifically, the Court stated at paragraph 27:

> "Those facts clearly show that Asfinag is a body to which, pursuant to an act adopted by the public authorities, the performance of a public-interest service (namely: the constructing, planning,

> operating, maintaining and financing of motorways and expressways in addition to the levying of tolls and user charges), has been entrusted, under the supervision of those public authorities, and which for that purpose possesses special powers beyond those resulting from the normal rules applicable in relations between individuals."

In response to my Investigator, both parties indicated that they wished to rely primarily on submissions previously made in relation to Case CEI/17/0025. I do not regard it as necessary to set out the previous submissions in detail here but all relevant points have been considered.

The crux of the appellant's case, as summarised in its response to my Investigator dated 24 June 2020, is that CRG is a category (b) public authority since it has been conferred with public administrative functions, including the exercise of powers, under the State Authorities (Public Private Partnerships Arrangements) Act 2002 (the State Authorities Act) and has been conferred with special powers appropriate for the operation of a tolled public road. In the appellant's view, the operator in *Rieser* is in an analogous position to CRG. The appellant accepted that, while the satisfaction of the emanation of the State criteria may be an indication that the control condition of the public authority definition in the AIE Directive is met, "the precise meaning of the concept of public authority must be sought taking into account the AIE Directive's own objectives". In its view, however, the objectives of the AIE Directive are consistent with CRG being a category (b) public authority by virtue of the fact that it possesses large amounts of environmental information concerning the operation of a major motorway.

It is CRG's position that the *Rieser* case is distinguishable "on a number of key factual grounds". CRG reiterated, as previously submitted, that its rights and obligations are derived solely from the PPP contract. "As a matter of contract, CRG, as a private partner, performs functions consistent with the State authority's functions on a contractual basis only. As such, the Roads Acts 1993-2016, or indeed the M1 Bye-laws, do not confer any 'special powers' upon CRG."

Previously, CRG emphasised that it is a private limited company, whereas Asfinag, the operator in *Rieser*, was State owned: "The State was the sole shareholder in Asfinag, and that it had extensive powers of oversight over the operations of Asfinag." It accepted that it collects tolls and carries out operations and maintenance of the Dundalk By-Pass under the PPP Contract. However, it stated: "both of these sets of obligations are derived solely from the PPP Contract. It has not been given any independent statutory powers or 'special powers' to do so." CRG also maintained that the appellant's reliance on the State Authorities Act was misplaced. In its view, a PPP contract does not transfer, delegate or devolve a State authority's functions to the relevant private sector party. It acknowledged that the State Authorities Act requires, as a matter of contract, the private sector party to

perform functions which are consistent with the State authority's functions, but "on a contractual basis only".

Conclusions

Legal basis

CRG considers that its status is distinguishable from that of Asfinag, the toll company that was found to have special powers in *Rieser*, on the basis that it is a private company not in State control and that its functions in relation to the motorway are carried out on a contractual basis only. However, the issue of control relates to the question of whether an entity is a category (c) public authority and is not determinative in considering whether CRG is empowered to perform public administrative functions. Moreover, it is apparent from paragraphs 12 and 21 of *Rieser* that the legal basis for Asfinag's powers was also contractual, coupled with a licence.

It is not in dispute that the M1, including the Dundalk Bye-Pass, is a public road and that the relevant "road authority" under the Roads Act 1993 as amended is Transport Infrastructure Ireland (TII). It is likewise not in dispute that, by virtue of its PPP contract, CRG is a "road undertaking" under Part V of the Roads Acts, which relates to toll roads. While TII, as the road authority, is the primary authority in relation to the establishment and operation of toll roads in Ireland, including the M1, as a road undertaking and Toll Company, CRG has the authority to do the following in relation to the relevant stretch of the motorway:

- Collect tolls (specifically, it may "demand, charge, collect and recover tolls" as set out in the M1 Bye-laws, which in turn were made pursuant to section 61 of the Roads Act; see also section 59 in conjunction with section 63 of the Roads Act);
- Recover tolls as a simple contract (section 64(4) of the Roads Act);
- Serve notice of a toll charge by post with the presumption that such notice was received (section 64(4) of the Roads Act);
- Give instructions to persons on the toll road (section 64(9) of the Roads Act);
- Access vehicle licensing records and require provision of information from the registered owner of a vehicle (where the vehicle is the subject of a hire-purchase agreement or a consumer-hire agreement) (section 64A of the Roads Act).

