



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-94897-N8Y8Y3

Date of decision: 26 August 2022

Appellant: Right to Know CLG

Public Authority: ESB

Issue: Whether the entirety of the information requested by the appellant is “environmental information” within the meaning of the AIE Regulations and whether ESB is entitled to refuse access to the requested information on the basis of article 9(1)(d) of the AIE Regulations.

Summary of Commissioner's Decision: The Commissioner found that the information requested was “environmental information” within the meaning of the AIE Regulations and that ESB was not entitled to rely on article 9(1)(d) of the AIE Regulations to refuse access to that information.

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



Background

1. On 28 April 2020, the appellant requested a soft copy of the transcript requested by the appellant in a previous decision of my Office [CEI/18/0003 Lar McKenna and ESB](#) (referred to in this decision as the Transcript).
2. The Transcript sought was prepared by a stenography company engaged by ESB and records a hearing held on 19 and 20 June 2017 before a Property Arbitrator in respect of an application for compensation on foot of the exercise of powers by ESB under section 53(3) of the Electricity Supply Act 1927 (as amended) to place electricity infrastructure across land.
3. ESB responded to the request on 27 May 2020. In its original decision, it refused the request on the basis that it was manifestly unreasonable under article 9(2)(a) of the AIE Regulations and that the Transcript was not “environmental information” within the meaning of article 3(1) of the AIE Regulations.
4. The appellant sought an internal review of that decision. The internal review varied the original decision. It concluded that while the Transcript did not constitute environmental information “in its entirety”, there was information within the Transcript which “may fall within the definition of environmental information under and for the purposes of the AIE Regulations”. The internal review outcome did not identify the information considered to come within the definition of environmental information and instead went on to conclude that release of the Transcript would adversely affect the intellectual property rights of the stenography company, which had prepared it.
5. ESB relied on the decision of O’Neill J in *EH v Information Commissioner* [2001] 2 IR 463 in support of its position that it “must assume that any person requesting the release of information that is subject to intellectual property rights (held by a third party) will commercially exploit it or otherwise do something in respect of that information (in this case the Transcript) which would constitute an unauthorised infringement of the intellectual property rights asserted in it by the Stenographer, even if that is not, or is not likely to be, the case”. It relied on the decision of this Office in [CEI/18/003 Lar McKenna and ESB](#) in support of its position that there was a real risk of monetary loss and loss of future business opportunities connected with release of the Transcript. ESB did not consult with the stenography company before reaching its decision and was of the view that there was nothing in the AIE Regulations requiring it to ask the stenography company for its views on the release of the Transcript. The internal review went on to conclude that “the public interest would not be served by disclosure of information in circumstances where that disclosure would breach the intellectual property rights of a third party (rights which are protected by Irish law) and in circumstances where that disclosure would breach the terms on which the Transcript was provided to ESB” as it would not “serve the public interest for a commercial semi-state company such as ESB to take an action which would knowingly breach rights which are protected by Irish law, namely the intellectual property rights of a private sector company that earns its revenues from selling the output of the efforts of its employees engaged in exercising a very



specific and sought after skillset (namely stenography skills), nor to act in a manner which could expose ESB to a claim for damages for breach of copyright and/ or damages for breach of contract”.

6. The appellant appealed to my Office on 28 July 2020.

Scope of the Appeal

7. ESB has refused access to the Transcript on the basis of article 9(1)(d) of the Regulations and has also asserted that only some of the Transcript constitutes “environmental information” within the meaning of article 3(1) of the Regulations. The appellant is of the view that the Transcript in its entirety is environmental information and that article 9(1)(d) does not provide grounds for its refusal. My review in this case is therefore concerned with:

- (i) whether the Transcript constitutes “environmental information” within the meaning of the Regulations; and
- (ii) whether article 9(1)(d) of the Regulations provides grounds for refusal of the Transcript in the circumstances of this appeal.

Analysis and Findings

8. I have now completed my review under article 12(5) of the Regulations. In carrying out my review, I have had regard to the submissions made by the appellant, ESB and the third party stenography company. I have also examined the contents of the records at issue. In addition, I have had regard to:

- Directive 2003/4/EC (the AIE Directive), upon which the AIE Regulations are based;
- the 1998 United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention);
- the Aarhus Convention—An Implementation Guide (Second edition, June 2014) (‘the Aarhus Guide’);
- the judgments in *Minch v Commissioner for Environmental Information* [2017] IECA 223 (*Minch*), *Redmond & Anor v Commissioner for Environmental Information & Anor* [2020] IECA 83 (*Redmond*), *Electricity Supply Board v Commissioner for Environmental Information & Lar Mc Kenna* [2020] IEHC 190 (*ESB*) and *Right to Know v Commissioner for Environmental Information & RTÉ* [2021] IEHC 353 (*RTÉ*);
- the judgment of the Court of Appeal of England and Wales in *Department for Business, Energy and Industrial Strategy v Information Commissioner* [2017] EWCA Civ 844 (*Henney*) which is referenced in the decisions in *Redmond*, *ESB* and *RTÉ*;
- the decisions of the Court of Justice of the European Union in *C-321/96 Wilhelm Mecklenburg v Kreis Pinneberg - Der Landrat (Mecklenburg)*, *C-316/01 Eva Glawischnig v Bundesminister für soziale Sicherheit und Generationen (Glawischnig)*, *C-204/09 Flachglas Torgau GmbH v Federal Republic of Germany (Flachglas Torgau)* and *C-470/19 Friends of the Irish Environment v. Commissioner for Environmental Information*;



- the decisions of the Court of Justice of the European Union in [C-05/08 Infopac International AS v Danske Dagblades Forening \(Infopac\)](#), [C-604/10 Football Dataco v Yahoo! UK Limited \(Football Dataco\)](#) and [C-145/10 Painer v Standard Verglas GmbH & Ors \(Painer\)](#); and
- the judgment of the Supreme Court in *Gormley v v EMI Records* [2000] 1 IR 74 and of the UK House of Lords in *Walter v Lane* [1900] AC 539.

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

9. As outlined above, there are two issues for me to consider in this appeal. The first is whether the Transcript is “environmental information”. If it is, then I must consider whether ESB is entitled to rely on article 9(1)(d) to refuse disclosure of the Transcript.

Is the Transcript “environmental information” within the meaning of the AIE Regulations?

10. Article 3(1) of the AIE Regulations defines environmental information as “information in written, visual, aural, electronic or any other material form on –
- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms and the interaction among these elements,
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment,
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements,
 - (d) reports on the implementation of environmental legislation,
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c), and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are, or may be, affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c)”.
11. The appellant is of the view that the Transcript in its entirety is “environmental information” and has made the following submissions in support of its position:
- (i) It submits that the Transcript fits the definition of environmental information set out at paragraph (c) since it is information on the development of electricity infrastructure which is a measure and/or activity affecting or likely to affect the environment. It notes that the environmental effects of the development of electricity infrastructure include those arising from the construction of electricity pylons on land, the running of lines over or under land



and the construction of associated installations such as transformers and other electricity infrastructure as well as the emission of electromagnetic energy from electricity lines transmitting electricity.

