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)

Joined Cases CEI/18/0032 and CEI/19/0033

Date of decision: 18 December 2019

Appellant: Right to Know CLG

Body: IPB Insurance Company Limited by Guarantee (IPB Insurance)

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

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

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

Case CEI/18/0032 concerns a request that the appellant made to IPB Insurance on 12 August 2018 for the following information:

> "1./ Details of all claims made to date by public bodies under your Environmental Impairment Liability Insurance offering to include:
> (a) nature of the incident giving rise to the claim
> (b) the name of the party making the claim and the name of the member insured in each case
> (c) the value of the claim
> (d) the amount it was settled for if it was settled
> (e) the list of current public bodies which are members of IPB Insurance CLG".

The appellant did not receive a decision on its request and on the 13 September 2018 it requested an internal review on the basis that its request had been deemed refused. IPB Insurance notified the appellant on 18 September 2018 that the AIE Regulations did not apply to it. The appellant appealed IPB Insurance's decision to my Office on 20 September 2018.

While my Office was investigating Case CEI/18/0032, it received a second appeal from the appellant against a decision of IPB Insurance refusing it access to information under the AIE Regulations. Case CEI/19/0033 concerns a request the appellant made to IPB Insurance on 6 May 2019 for the following information:

> "(a) the risk analysis and your underwriting policy in relation to risks associated with trees and vegetation near roads, waterways and urban areas; and
> (b) any offers, directions or suggestions that are being made to local authorities in relation to their insurance cover relating to trees and vegetation beside roads, waterways and in urban areas."

On 29 May 2019 IPB Insurance notified the appellant that it was not a body which the AIE Regulations applied to. The appellant requested an internal review of IPB Insurance's decision. There was no internal review decision and the appellant appealed to my Office on 18 July 2019.

As the issue to be determined in both cases is the same *i.e.* whether IPB Insurance is a 'public authority' within the meaning of the AIE Regulations and both cases involve the same parties, my Office decided to join Case CEI/18/0032 and Case CEI/19/0033. The submissions made in Case CEI/18/0032 have been taken into consideration in Case CEI/19/0033 and *vice versa.*

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 and IPB Insurance. 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').

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

Scope of Review

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

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

Definition of "public authority"

Article 3(1) of the AIE Regulations

In line with Article 2(2) of the AIE Directive, article 3(1) of the AIE Regulations provides that "'public authority' means, subject to sub-article (2)—

(a) government or other public administration, including public advisory bodies, at national, regional or local level,
(b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment, and
(c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within paragraph (a) or (b),
and includes—
(i) a Minister of the Government,
(ii) the Commissioners of Public Works in Ireland,
(iii) a local authority for the purposes of the Local Government Act 2001 (No. 37 of 2001),
(iv) a harbour authority within the meaning of the Harbours Act 1946 (No. 9 of 1946),
(v) the Health Service Executive established under the Health Act 2004 (No. 42 of 2004),
(vi) a board or other body (but not including a company under the Companies Acts) established by or under statute,
(vii) a company under the Companies Acts, in which all the shares are held—
(I) by or on behalf of a Minister of the Government,
(II) by directors appointed by a Minister of the Government,
(III) by a board or other body within the meaning of paragraph (vi), or
(IV) by a company to which subparagraph (I) or (II) applies, having public administrative functions and responsibilities, and possessing environmental information".

Article 3(2) of the AIE Regulations excludes certain bodies from the definition of public authority, however, that provision is not relevant for the purpose of this review.

The AIE Directive was adopted to give effect to the first pillar of the Aarhus Convention in order to increase public access to environmental information so that an informed public can participate more effectively in environmental decision-making. It replaced Council Directive 90/313/EEC, the previous AIE Directive.

Court of Justice of the European Union

Guidance on the meaning of the term "public authority" under Article 2(2) of the Directive, and thus article 3(1) of the Regulations, is provided by the judgment of the Court of Justice of the European Union (CJEU) in Case C-204/09 *Flachglas Torgau GmbH v Federal Republic of Germany* (*Flachglas)* and in particular in Case C-279/12 *Fish Legal and Emily Shirley v Information Commissioner and Others* (*Fish Legal EU*), available at www.curia.europa.eu, which considered the meaning of "public authority" and, in particular, its meaning under Article 2(2)(b) and Article 2(2)(c) of the AIE Directive.