Although the PPP contract is the instrument that gives CRG the status of a road undertaking and Toll Company, the State Authorities Act provides the statutory basis for the transfer of State functions to an entity by way of a PPP "arrangement". Section 3 provides that a State Authority may enter into an arrangement with a partner "for the performance of functions of the State Authority specified in the arrangement". Section 4 confirms that the PPP arrangement operates to confer on the partner the functions of the State authority specified in the arrangement. Moreover, the Act specifies that "'functions' includes powers and duties, and a reference to the performance of functions includes, with respect to powers and duties, a reference to the exercise of the powers and the carrying out of the

duties". I agree with the appellant that operating and maintaining the Dundalk By-Pass are services of public interest. I therefore accept that CRG has been entrusted under national law with the performance of services of public interest and, for this purpose, is vested with the relevant powers set out in the Roads Act and the M1 bye-laws.

"Special powers"

CRG does not appear to directly argue that the nature of its powers is distinguishable from those of the toll company in *Rieser* beyond the legal basis for the powers and the absence of State control. Nevertheless, I consider it appropriate to examine the question of whether its powers qualify as "special powers".

As I observed in Case CEI/15/0011, a body may be vested with legal powers without being a public authority carrying out public administrative functions. At paragraph 55 of the *Fish Legal* judgment, the CJEU stated: "It is for the referring tribunal to determine whether, having regard to the specific rules attaching to them in the applicable national legislation, these rights and powers accorded to the water companies concerned can be classified as special powers." To assess whether a body carries out public administrative functions, *Fish Legal* requires a comparative analysis of powers vested in the body with the normal rules applicable in relations between persons governed by private law.

The UK Upper Tribunal applied the CJEU's judgment in Fish Legal in its decision in *Fish Legal v Information Commissioner* [2015] UKUT 52 (AAC). In response to the argument that "special" had to be given a meaning, the Upper Tribunal stated (at paragraph 103):

> "We do not read *special* as adding some additional element that would otherwise be absent. Rather, we read it as part of the composite phrase that captures the contrast between the powers vested in the bodies in question and those that result from the rules of private law. We note that the other language versions of the judgment that we have consulted do not use any equivalent term to *special*. We find in this confirmation for our view that the phrase has to be read as a whole."

The Upper Tribunal went on to adopt a practical approach in determining what qualifies as a power, looking to the substance and not the form. At paragraph 106, it stated that the relevant question was whether the powers "give the body an ability that confers on it a practical advantage relative to the rules of private law".

Fish Legal involved privatised utility companies with "certain statutory powers", including (but not limited to) the power of compulsory purchase of land; the right to make bye-laws relating to waterways; the power to discharge water; and the right to impose temporary hosepipe bans. In *NAMA*, O'Donnell J. stated at paragraph 50: "[T]he decision in *Fish Legal* provides an authoritative interpretation of the Directive, and moreover does so in the

context of a common law system." O'Donnell then applied the *Fish Legal* test by describing NAMA's powers (of compulsory acquisition, of enforcement, to apply to the High Court to appoint a receiver and to set aside dispositions) and the legal basis for its powers in reference to the legal situation of the water companies in *Fish Legal*, highlighting its "substantial powers", its "exceptional" scope and scale, and its "important public functions".

The M1 is a major piece of public infrastructure and the collection of tolls is akin to tax collection. I accept that its power to "demand, charge, collect and recover tolls" as set out in the M1 Bye-laws, coupled with its additional powers under the Roads Act as a road undertaking, confers on it a practical advantage relative to the rules of private law. Similar functions and powers conferred on Asfinag by contract and licence were found to be "special powers beyond those resulting from the normal rules applicable in relations between individuals". In the circumstances, I am satisfied that CRG is a public authority within the meaning of article 3(1)(b) of the AIE Regulations.

Accordingly, I find that CRG was not justified in refusing the appellant's request on the basis that it is not a public authority within the meaning of the Regulations. While it is unclear whether the appellant wishes to pursue an argument that CRG is also captured by paragraph (c) of definition, I do not consider it necessary to determine the matter in any event. As I find that CRG is a public authority under article 3(1)(b) of the Regulations, it must undertake a fresh decision-making process in response to the request in accordance with the Regulations. In doing so, it should have regard to the recent judgments in *Jim Redmond & Mary Redmond v Commissioner for Environmental Information & Coillte* [2020] EICA 83 and *Electricity Supply Board v Commissioner for Environmental Information* [2020] IEHC 190. It should also have regard to the decision of this Office in Case CEI/17/0026 (New Morning Intellectual and Transport Infrastructure Ireland).

Decision

Having carried out a review under article 12(5) of the AIE Regulations, I find that CRG was not justified in refusing the appellant's request on the basis that it is not a public authority within the meaning of the Regulations. I therefore annul CRG's decision and direct it to undertake a fresh decision-making process in relation to the appellant's request in accordance with the Regulations, including the timeframes specified. This means that, subject to article 13 of the Regulations, action on the request should be taken within one month as specified under article 7(2) of the Regulations.

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.

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Peter Tyndall
Commissioner for Environmental Information
21 September 2020