- (ii) The appellant refers to paragraph 37 of the decision of the Court of Appeal of England and Wales in *Henney* which notes that once information is about, relates to or concerns a measure it comes within the scope of the AIE Regulations. It submits that there is no requirement for the contents of the document at issue to be intrinsically environmental in nature nor is there a requirement for the document to be integral to the measure or activity at issue in order for that document to constitute environmental information. It argues instead that once the information at issue is about, relates to or concerns the measure in question it comes within the scope of the AIE Regulations.
 - (iii) The appellant argues that no doubt arises in this case as to whether the Transcript is environmental information but where such doubt does arise, it states that the line is to be drawn with reference to the objectives of the Aarhus Convention and the AIE Directive. It notes in this regard that the process captured by the Transcript is a quasi-judicial procedure held in public to determine the amount of compensation to be awarded to landowners by public authorities in relation to the compulsory acquisition of rights over property. It submits that the objectives of the Aarhus Convention would be well served through access to the Transcript since it would enhance transparency and accountability around the expenditure of public money in relation to the construction of electricity infrastructure as well as building public trust in the decisions awarding such compensation.
 - (iv) Finally, the appellant argues that the Transcript is an integral document relating to the relevant proceedings and its utility to the public would be significantly undermined if it were not to be treated as environmental information in its entirety. It submits that ESB's proposal to separate parts of the Transcript into environmental and non-environmental information is artificial and has no basis in the AIE Regulations.
12. ESB accepts that parts of the Transcript are “environmental information”; although it has not accepted a request by my Office to identify those parts. ESB's submissions in this regard can be summarised as follows:
- (i) ESB accepts that the development of electricity infrastructure and the construction of electricity lines is a measure within the meaning of the AIE Regulations. However, it submits that insofar as the appellant suggests that the development and construction of electricity lines are separate measures, that is incorrect. ESB's position is that the development of electricity infrastructure is a measure which includes within its scope the construction of electricity lines.
 - (ii) ESB submits that it cannot be said, on the basis of any reasonable analysis, that the Transcript is information “on” the development of electricity infrastructure. It argues that the Transcript, as a whole, is not information on the development of electricity infrastructure. It submits that the appellant's framing of the decision in *Henney* is not entirely accurate and argues that *Henney* in fact presents a significantly more nuanced view of the circumstances in which information will be said to be environmental information. It refers to paragraph 34 of that decision which notes that “information is ‘on’ a measure if it



- is about, relates to or concerns the measure in question” and argues that this statement of principle in fact relates to the obligation to identify the measure in question before turning to the question of whether the information is on that measure.
- (iii) ESB argues that the decision in *Henney* suggests that the question of whether information is information on a particular measure must be examined through the lens of the aims and objectives of the Aarhus Convention and, in particular, whether it is information which will enable members of the public to contribute to environmental decision making. It submits that the hearing before the Property Arbitrator is for the purpose of assessing the compensation to which a landowner is entitled in accordance with the Acquisition of Land (Assessment of Compensation) Act 1919, following the exercise by ESB of powers under section 53(3) of the Electricity Supply Act 1927 on foot of which ESB can serve notice of its intention to enter onto land to place and maintain an electricity line with or without the consent of the landowner, subject to the landowner’s entitlement to be paid compensation.
 - (iv) ESB argues that the hearing is not a hearing in respect of any environmental decision-making process as its sole purpose is to determine the level of compensation payable to individual landowners. It submits that the environmental decision-making process (including that which relates to the location of the electricity infrastructure, its design, its merits and the appropriate method of construction) and the construction of such infrastructure will be entirely complete by the time of a hearing before the Property Arbitrator. Its position therefore is that while there is a tangential link between the information contained in the Transcript and the development of electricity infrastructure, it is difficult to see how such information would enable the public to be informed about environmental decision-making or to participate in environmental decision-making. It submits that the information contained in the Transcript is too remote from the measure in question to be “environmental information” within the meaning of the AIE Regulations.
 - (v) In response to the appellant’s argument that release of the Transcript would enhance transparency and accountability around the expenditure of public money in relation to the construction of electricity infrastructure, ESB argues that neither the AIE Directive nor the Aarhus Convention were enacted for the purpose of enhancing transparency around the expenditure of public money or to build trust in the quasi-judicial decision-making process. It also argues that these elements are achieved by virtue of the fact that the hearing is held in public.
 - (vi) ESB also submits that the Property Arbitrator is outside the scope of the AIE Regulations as he acts in a judicial capacity and falls outside the definition of “public authority”. ESB also refers to the decision of the Court of Justice in [C-470/19 Friends of the Irish Environment v Commissioner for Environmental Information](#) in support of its position that the promotion of public information in judicial matters is not an aim of the Directive or the Aarhus Convention. It refers in particular to paragraphs 36 and 37 of the Court’s decision in which it discusses the purpose of the AIE Directive which is “to promote increased public access to environmental information and more effective participation by the public in environmental decision-making, with the aim of making better decisions and applying them more effectively and, ultimately, promoting a better environment”. The Court of Justice then notes that “while the implementation of that objective means that administrative



authorities must give the public access to environmental information in their possession, in order to give an account of the decisions they take in that field and to connect citizens with the adoption of those decisions, the same is not true of pleadings and other documents adduced in court proceedings on environmental matters, since the EU legislature did not intend to promote public information in judicial matters and public involvement in decision-making in that area". ESB argues that the Transcript has been generated in the context of a judicial process and is akin to the type of document referenced by the CJEU in *Friends of the Irish Environment*.

- (vii) ESB argues that the classification of the Transcript, as a whole, as "environmental information" would extend the scope of the AIE Regulations to any information concerned with the development of electricity infrastructure in the State which would be contrary to the decision of the Court of Justice in *Glawischnig*.
 - (viii) ESB accepts that there is "a possibility that the Transcript contains environmental information". However, when asked to identify the information within the Transcript it considered to be "environmental information", it responded that it had not carried out an exercise to identify such information as such an exercise would place "an overly onerous burden on it". This is despite the fact that the internal review outcome expressly states that the internal reviewer had "identified within the Transcript information which [they believed] may fall within the definition". ESB estimated "that it would take two people approximately one continuous uninterrupted full-time working week to complete a review of the entire Transcript and to identify precisely the environmental information contained in it and whether any of this information it was subject to any of the reasons for refusal (other than Article 9(1)(d))". It also considered that this would be "disproportionate in circumstances where the refusal of access to any environmental information which may be contained within the Transcript can be justified by reference to Article 9(1)(d)".
13. The right of access to environmental information that exists includes access to information "on" one or more of the six categories at (a) to (f) of the definition. The element of the definition of relevance in this case is paragraph (c) which provides that information on "measures (including administrative measures) such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements" is environmental information. An activity is "likely to affect" the elements and factors of the environment if there is a real and substantial possibility that it will affect the environment, whether directly or indirectly. While it is not necessary to establish the probability of a relevant environmental impact, something more than a remote or theoretical possibility is required (*Redmond* at paragraph 63).
14. In his decision in *RTÉ*, Barrett J expressly endorsed the approach set out by the Court of Appeal of England and Wales in *Henney* to determine the "information on" element of the definition (*RTÉ* at paragraph 52). Where an assessment under article 3(1)(c) is to be carried out, the first step is to identify the relevant measure or activity. It is important to note that information may be "on" one measure or activity, more than one measure or activity or both a measure or activity which forms part of a broader measure (*Henney* at paragraph 42). In identifying the relevant measure or activity



that the information is “on” one may consider the wider context and is not strictly limited to the precise issue with which the information is concerned, and it may be relevant to consider the purpose of the information (*ESB* at paragraph 43).