In *Flachglas,* the CJEU stated that:

> "40. It is apparent from both the Aarhus Convention itself and Directive 2003/4, the purpose of which is to implement the Convention in European Union law, that in referring to 'public authorities' the authors intended to refer to administrative authorities, since within States it is those authorities which are usually required to hold environmental information in the exercise of their functions."

In *Fish Legal EU* the CJEU summarised the definition of "public authority" as follows:

> "67. Thus, in defining three categories of public authorities, Article 2(2) of Directive 2003/4 is intended to cover a set of entities, whatever their legal form, that must be regarded as constituting public authority, be it the State itself, an entity empowered by the State to act on its behalf or an entity controlled by the State."

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

> "51. Entities which, organically, are administrative authorities, namely those which form part of the public administration or the executive of the State at whatever level, are public authorities for the purposes of Article 2(2)(a) of Directive 2003/4. This first category includes all legal persons governed by public law which have been set up by the State and which it alone can decide to dissolve."

The CJEU considered in detail the meaning of Article 2(2)(b) of the AIE Directive (the equivalent provision to article 3(1)(b) of the AIE Regulations) in *Fish Legal EU.* The CJEU stated that:

> "48. It follows that only entities which, by virtue of a legal basis specifically defined in the national legislation which is applicable to them, are empowered to perform public administrative functions are capable of falling within the category of public authorities that is referred to in Article 2(2)(b) of Directive 2003/4. On the other hand, the question whether the functions vested in such entities under national law constitute 'public administrative functions' within the meaning of that provision must be examined in the light of EU law and of the relevant interpretative criteria provided for by the Aarhus Convention for establishing an autonomous and uniform definition of that concept."

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

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

> “52. The second category of public authorities, defined in Article 2(2)(b) of Directive 2003/4, concerns administrative authorities defined in functional terms, namely entities, be they legal persons governed by public law or by private law, *which are entrusted, under the legal regime which is applicable to them, with the performance of services of public interest*, inter alia in the environmental field, *and which are, for this purpose, vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law*.” (Emphasis added)

It was not in dispute that the water companies at issue in *Fish Legal EU* are entrusted under the national law which is applicable to them with carrying out services of public interest relating to the environment *i.e.* the maintenance and development of water and sewerage infrastructure as well as water supply and sewage treatment. It was also not in dispute that the water companies are vested with certain statutory powers for the purpose of carrying the companies’ environmental functions.

The Court stated that:

> "54. It is also clear from the information provided by the referring tribunal that, in order to perform those functions and provide those services, the water companies concerned have certain powers under the applicable national law, such as the power of compulsory purchase, the power to make byelaws relating to waterways and land in their ownership, the power to discharge water in certain circumstances, including into private watercourses, the right to impose temporary hosepipe bans and the power to decide, in relation to certain customers and subject to strict conditions, to cut off the supply of water."

The CJEU stated that it was for the referring court to determine whether the water companies statutory powers could, having regard to the specific rules attaching to them in the applicable national legislation, be classified as special powers. It concluded that:

> “56. In the light of the foregoing, the answer to the first two questions referred is that, *in order to determine whether entities such as the water companies* concerned can be classified as legal persons which *perform ‘public administrative functions’ under national law*, within the meaning of Article 2(2)(b) of Directive 2003/4, *it should be examined whether those entities are vested, under the national law which is applicable to them, with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law*.” (Emphasis added)

I note that the European Union in its submission to the Aarhus Convention Compliance Committee (ACCC) in European Union ACCC/C/2014/123, available at www.unece.org, submitted that "[a]s a result of [the CJEU's ruling in Fish Legal EU], a common and uniform interpretation of what constitutes “public administrative functions” is ensured throughout the European Union".