15. Both parties agree that the development of electricity infrastructure is a measure or activity within the meaning of paragraph (c) of the definition contained in article 3(1) of the Regulations. *ESB* does not accept however that the Transcript is information “on” that measure.
16. The decision in *RTÉ* endorses the approach taken by the Court of Appeal in *Henney* in order to determine whether information is “on” a measure. That approach is set out at paragraphs 47 and 48 of the *Henney* decision:

“...the way the line will be drawn is by reference to the general principle that the Regulations, the Directive, and the Aarhus Convention are to be construed purposively. Determining on which side of the line the information falls will be fact and context-specific. But it is possible to provide some general guidance as to the circumstances in which information relating to a project will not be information on the project for the purposes of section 2(1)(c) because it is not consistent with or does not advance the purpose of those instruments.

My starting point is the recitals to the Aarhus Convention and the Directive, in particular those set out at para 15 above. They refer to the requirement that citizens have access to information to enable them to participate in environmental decision-making more effectively, and the contribution of access to a greater awareness of environmental matters, and eventually, to a better environment. They give an indication of how the very broad language of the text of the provisions may have to be assessed to provide a framework for determining the question of whether in a particular case information can properly be described as on a given measure”.

17. *Henney* suggests that, in determining whether information is “on” the relevant measure or activity, it may be relevant to consider the purpose of the information such as why it was produced, how important it is to that purpose, how it is to be used, and whether access to it advances the purposes of the Aarhus Convention and AIE Directive (paragraph 43; see also *ESB* at paragraph 42). Information that does not advance the purposes of the Aarhus Convention and AIE Directive may not be “on” the relevant measure or activity (*Redmond* at paragraph 99). As the Court noted in *Henney*, the recitals of both the Aarhus Convention and the AIE Directive refer to the requirement that citizens have access to information to provide for a greater awareness of environmental matters, to enable more effective participation in environmental decision-making and to facilitate the free-exchange of views with the aim that all of this should lead, ultimately, to a better environment. They give an indication of how the very broad language of the text of the provisions in the Convention and Directive may have to be assessed and provide a framework for determining the question of whether in a particular case information can properly be described as on a given measure (see *Henney* at paragraph 48 and *RTÉ* at paragraph 52). Finally, as the High Court noted in *ESB* information that is integral to the relevant measure or activity is information “on” it (see



paragraphs 38, 40 and 41) while information that is too remote from the relevant measure or activity does not qualify as environmental information (*ESB* at paragraph 43).

18. The guidance provided by the Courts therefore suggests that there is a sliding scale, with information integral to a measure at one end (in the sense that it is quite definitively information “on” a measure) and information considered too remote from the measure on the other end (in the sense that it is not). The example referred to in *Henney* noted that a report on PR and advertising strategy might be considered information “on” the Smart Meter Programme “because having access to information about how a development is to be promoted will enable more informed participation by the public in the programme”. However, information relating to a public authority's procurement of canteen services in the department responsible for delivering a road project would likely be considered too remote (see paragraph 46). *Henney* also makes it clear that the definition should be applied purposively having regard to matters such as “the purpose for which the information was produced, how important it was to that purpose, how it is to be used and whether access to it would make the public better informed about, or to participate in, decision-making in a better way” (see paragraph 43).
19. The Transcript is a record of a hearing which took place before the Property Arbitrator to determine the appropriate level of compensation to be paid to landowners whose land had been used as part of the development of electricity infrastructure. In order to decide whether there is a sufficient connection between the information contained in the Transcript and the measure identified by the parties i.e. the development of electricity infrastructure, it is necessary to explore the legal framework for the placement of such infrastructure in further detail. While historically, many of the functions related to the generation and provision of electricity in the Irish market were carried out by ESB, the liberalisation of the Irish electricity market has diversified electricity generation, transmission and supply. Section 14 of the Electricity Regulation Act 1999 empowers the Commission for the Regulation of Utilities to grant licences “to any person” to generate and supply electricity as well as to discharge the functions of transmission system operator, transmission system owner, distribution system operator, public electricity supplier and Distribution System Owner. The 1999 Act also provides that a licence to act as transmission system operator may only be granted to EirGrid while a licence to discharge the functions of transmission system owner, distribution system operator, public electricity supplier and Distribution System Owner may only be granted to ESB or, in the case of transmission system owner and distribution system operator, to one of its subsidiaries. As such, both ESB and EirGrid bear a degree of responsibility for the construction and operation of the electricity transmission system.
20. My understanding is that EirGrid, in its capacity as transmission system operator, is responsible for planning the development of the transmission system while ESB, as the transmission asset owner, is responsible for constructing and maintaining transmission lines on foot of instructions from EirGrid. The same applies to distribution lines except that in that case the decisions rest with ESB Networks DAC rather than EirGrid. Decisions with regard to line placement are undertaken by EirGrid or ESB Networks DAC and not by ESB. Once the location of the line placement is decided by EirGrid or ESB Networks DAC, ESB makes preparations for the construction of the line and is also responsible for maintenance of the line, once constructed. As outlined above, ESB’s position is that



that the development of electricity infrastructure is a measure which includes within its scope the construction of electricity lines.

21. As part of its preparations for construction, ESB must serve a Wayleave Notice on the owners and occupiers of any lands impacted by the line placement. The service of a Wayleave Notice is governed by section 53 of the Electricity Supply Act 1927 as amended. Section 53 of the Electricity Supply Act 1927 (as amended) allows ESB to place electricity lines above or below ground across any land and to affix support infrastructure to any buildings on such land provided a notice is served on the owner and occupier “stating [ESB’s] intention to place the line or attach the fixture (as the case may be) and giving a description of the nature of the line or fixture and of the position and manner in which it is intended to be placed or attached”. Section 53(4) provides that ESB may proceed to place the line or attach the fixture if the owner or occupier provides consent within seven days of receipt of the Wayleave Notice and that such consent may be unconditional or subject to conditions which are acceptable to ESB. If the owner or occupier’s consent is not forthcoming, section 53(5), as amended by section 1 of the Electricity (Supply) (Amendment) Act 1985, allows ESB to proceed with the placement of the line or fixture, subject to the entitlement of the owner or occupier to compensation which is to be assessed in default of agreement under the provisions of the Acquisition of Land (Assessment of Compensation) Act.
22. Compensation is therefore specifically referred to in section 53(5) of the 1927 Act, which provides that although the consent of a landowner or occupier is not required in order to place an electricity line on land, adequate compensation must be paid to the landowner or occupier in question. The level of compensation may be agreed between the parties or it may be the subject of arbitration proceedings. My understanding is that the statutory reference to an entitlement to compensation was introduced following the decision of the Supreme Court, in *ESB v Gormley* [1985] IR 129, that the previous iteration of section 53 was unconstitutional as it failed to provide for a right to compensation which could be assessed, in default of agreement, by an independent arbiter or tribunal. As noted by Denham J in *ESB v Harrington* [2002] IESC 38, under section 53 of the 1927 Act, ESB’s entitlement to proceed with a line placement is “subject to the [owner/occupier]’s right to compensation”. If the entitlement to proceed with line placement is subject to the entitlement to compensation to be independently assessed in default of agreement, it appears to me that both compensation and arbitration of the type referred to in the Transcript are integral parts or key elements of the line placement project. Indeed, the import of the Supreme Court’s decision in *Gormley* is that the entitlement to compensation and the ability to avail of the arbitration process to exercise that entitlement is an integral part of the line placement powers conferred on ESB under section 53 of the 1927 Act since, in the absence of such entitlements, those powers would be unconstitutional.
23. ESB argues that it is difficult to see how access to the Transcript would enable the public to be informed about environmental decision-making or to participate in environmental decision-making as the sole purpose of the hearing recorded in the Transcript is to determine the compensation which will be payable to individual landowners and decisions on the location of that infrastructure, its design, the merits or otherwise of using such infrastructure or the appropriate methods of constructing that infrastructure will be “entirely complete” by the time of the hearing. It submits



therefore that the Transcript is too remote from the development of electricity infrastructure to be considered information “on” that measure. Having reviewed the Transcript however, I note that it is suggested therein that the electricity line had yet to be placed on the relevant land at the time of the hearing and one of the arguments put forward by the landowners was that ESB had not provided sufficient detail as to the impact such placement would have on their rights in respect of the land.

24. Regardless of whether or not decisions in relation to the electricity line had been complete at the time of the hearing, I do not agree with ESB’s argument that providing the public with the Transcript would not contribute to greater public participation in environmental decision-making. Ideally, public participation would take place at a time when the public’s views might shape the relevant decision-making. However, at the very least, having access to information about the arbitration procedure relating to the compensation payable to landowners in respect of one line-placement project might contribute to the public’s ability to participate in debate concerning further projects. In addition, *Henney* makes it clear that the definition should be applied purposively and participation in environmental decision-making is not the only purpose of the AIE Directive and the Aarhus Convention. While Recital 1 of the Directive emphasises that one of the key purposes of the Regulations is to enable greater public participation in environmental decision-making, it is not the only purpose referred to. Recital 1 also notes that access to environmental information contributes to a “greater awareness of environmental matters” and a “free exchange of views”.
25. The recitals to the Aarhus Convention also note that “in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public an opportunity to express its concerns and enable public authorities to take due account of such concerns” which in turn furthers “the accountability of and transparency in decision-making and [strengthens] public support for decisions on the environment”. Information does not therefore need to enable participation in a manner that influences the decision-making process to which that information directly relates in order for it to fall within the definition of “environmental information”. Indeed, this is recognised by the Court of Appeal in *Henney* when it notes that regard should be had to “whether access to [the information] would enable the public to be informed about, or to participate in, decision-making in a better way” (paragraph 43, emphasis added). Compensation payments for part of the cost of the development of electricity infrastructure projects and information on the costs of the project is likely to be a public concern which impacts on the level of support for that project which itself amounts to a measure with environmental impact. Having information about the arbitration and compensation process therefore enables the public to better understand the system for the development of electricity infrastructure and in turn to better participate in decisions relating to such development.
26. ESB also argues that the status of the Property Arbitrator and the functions being discharged by him are relevant to the issue of whether the Transcript should be considered “environmental information”. It argues that the compensation hearing has the status of a judicial process rather than an environmental decision-making process and that the Court of Justice in *Friends of the Irish*



Environment has drawn a distinction between environmental information in the possession of administrative authorities which gives “an account of the decisions they take in that field [and connects] citizens with the adoption of these decisions” and “pleadings and other documents adduced in court proceedings on environmental matters” on the basis that “the EU legislature did not intend to promote public information in judicial matters and public involvement in decision-making in that area” (see para 37). I am unconvinced that the status of the Property Arbitrator, and whether he acts in a judicial capacity so as to be excluded from the definition of “public authority” under the Regulations, has a bearing on whether the Transcript constitutes “environmental information” as no argument has been made that ESB holds the Transcript on the Property Arbitrator’s behalf. ESB engaged the stenography company to prepare the Transcript, which records a public hearing, and there is no argument as to ESB’s status as a “public authority” within the meaning of the Regulations.

27. ESB have also argued that while some of the information contained within the Transcript is “environmental information”, other parts of the Transcript do not constitute “environmental information”. I find that ESB’s submissions in this regard are not entirely clear since it has made general arguments that the information contained in the Transcript is too remote from the development of electricity infrastructure to be considered information “on” that measure or activity and has also declined to identify the parts of the Transcript which it accepts to be environmental information. I am satisfied, from a review of the Transcript, that there is nothing in the Transcript which can be considered so remote as to render it outside the scope of what I consider to be information “on” the development of electricity infrastructure. In my view, the Transcript in its entirety comes within the definition of “environmental information” contained in paragraph (c) of article 3(1) of the AIE Regulations.

28. I will now go on to consider whether article 9(1)(d) of the Regulations provides grounds for refusal of the Transcript.

Does article 9(1)(d) provide ESB with grounds to refuse the Transcript?

29. Article 9(1)(d) of the AIE Regulations provides that “a public authority may refuse to make available environmental information where disclosure of the information requested would adversely affect intellectual property rights”. Article 10(4) provides that “the grounds for refusal of a request for environmental information shall be interpreted on a restrictive basis having regard to the public interest served by disclosure” while article 10(3) provides that each request must be considered on an individual basis, weighing the public interest served by disclosure against the interest served by refusal.

30. I must therefore consider:

- (i) whether article 9(1)(d) can be said to apply in the circumstances of this case, having regard to the restrictive test set out in article 10(4); and
- (ii) if so, whether the interest served by refusal outweighs the public interest served by disclosure of the Transcript.



Does article 9(1)(d) arise, in the first instance, in the circumstances of this case?

31. Article 9(1)(d) arises if release of the Transcript would adversely impact intellectual property rights. Two conditions must therefore be fulfilled:

- (i) Intellectual property rights must arise in respect of the Transcript; and
- (ii) Those intellectual property rights must be adversely impacted by release of the Transcript.