In relation to Article 2(2)(c) of the AIE Directive (the equivalent provision to article 3(1)(c) of the AIE Regulations) the CJEU considered the meaning of the concept of control in Article 2(1)(c). It was not in dispute that the water companies provide public services relating to the environment.

The CJEU explicitly considered the relationship between a body which is an emanation of the state because it meets the control criteria in Case C-188/89 *Foster and others v British Gas* (*Foster and Others*), available at www.curia.europa.eu, and the control condition in Article 2(2)(c). The CJEU stated that where a situation of control is met under *Foster and Others* it might indicate that the control condition in Article 2(2)(c) is met. However, it went on to emphasise that the exact meaning of the concept of control in the AIE Directive must be interpreted in light of the Directive's own objectives. The CJEU stated that:

> "63. In this context, the referring tribunal specifically asks whether a water company, as an 'emanation of the State', is necessarily a legal person caught by Article 2(2)(c) of Directive 2003/4.
>
> 64. Where a situation of control is found when applying the criteria adopted in *Foster and Others*, paragraph 20, that *may* be considered to constitute *an indication* that the control condition in Article 2(2)(c) of Directive 2003/4 is satisfied, since in both of those contexts the concept of control is designed to cover manifestations of the concept of 'State' in the broad sense best suited to achieving the objectives of the legislation concerned.
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> 65. *The precise meaning of the concept of control* in Article 2(2)(c) of Directive 2003/4 *must, however, be sought by taking account also of that directive's own objectives*." (Emphasis added)

The Court clarified the meaning of 'control' in Article 2(2)(c):

> "68. Those factors lead to the adoption of an interpretation of 'control', within the meaning of Article 2(2)(c) of Directive 2003/4, under which this third, residual, category of public authorities covers any entity which does not determine in a genuinely autonomous manner the way in which it performs the functions in the environmental field which are vested in it, since a public authority covered by Article 2(2)(a) or (b) of the directive is in a position to exert decisive influence on the entity's action in that field."

The CJEU continued that:

> "69. The manner in which such a public authority may exert decisive influence pursuant to the powers which it has been allotted by the national legislature is irrelevant in this regard. It may take the form of, inter alia, a power to issue directions to the entities concerned, whether or not by exercising rights as a shareholder, the power to suspend, annul after the event or require prior authorisation for decisions taken by those entities, the power to appoint or remove from office the members of their management bodies or the majority of them, or the power wholly or partly to deny the entities financing to an extent that jeopardises their existence."

It stated that it was for the referring court to determine whether the water companies do not have genuine autonomy.

The CJEU held that:

> "73. In the light of the foregoing, the answer to the third and fourth questions referred is that undertakings, such as the water companies concerned, which provide public services relating to the environment are under the control of a body or person falling within Article 2(2)(a) or (b) of Directive 2003/4, and should therefore be classified as 'public authorities' by virtue of Article 2(2)(c) of that directive, if they do not determine in a genuinely autonomous manner the way in which they provide those services since a public authority covered by Article 2(2)(a) or (b) of the directive is in a position to exert decisive influence on their action in the environmental field."

Supreme Court

The Supreme Court considered the meaning of the term "public authority" under article 3(1) of the AIE Regulations in *National Asset Management Agency v Commissioner for Environmental Information* [2015] IESC 51 (*NAMA*), available at www.courts.ie. O'Donnell J. interpreted the structure of the definition of "public authority" as "reproducing the international and European law terms, and thereafter attempting to clarify the scope of application of those terms within the Irish legal system, rather than somehow extending them." Accordingly, sub-articles (i) to (vii) of article 3(1) do not extend the primary elements of the definition contained at (a) to (c), which correspond to the definition of "public authority" as set out in Articles 2(2)(a) to (c) of the Directive.

In relation to article 3(1)(a), the Court stated that:

> "4. ... The concept of "[g]overnment at national, regional and other level" addressed in subparagraph (a) is reasonably clear, although there may perhaps be some debate at the margins as to what is captured by that definition. ..."