32. ESB makes the following arguments with regard to the application of article 9(1)(d):

- (i) It argues that the Transcript is a literary work for the purposes of the Copyright and Related Rights Act 2000 (the 2000 Act).
- (ii) It notes that the Transcript is stated on its front cover to be subject to copyright. The internal reviewer informed the appellant that they were not aware that the copyright holder had given its permission to provide the Transcript to a third party and were not required to investigate whether it would be willing to do so. They also relied on the decision of my predecessor in CEI/18/0003 *Lar McKenna and ESB* to argue that ESB could not be compelled to disclose information under the AIE Regulations that was subject to restrictive licence.
- (iii) In considering adverse effect, ESB relied on the decisions of the Information Tribunal of England and Wales in *Archer v the Information Commissioner and Salisbury DC* EA/2006/0037 and *Office of Communications v Information Commissioner and T-Mobile (UK) Limited* EA/2006/0078. It argued that while such decisions have held that granting access to information does not involve an implied licence to exploit it commercially or do any act which would constitute an infringement if not authorised, they have also highlighted the practical difficulty in policing compliance. It therefore concluded that it would be impossible for either ESB or the copyright holder to police the use of the Transcript upon its release under the AIE Regulations.
- (iv) ESB also concluded in its internal review that release of the Transcript would constitute a breach of the stenography company's intellectual property rights regardless of what the appellant subsequently did with it. It relied in this regard on the decision of *EH v Information Commissioner* [2001] 2 IR 463. In that case, O'Neill J found that disclosure of a record requested under the Freedom of Information regime would constitute contempt of court. In doing so, he noted that the Freedom of Information Act 1997 created "an untrammelled right to information, based on a philosophy of disclosure wholly different to that which is at the root of the discovery process in contempt of court proceedings" and did not permit any conditions or fetters to be placed on use of information by a requester once that information was released. ESB's internal reviewer relied on that decision in support of their position that it was necessary for them to assume that any person requesting release of information subject to intellectual property rights would commercially exploit or otherwise do something in respect of that information which would constitute an unauthorised infringement of the intellectual property rights asserted in it by the stenography company, even if that was not likely to be the case.



- (v) Although it was accepted that the stenography company in this case had already been paid for the Transcript, ESB again relied on the decision of my predecessor in CEI/18/0003 which noted that it was “possible that a party to proceedings may decide not to commission a transcript on the grounds that it could obtain it under the AIE Regulations where the other party is a public authority for the purposes of the AIE Regulations” and that “releasing the transcript under the AIE Regulations could result in economic loss due to [the stenography company’s] clients ceasing to use stenography services and, therefore, that release of the transcript would adversely affect its intellectual property rights”.
- (vi) In submissions to my Office, ESB again referred to the decision of my predecessor in CEI/18/0003 in which it was accepted that the Transcript was an original literary work for the purposes of section 17(2) of the 2000 Act. It submitted that I should adopt a consistent position to that adopted in CEI/18/0003 in which my predecessor had rejected the argument that EU law prevented the Transcript from being considered an original literary work for the purposes of the 2000 Act. It also argued that the conclusion in CEI/18/0003 was consistent with the decision of the House of Lords in *Walter v Lane* [1900] AC 539 which it submitted remains good law and was approved by the Supreme Court in *Gormley v EMI Records (Ireland) Limited* [2000] IR 74.
- (vii) ESB also submitted that section 76(1) of the 2000 Act (which provides that the undertaking of an act authorised by an enactment shall not infringe copyright in a work) does not alter the position and may not apply to disclosure in this instance as disclosure of the Transcript is not specifically authorised under the AIE Regulations and such disclosure may not therefore come within the terms of that section. ESB also submits that it is questionable whether section 76(1) could apply where the AIE Regulations expressly envisage the refusal of access to environmental information where release would adversely affect intellectual property rights.
- (viii) ESB submits that the adverse impact of release on the stenography company’s intellectual property rights would be twofold. Firstly, it argues that release of the Transcript would result in the stenography company entirely losing control over the manner in which the Transcript is to be used which entirely undermines the licence on foot of which ESB has been provided with the Transcript. ESB again referred to the decisions of the Information Tribunal in *Archer* and *Office of Communications* in this regard. It also reiterated its position that *EH v Information Commissioner* was authority for its position that the AIE Regulations do not entitle restrictions to be placed on the use of the Transcript such that refusal of the request is the only mechanism by which the intellectual property rights of the stenography company can be protected. Secondly, it submits that release of the Transcript could cause potential economic harm to the stenography company as it would deprive it of the ability to generate further income from the sale of the Transcript. ESB accepted that the cost of preparation of a transcript is not determined by the number of parties to the hearing who wish to be provided with a copy of the transcript but submitted that this only addressed the position with regard to the parties to the hearing and the judge or decision-maker. It submitted that it did not address the position of persons who were not party to the hearing and that release of the Transcript under AIE would deprive the stenography company of the option of generating income from the sale of the Transcript in this manner. Finally, it noted that if transcripts were to be subject to release under AIE, public authorities may



decline to obtain transcripts and cease to use stenography services. It noted that this possibility had been recognised in the decision of the Commissioner in CEI/18/0003.

33. The appellant's submissions as to the application of article 9(1)(d) can be summarised as follows:

- (i) The appellant submits that it is clear that for a work to benefit from copyright it must be original. It argues that the concept of an original work is an autonomous EU law concept which cannot be modified or extended under national law particularly in the context of the AIE Regulations which transpose harmonised EU law on access to environmental information.
- (ii) It goes on to submit that under EU law a work is original if it is the author's own intellectual creation. It refers to the opinion of the Advocate General in [C-469/17 Funke Medien NRW GmbH](#) in which he noted that the concept of a 'work' under EU copyright law is an autonomous EU law concept and the main component of the definition is that the work must be 'its author's own intellectual creation'. He referred to the decisions of the Court of Justice in [C-5/08 Infopaq International](#) and [C-145/10 Painer](#) noting that the Court has explained that an intellectual creation is an author's own if it reflects the author's personality which is the case if the author was able to express his creative abilities in the production of the work by making free and creative choices. Referring to the decision in [C-604/10 Football Dataco and Others](#), the Advocate General went on to note that only an author's intellectual creation has the status of work eligible for copyright protection and that elements such as intellectual work and the skill of the author cannot justify the protection of the subject matter at issue by copyright if such work and skill do not express any originality.
- (iii) The appellant therefore argues that the recording on a tangible medium of a verbatim transcript of a hearing cannot meet the test of originality because the stenographer has no choice, creative or otherwise, other than to make a verbatim record of the proceedings.
- (iv) The appellant also rejects ESB's contention that release of the Transcript would infringe the intellectual property rights of the stenography company. It submits that section 76(1) of the 2000 Act applies such that a lawful release of the Transcript under the AIE Regulations would not constitute an infringement of copyright in any work. Section 76(1) provides that "where the undertaking of a particular act is specifically authorised by enactment then, unless the enactment provides otherwise, the undertaking of that act shall not infringe copyright in a work".
- (v) The appellant also submits that ESB cannot rely on the contract between it and the stenography company to refuse access to the Transcript. It argues that ESB is incorrect in its assertion that the creator of the Transcript is "fully at liberty to determine the conditions upon which the Transcript is provided to ESB" as ESB cannot allow a private entity to set the terms on which it exercises its public law functions. It argues therefore that it is implicit in any agreement that ESB may have with the stenography company that it cannot displace the public's rights of access to environmental information as these rights can only be restricted based on the provisions of the AIE Regulations.
- (vi) It argues that ESB's reliance on the decision in *EH v Information Commissioner* is misplaced as this case considered the ability of the head of a public body or the Information



Commissioner to impose restrictions on the use of information disclosed having regard to the question of contempt of court and made no reference to copyright. It submits that ESB has not pointed to any authority to support the view that the provision of access to the Transcript under AIE would negate intellectual property rights. The appellant submits that there is no need to consider whether ESB or the Commissioner could impose restrictions on the further use of the Transcript should it be released as any copyright which exists in the Transcript would remain protected by the law of copyright.

- (vii) The appellant submits that ESB's arguments are tantamount to a contention that the protection afforded by copyright systematically takes precedence over the presumption in favour of access to environmental information. It submits that this argument was rejected by the Court of Justice in Case [T-189/14 Deza a.s. v European Commission](#) where it found that copyright did not systematically prevent access to documents under Regulation 1049/2001 and noted that copyright "protected the holder of a document from copyright infringement and the commercial value of the document in the event that the information contained therein is disclosed as a result of a request for access to that document" and that "these provisions prevent the information in question from being used for commercial purposes by the competitors and thus giving them a competitive advantage".
- (viii) The appellant notes that ESB do not appear to have consulted the stenography company before issuing its decision on the request such that the discussion around adverse impact on intellectual property rights is speculative and hypothetical and that no adverse effect has in fact been identified.
- (ix) It submits that there are many uses of copyright works which do not constitute infringement including uses relating to education, research, private study, criticism and review, and public administration and that a requestor is fully entitled to carry out these acts using information gathered under the AIE Regulations without having any effect on the stenography company's intellectual property and that it cannot be assumed that granting the request would lead to copyright infringement.
- (x) Insofar as ESB suggest that a party to proceedings could use AIE to get free access to a Transcript and thus deprive the stenography company of revenue, the appellant notes that while this may be a theoretical possibility, in this case it was not a party to the hearing recorded in the Transcript and there is therefore no possibility that it is seeking to get free access to a transcript for proceedings to which it is a party and for which it would otherwise have to pay. It submits that arguments of a theoretical nature cannot be used to justify refusal of environmental information. It also argues that since each case is treated on a case by case basis, it is not appropriate to seek to apply the result of those request to another hypothetical request with different facts.
- (xi) It also submits that since transcripts are merely verbatim records of what is said at a hearing they cannot be used by a requestor to learn about any proprietary techniques of the stenography company and thereby compete with them.

34. As ESB had indicated an assumption that the decision of my predecessor in CEI/18/0003 would be adopted in this case, my Investigator wrote once more to advise ESB that I would conduct a fresh review in these proceedings and was not bound by the decision in CEI/18/0003. She also advised ESB that in fact her preliminary view was that the test for originality set out in *Walter v Lane* sets a



lower threshold than the more restrictive test under EU law as set out by the Court of Justice in decisions such as *Infopac*, *Football Dataco* and *Painer*. ESB provided further submissions in response to this correspondence which may be summarised as follows:

- (i) It submits that my Investigator's statement that I would conduct a fresh review of the case and did not consider myself bound by previous decisions was a "surprising assertion". It notes that while my decisions may not have the same precedential value as those of the Superior Courts, it was clear from my Office's decisions that I sought to adopt a consistent position in respect of the application of specific legal principles.
- (ii) It also argues that my predecessor, as Commissioner, had already determined that the Transcript at issue in this case was an original literary work and had therefore already considered how the relevant legal principles applied to the facts of this appeal. ESB's position therefore is that the issue of whether the Transcript was an original literary work within the meaning of the 2000 Act had already been decided by the Commissioner.
- (iii) It also argues that the decision in CEI/18/0003 was correct having regard to the legal principles which can be derived from decisions of the Supreme Court and the Court of Justice of the EU. It referred again to the decision of the Supreme Court in *Gormley* which it said approved the decision of the House of Lords in *Walter v Lane* and also concluded that "originality does not require the work to be unique, merely that there should have been original thought". It also submits that although the decision in *Gormley* provides that "the work in question needs to demonstrate a new approach in order to benefit from the protections of copyright law", the reference to a new approach must be seen in the context of the entire conclusion of the Supreme Court which also indicates the requirement of originality does not mean that a work must be unique, merely that there must have been original thought. ESB therefore argues that the reference to a "new approach" is in the context of how the treatment of materials already in existence is to be assessed.
- (iv) ESB submits that the Transcript meets the test set out in *Gormley* as it will have been necessary for the stenographer to engage in original thought in order to prepare a proper record of the hearing. It also notes that a transcript of a hearing is based on what occurs in real time at the hearing, rather than the stenographer copying materials which are already in existence.
- (v) ESB argues that there is no inconsistency between the relevant principles of national law and those which can be derived from decisions of the Court of Justice in decisions such as *Infopac*, *Football Dataco* and *Painer*. It submits that the test propounded by the Court of Justice focuses on whether the work in question is the author's own intellectual creation. It further submits that that the language used in *Painer* arose in the specific context of a discussion as to whether a photograph met the test and the use of the terms "creative freedom" and "personal touch" are simply illustrative of situations in which a work will meet the relevant test rather than specific criteria which must be met. It submits that the preparation of the Transcript clearly involves the author's own intellectual creation and requires the stenographer to engage in intellectual rigour in order to ensure that an accurate record of the hearing is prepared.
- (vi) ESB thus argues that whether the terminology used by the Supreme Court or that which is found in the decisions of the Court of Justice is applied, the result is the same i.e. that the



Transcript is an original literary work and the conclusion already reached by the Commissioner in CEI/18/0003 should be followed.

35. My Investigator also contacted the stenography company to inform it of the appeal and provide it with an opportunity to make submissions as a third party which might be impacted by release of the information at issue. The submissions of the stenography company can be summarised as follows:
- (i) It contends that the Transcript was an “original literary work” within the meaning of section 17(2)(a) of the 2000 Act.
 - (ii) It submits that the threshold for originality in respect of an “original literary work” was set out in *Walter v Lane* and later endorsed by the Supreme Court in *Gormley*. The test in *Gormley* provides that “originality does not require a work to be unique, merely that there should be original thought”. It argues that the Transcript meets this test as the stenographer engages in original thought in order to prepare a proper record of the hearing.
 - (iii) It explains that stenography is a specialised skill that utilises specialised tools not commonly available in order to produce the final literary work. Stenographers complete stenography training and at least six years of additional training before becoming a fully qualified stenographer. The stenographer employs a specialised machine and a unique shorthand method to produce the record of the hearing. After the hearing, the stenographer uses their skill to translate the shorthand and to edit and format the material in order to produce the final literary work.
 - (iv) The stenography company therefore submits that the Transcript reflects the author’s original, intellectual and creative thought, given the skill, labour and creative choices exerted by the stenographer in the production of the Transcript both prior to the hearing, during the hearing and after the hearing. It submits that the stenographer exercises their original thought, skill, judgment and creativity in not only the recording of the words in shorthand but also the attribution of words and statements to particular persons, choosing how to format the work, making stylistic decisions and through the editing process which results in the finished transcript.
 - (v) It also submits that it has clearly asserted its right under section 17(1) of the 2000 Act that only it, as the copyright holder, “may authorise other persons in relation to that work to undertake certain acts in the State, being acts which are designated by this Act as acts restricted by copyright in a work of that description”. It does so through a prominent disclaimer placed on each of its transcripts which clearly states that the transcript is subject to copyright and must not be photocopied, reproduced, supplied or loaned to any party without the written permission of the stenography company.
 - (vi) It argues that the Commissioner has previously concluded in CEI/18/0003 that the Transcript is an original literary work which benefits from copyright protection by reference to the relevant legal principles and the specific facts of the appeal and that the High Court in *ESB* did not interfere with that decision and found that the Transcript was protected by copyright and ESB were therefore entitled to rely on article 9(1)(d) of the Regulations. It