Regarding article 3(1)(b), the Court stated that:

> "50. ... However the decision in *Fish Legal* provides an authoritative interpretation of the Directive, and moreover does so in the context of a common law system. Applying that test it is clear that NAMA is indeed a public authority exercising public administrative functions. Although like the water companies in *Fish Legal*, it is obliged to act commercially, it is undoubtedly vested with special powers well beyond those which result from the normal rules applicable in relations between persons governed by private law. If anything, the case is clearer here. The water companies in *Fish Legal* were companies established in private law whereas NAMA is established pursuant to a statute which confers upon it substantial powers of compulsory acquisition, of enforcement, to apply to the High Court to appoint a receiver and to set aside dispositions. The Act also restricts or excludes certain remedies against NAMA. The establishment and operation of NAMA is a significant part of the executive and legislative response to an unprecedented financial crisis. The scope and scale of the body created is exceptional. Indeed if it were not so it would not be in a position to carry out the important public functions assigned to it in the aftermath of the financial crisis. ..."

While the CJEU in *Fish Legal EU* did not expressly and positively consider whether or not the water companies were acting in the environmental field, the Supreme Court stated that:

> "4. ... In one sense the last portion of the definition ("including specific duties, activities or services in relation to the environment") might be thought to be superfluous since it

does not limit or otherwise define or indeed describe the type of entity captured by the definition. The concept can perhaps be understood as meaning “including but not limited to” such specific duties, activities etc. Once that is understood, subparagraph (b) can be read as applying to “natural or legal persons performing public administrative functions under national law” which directs attention to the key concept of “public administrative functions” and in particular the qualifying adjective “administrative” which is not otherwise defined in the Convention."

The Purpose of AIE

The Supreme Court in *NAMA* explained that the provisions of the AIE Regulations "must be understood as implementing the provisions of the Directive 2003/4/EC (and indirectly the [Aarhus] Convention) and . . . ought not to go further (but not fall short of) the terms of that Directive." The Explanatory Memorandum for the Proposal for a Directive of the European Parliament and of the Council on public access to environmental information (COM/2000/0402 final - COD 2000/0169), available at www.eur-lex.europa.eu/homepage, states that:

> "Increasingly, through privatisation and new methods of service delivery, services of general interest in relation to the environment traditionally performed by public authorities are being carried out by bodies which do not form part of the public sector. These services include those such as gas, electricity, water or transport. The result is that in some Member States such services are still performed by public administrations or utilities while in others they are performed by bodies now in the private sector. … It is undesirable, in terms of environmental protection, for such inconsistencies to arise between, or within, Member States as a consequence only of reorganisations in the carrying out of such services. Provision to ensure that bodies now in the private sector grant access to environmental information on the same basis as public authorities carrying out similar services is justified."

It is thus apparent that the purpose of the AIE Directive in relation to the definition of public authority was to clarify the concept by extending it to include bodies providing services that were traditionally provided by the State, for example, as a result of privatisation of the services as was the situation with the water companies in *Fish Legal EU* or which the State has outsourced.

In the context of Article 2(b) of the definition of public authority in the Aarhus Convention (which is the equivalent provision to article 3(1)(b)), the Aarhus Guide explains that:

> “[t]he kinds of bodies that might be covered by [Article 2(b)] include public utilities and quasi-governmental bodies such as water authorities.”

<u>The Appellant's position</u>

Article 3(1)(a)

The appellant submits that despite being a legal person under the Companies Act 2014 (2014 Act), IPB Insurance is governed by public law under the Local Authorities (Mutual Assistance) Acts 1926 to 1935. It asserts that IPB Insurance is organically a part of the State or the public administration of the State and is a public authority within the meaning of article 3(1)(a). It contends that IPB Insurance was set up by the State under the Local Authorities (Mutual Assurance) Act 1926 (1926 Act). It states that the 1926 Act defines IPB

Insurance's main objectives and constrains its capital structure and membership. It contends that only the State can dissolve IPB Insurance by bringing to an end its public function through legislative change. In support of its position, it cites paragraph 51 of the CJEU's judgment in *Fish Legal EU.*

Article 3(1)(b)

The appellant submits that IPB Insurance's main objective is to perform the public administrative function of the mutual insurance of local authorities, and that it is governed by public law.

It asserts that, by virtue of its membership, IPB Insurance is owned and controlled by public authorities. It states IPB Insurance "liabilities are guaranteed by public authorities and only these public authorities are entitled to dividends and distributions from the company", and in that sense, it is an emanation of the state. The appellant contends that as an emanation of the state, IPB Insurance is a public authority pursuant to article 3(1)(b). It asserts that all emanations of the state are public authorities under article 3(1)(b). In support of its position, it cites the CJEU's judgments in *Foster and Others* and C-413/15 *Farrell v Whitty and Others* (*Farrell*), available at www.curia.europa.eu.

It asserts that being vested with a "special power" is not a necessary condition to being classified as an emanation of the state, and therefore, it is not a prerequisite to being a public authority under article 3(1)(b). It contends that the CJEU's judgment in *Fish Legal EU* did not limit article 3(1)(b) to bodies with special powers. It states that "even if IPB [Insurance] does not have special powers this is not decisive, what is decisive is that it has been vested with the performance of a service of public interest". Notwithstanding this, it argues that IPB Insurance has the following special powers:

1. IPB Insurance cannot admit non-local authorities as members;
2. Only local authorities which are insured by IPB Insurance or are about to be insured by it can be admitted membership and the act of insuring a local authority is deemed to constitute membership;
3. A local authority which ceases to be insured by IPB Insurance ceases to be a member of it;
4. IPB Insurance cannot deviate from the main objects of the 1926 Act.

The appellant states that some of IPB Insurance's powers are "negative" special powers in that it is restricted by the provisions of statute, and that "IPB lacks powers that would result from the normal rules applicable in relations between persons governed by private law". It also states that IPB Insurance's powers are of the same category of special powers contemplated by the CJEU in *Fish Legal EU.*

As I have set out above, the appellant contends that what is decisive in considering whether a body is a public authority under article 3(1)(b) is whether it is vested with the performance of a service of public interest. According to the appellant, the 1926 Act vests in IPB Insurance a service of public interest *i.e.* the mutual insurance of its members. It states that IPB Insurance is subject to the authority and control of the State by virtue of the 1926 Act and the constraint that its members may only be local authorities. In addition, it asserts that IPB Insurance's objects are limited to those set in section 2(a) of the 1926 Act. In support of its position it cites section 3(a) and (b) of IPB Insurance's Memorandum of Association.

Article 3(1)(c)

The appellant submits that IPB Insurance has public responsibilities or functions relating to the environment since it provides Environmental Impairment Liability Insurance for its members (who are all public authorities) on a mutual basis. It states that Environmental Impairment Liability Insurance provides protection in respect of expenses incurred as a result of a pollution incident. It says that IPB Insurance's status under the 1926 to 1935 Acts supports the submission that its responsibilities and functions are public ones.

In addition, it submits that IPB Insurance is under the control of public authorities under article 3(1)(a) and/or (b). It states that IPB Insurance's membership is exclusively made up of public authorities and it is not permitted to have members which are not local authorities as defined in the 1926 to 1935 Acts. It also states that the members of IPB Insurance exercise decisive control through company law, through the adoption of the company's constitution which constrains the board, and through other powers such as the removal of directors. It asserts that its board level governance cannot affect this.

It further submits that IPB Insurance is subject to public law constraints that do not apply to purely private persons. It contends that the Oireachtas exercises decisive influence over IPB Insurance by constraining its main objectives to those set out in the 1926 Act and by restricting membership to local authorities only. It states that the 1926 Act determines the legal form of IPB Insurance and sets down the maximum amount its members may guarantee. It also states that the law requires its members to be insured or about to be insured and requires the cessation of membership when a local authority is no longer insured by IPB Insurance.