- submits therefore that the issue of whether the Transcript is an original literary work for the purposes of section 17(2) of the 2000 Act has already been decided.
- (vii) On the issue of adverse effect, the stenography company submits that the core value of the protection provided under the 2000 Act is that only the copyright owner “may authorise other persons in relation to that work to undertake certain acts in the State, being acts which are designated by this Act as acts restricted by copyright in a work of that description”. It notes that the “acts restricted by copyright” are set out in section 37 of the Act and provide that a copyright owner has “the exclusive right to undertake or authorise others to undertake” particular acts in relation to the copyright work, which include copying the work and making the work available to the public. It argues therefore that disclosure of the Transcript without its permission would be an infringement of its intellectual property rights under the 2000 Act.
 - (viii) It also submits that disclosure of the Transcript would fundamentally undermine the value of its work product and the legal framework upon which its business is based. It submits that disclosure of the Transcript would also fundamentally undermine the terms pursuant to which its customers have engaged with it, which are based on the fact that the transcripts are subject to copyright protection and are not shared with any other party. It submits that fundamentally altering the terms on which its services are offered would have a detrimental impact on its business.
 - (ix) It further submits that disclosure of the Transcript would set a precedent whereby any member of the public might request a copy of its work from an engaging party which would result in it being exposed to, and likely inundated with, requests from its customers for permission to copy and disseminate its work product, as required by copyright. It argues that this would impose a heavy administrative burden on it in terms of receiving, reviewing, processing and responding to such requests resulting in the incurrence of additional expense.
 - (x) It submits that a significant portion of its customers are public authorities within the meaning of the AIE Regulations. It considers that there is a real and pertinent risk that those bodies might reassess the risks associated with engaging stenography services should the Transcript be considered disclosable pursuant to the AIE Regulations as they would be required to employ significant time and resources responding to requests and seeking permission to reproduce. This in turn would result in a significant loss of business.
36. Article 9(1)(d) of the Regulations provides grounds for refusal where disclosure would adversely affect “intellectual property rights”. Unlike articles 9(1)(c), which precedes it, it makes no reference to national law. As noted by the Court of Justice in *Flachglas Torgau* “the need for the uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, which must take into account the context of that provision and the purpose of the legislation in question” (see para 37). This principle is repeated by the Court of Justice in *Land Baden-Württemberg* and *Friends of the Irish Environment*. It is therefore clear that the protection afforded to “intellectual property rights” is to be interpreted in accordance with the operation of such rights as a matter of EU law.



37. As noted by the parties, a previous decision of the Commissioner in CEI/18/0003 concluded that the Transcript was protected by copyright. Both ESB and the stenography company argue that this decision should be followed for the purposes of this appeal as it involves the application of the relevant legal principles to the same facts. The appellant however submits that this decision was quashed by the High Court in the *ESB* case and that it is entitled to advance its own grounds as to why ESB was incorrect to refuse to grant access. I consider that a purposive interpretation of the Regulations (article 10(3) of which require public authorities to consider each request on an individual basis) requires me to consider each appeal afresh and on an individual basis. Indeed, this is something that is frequently referred to in my decisions. I am also mindful that ESB considers that I should adopt the approach set out in my predecessor's decision in its entirety and has contended that it was a "surprising assertion" that I would not. The High Court expressed some concern with that approach in its judgment in the *ESB* case, which was delivered on foot of an appeal from ESB challenging that very decision. In those circumstances I consider that the appropriate course of action is to consider the application of the relevant legal principles afresh. I am satisfied that my Investigator has made my intention to do so clear to the parties and provided them with an opportunity to make submissions in light of that position, such that the entitlement of all parties to fair procedures has not been impeded by this approach.
38. I believe that a consideration of the case law referred to by the parties and in the decision in CEI/18/0003 must be conducted chronologically and having regard to the need for a uniform interpretation of article 4(2)(e) of the Directive (which is transposed by article 9(1)(d) of the Regulations). It is true that the House of Lords in *Walter v Lane* found that a person who made notes of a speech delivered in public, transcribed them and published a verbatim report in a newspaper was the "author" of the report within the meaning of the Copyright Act 1842 and entitled to copyright in that report. However, that decision was made in 1900 in the context of a wholly different statutory regime i.e. the Copyright Act 1842. In fact, the House of Lords in that decision noted that "literary skill or originality are not necessary to authorship" and that "protection had been given to...publications where there was no literary skill or originality, nothing but industrious collection" (see p 541-542). The House of Lords also observed "that the Court of Appeal introduces the words 'original composition' as if those were the words of the statute" and that "the words 'original composer' are not to be found in the statute at all" (p 546). The Earl of Halsbury made the position very clear when he stated: "I do not find the word 'original' in the statute, or any word which imports it, as a condition precedent, or makes originality of thought or idea necessary to the right" (p 548). Lord Davey also found that the "case raises only a question of statutory copyright in the...report and must be decided on the provisions of the Copyright Act" (p 550). He went on to note that it did not appear to him that "the fact that...no originality or literary skill was demanded for the composition of the report, [has] anything to do with the matter" going on to state that "copyright has nothing to do with the originality or literary merits of the author or composer" (p 551). I therefore consider it fair to say that the decision in *Walter v Lane* was reached in circumstances where the House of Lords expressly considered a requirement of "originality" did not apply.



39. As also noted by the parties, in 1998 the Supreme Court issued a decision in *Gormley* which considered the application of copyright in a more recent Irish context. The protection claimed by the plaintiff in that case was that which applied to an “original literary work” under the Copyright Act 1963. The Court in that case were considering the issue having regard to the provisions of the Copyright Act 1963 which contained an explicit requirement of originality which was not present in the 1842 Act considered by the House of Lords in *Walter v Lane*. The Supreme Court did refer to the decision in *Walter v Lane* in considering the question of whether the recording of a copyrighted work could be done by someone other than the author. However, the judgment of the Supreme Court also notes that at the time of the decision in that case “it was not...necessary for the work to have been ‘original’ to obtain copyright” (para 19). The Supreme Court went on to conclude that while “originality does not require the work to be unique” it did require “original thought” and that “where there is treatment of materials already in existence, it is necessary to show some new approach” and the material “cannot be copied directly” (para 34). It explained that “it is not the language which creates the copyright, it is the creativity” (para 42). Applying that test, the Supreme Court found that the plaintiff, whose childhood voice had been recorded by her teacher and subsequently published and disseminated by the respondent for commercial gain via a tape entitled “Give up yer aul sins”, was not entitled to avail of copyright as she had copied a Bible story told to her by her teacher albeit that she had put some of it in her own language (para 44).
40. The Copyright and Related Rights Act was enacted on 1 January 2000, subsequent to the Supreme Court’s decision in *Gormley*. The 2000 Act, like the 1963 Act, provides protection for “original literary works”. The intellectual property right being claimed in this case is that which is provided for by section 17(2)(a) of the 2000 Act. In May 2001, the EU enacted Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (the InfoSoc Directive). The InfoSoc Directive is one of a number of EU Directives relating to copyright including Directive 91/250/EEC on the legal protection of computer programs, Directive 96/9/EC on the legal protection of databases and Directive 2006/116/EC on the term of protection of copyright and certain related rights. The aim of the InfoSoc Directive was to harmonise certain aspects of copyright law at EU level to allow for the proper functioning of the internal market and to allow authors to be paid for work which would in turn enable them to pursue their creative and artistic endeavours (see *Infopaq* at para 40). In 2009, the European Court of Justice issued its decision in the *Infopaq* case which concerned the interpretation of the InfoSoc Directive. The Court also had regard to other Directives dealing with the issue of copyright and referred in particular to Recital 20 of the InfoSoc Directive which noted that it was “based on principles and rules already laid down in the Directives currently in force in this area, in particular Directives [91/250] and [96/9], and it develops those principles and rules and places them in the context of the information society”. It thus noted that Directive 91/250/EC contained a requirement for originality, article 1(3) of that Directive providing that “a computer program shall be protected if it is original in the sense that it is the author’s own intellectual creation”. Similarly, it noted that Directive 96/9/EC also provided that “databases which, by reason of the selection or arrangement of their contents, constitute the author’s own intellectual creation shall be protected as such by copyright”. Both these Directives also provided that no criteria other than the requirement that a work be the author’s own intellectual creation should determine eligibility of a work for protection under copyright law. The Court of Justice also referred to Directive 2006/116, article 6 of which provides that “photographs



which are original in the sense that they are the author's own intellectual creation shall be protected" and again that "no other criteria shall be applied to determine their eligibility for protection". Having regard to the Berne Convention for the Protection of Literary and Artistic Works (to which the EU is a signatory) and to the Directives referred to above, the Court of Justice described the InfoSoc Directive as "establishing a harmonised legal framework for copyright" before reiterating the test for originality expressly set out in those Directives and implicitly laid down in the Berne Convention which, in providing protection for artistic and literary works "presupposes that they are intellectual creations" (see para 34). The Court of Justice therefore held that copyright "is liable to apply only in relation to a subject-matter which is original in the sense that it is its author's own intellectual creation". It is therefore clear that although the question of copyright is dealt with at EU level across a number of Directives, the threshold of originality required to be met in order to avail of copyright protection is the same, that is, the work must be "the author's own intellectual creation".

41. The findings of the Court of Justice in *Infopaq* were affirmed in *Painer*. In that case the Court was required to consider whether copyright existed in portrait photographs or whether "because of the allegedly too minor degree of creative freedom such photographs can offer, that protection, particularly as regards the regime governing reproduction of works provided for in Article 2(a) of Directive 2001/29, is inferior to that enjoyed by other works, particularly photographic works" (see para 86). The Court considered Directive 93/98/EEC harmonising the term of protection of copyright and certain related rights (which had by the date of the decision been replaced by Directive 2006/116/EC on the term of protection of copyright and certain related rights but was the operative Directive at the time the photograph was created) along with the InfoSoc Directive. The Court reiterated the finding in *Infopaq* that "copyright is liable to apply only in relation to a subject-matter, such as a photograph, which is original in the sense that it is its author's own intellectual creation" (see para 87). It went on to elaborate that "an intellectual creation is an author's own if it reflects the author's personality" which "is the case if the author was able to express his creative abilities in the production of the work by making free and creative choices" (paras 88 and 89). It found that a portrait photograph was subject to copyright protection because "the photographer can make free and creative choices in several ways and at various points in production" including through the choice of background, the subject's pose, the lighting, the framing, the angle of the view and the atmosphere created. As such, the Court was of the view that "the freedom available to the author to exercise his creative abilities will not necessarily be minor or even non-existent" although this was a matter for the national court to determine in each case (see para 93 and 99).
42. Although the 2000 Act and the decision of the Supreme Court in *Gormley* predate some of the Directives mentioned above and the decisions in *Infopaq* and *Painer*, the requirement for originality set out in the 2000 Act and in the Supreme Court's decision can be read in accordance with the test for originality which applies as a matter of EU law. Indeed, this would appear to be the view of the Irish legislature as evidenced by the explanatory note to SI No 16/2004 European Communities (Copyright and Related Rights) Regulations 2004 which transposed the InfoSoc Directive. That explanatory note provides that the SI "completes the transposition into Irish law of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society". It goes on to note that "while Ireland was already in substantial compliance



with this Directive through the enactment of the Copyright and Related Rights Act 2000 this Order makes a small number of amendments to the 2000 Act to ensure it fully achieves the result intended by the Directive”.

43. It is therefore clear that the test which applies to the intellectual property right claimed in this case (i.e. the copyright applying to an “original literary work” as provided for in the 2000 Act) is that the work must be the author’s own intellectual creation. This will be the case if the work demonstrates original thought, reflects the author’s personality or expresses their creative abilities through the making of free and creative choices. The Court of Justice in *Infopaq* noted “words as such do not...constitute elements covered by the protection” and “it is only through the choice, sequence and combination of those words that the author may express his creativity in an original manner and achieve a result which is an intellectual creation” (see para 45). I am not persuaded that the Transcript satisfies this test.
44. The stenographer, as author of the Transcript, does not make decisions as to the sequence and combination of the words appearing in it. Indeed, the inherent value of a transcript is its verbatim replication in writing of words uttered at a hearing. The stenography company argues that “the stenographer exercises his or her original thought, skill, judgment and creativity in not only the recording of the words in shorthand, but also the attribution of words and statements to particular persons, choosing how to format the work, making stylistic decisions and through the editing process which results in the finished transcript”. While I accept that the preparation of such transcript involves significant skill, I cannot see how it involves any element of creativity or original thought so as to satisfy the test for originality. The formatting of the Transcript is basic and functional and there are no headings other than functional ones which set out who is speaking, the times at which the hearing convened and indicate periods of adjournment. Neither do I consider that the stenographer exercises any choice in the attribution of words to particular persons. Indeed, it would seem to me that any creativity or original thought would undermine the accuracy of the transcript thereby undermining its value. While I accept that it may have been the case that the industry and skill involved in the production of a verbatim record was sufficient to satisfy the test for copyright protection as it was at the time of the House of Lords decision in *Walter v Lane*, the test has evolved since that decision in 1900 and has been replaced by a test at EU level which is more onerous and which the Transcript, in my view, does not meet.
45. While I also accept that the stenography company may employ specialised skills and specialised tools to produce and prepare the final version of the Transcript, I note that section 17(3) of the 2000 Act explicitly provides that copyright protection does not extend “to the ideas and principles which underlie any element of a work, procedures [or] methods of operation”.
46. I am therefore not persuaded that the “intellectual property” right asserted by ESB and the stenography company (i.e. the copyright applying to an “original literary work” as provided for in the 2000 Act) arises in the circumstances of this case. As a result, the grounds for refusal set out in article 9(1)(d) of the Regulations do not arise and it is not necessary for me to consider the question of adverse impact nor is it necessary for me to consider the public interest balancing test.



Coimisinéir um Fhaisnéis Comhshaoil
Commissioner for Environmental Information

Decision

47. Having carried out a review under article 12(5) of the AIE Regulations, I annul ESB's decision to refuse access to the Transcript and direct release of the Transcript to the appellant.

Appeal to the High Court

48. 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.

Ger Deering
Commissioner for Environmental Information

26 August 2022