IPB Insurance's position

Article 3(1)(a)

IPB Insurance submits that it is not government or other public administration at national, regional and other level and that it is not a public authority within the meaning of article 3(1)(a). It cites the CJEU judgments in *Fish Legal EU* and *Flachglas* and notes that the CJEU in *Fish Legal EU* stated that the Aarhus Convention's authors in referring to public authorities "intended to refer to administrative authorities, since within States it is those authorities which are usually required to hold environmental information in performing their functions". It quotes paragraph 51 of *Fish Legal EU* and states that its structural composition is such that any decision to dissolve it does not rest solely with the State. It also cites paragraph 5.3 of the Minister's Guidance and states that it is neither a subsidiary public body nor a semi-state body performing administrative functions; rather, it performs a commercial function.

Article 3(1)(b)

IPB Insurance submits that it is a private company limited by guarantee under the 2014 Act. It states that it has a commercial mandate. It explains that it sells insurance products to its clients - which include local authorities and educational and training boards as it members - in its capacity as a mutual insurer. It also states that it is regulated by the Central Bank of Ireland (CBI) as an insurance undertaking. As such, it is governed by commercial and private law, legislation and regulatory provisions which govern all insurers operating in the State with which it competes in the general insurance market.

It denies that it performs public administrative functions. It cites the Aarhus Guide which it states describes a "public administrative function" as "a function normally performed by governmental authorities, as determined according to national law". It states that this suggests that the function should be governmental in nature. It submits that IPB Insurance's commercial operations as a private insurer with a commercial mandate in selling insurance products does not fulfil this criterion. In support of its position it cites the Supreme Court's judgment in *NAMA* and Advocate General (AG) Cruz Villalón's Opinion in *Fish Legal EU.*

It states that the 1926 Act applies to every company registered in Ireland which complies with the conditions set down in that Act, and that other companies can establish a similar mutual once they comply with the Act. In addition, it states that the 1926 Act "confers an entitlement" on a local authority to become a member of a company which meets the conditions set down in that Act.

IPB Insurance denies that it is governed by the 1926 Act. It states that it operates in a manner which is consistent with the Act. It also states that its objects are designated in its Memorandum of Association. It acknowledges that the conditions in the 1926 Act form part of IPB Insurance's objects. However, it states that its Memorandum of Association sets out 23 objects with an overarching object of providing policies of insurance to its members.

IPB Insurance also submits that, pursuant to the CJEU's judgment in *Fish Legal EU*, the test for determining whether a body performs public administrative functions is whether it is "vested with special powers beyond those which result from the rules applicable in relations between persons governed by private law" (emphasis original). It states that it is not vested with special powers for the performance of services of public interest or over other people or their property.

It maintains that it is not vested by statute or otherwise with powers exceeding normal rules regulating at private law. It states that, notwithstanding that IPB Insurance does not fulfil the "special powers" test *simpliciter*, the 1926 to 1935 Acts do not vest in it any "special powers" which it would not otherwise enjoy under private law. It also states it is not vested with any special powers arising from comparative analysis of its position as a body regulated by the CBI and subject to the legal, regulatory, financial and technical requirements of its peers in the general insurance market in which it competes.

It submits that there are two common threads in the jurisprudence regarding "special powers" and cites *Fish Legal EU*, *NAMA* and my decision in Case CEI/16/0034 (Darragh McDonagh and Galway Harbour Company), available at www.ocei.ie. The common threads it identifies are:

1. That each body in those three cases has significant powers which included the power to compulsorily purchase land;
2. That the special powers in each of those three cases confer on the relevant body "the power to take a particular step, i.e. a 'positive power'".

In relation to the powers which are vested in the bodies in those three cases, it notes that the water companies in *Fish Legal EU* held "extensive powers" including powers of compulsory purchase, the right to make bye-laws, the power to discharge water including into private watercourses, the right to impose temporary hosepipe bans and to cut off the supply of water. It also notes that NAMA similarly had "substantial powers" including powers of compulsory acquisition, of enforcement, to apply to the High Court to appoint a

receiver and to set aside dispositions and the National Asset Management Agency Act 2009 (2009 Act) restricted or excluded certain remedies against NAMA.

Regarding the appellant's assertion that negative powers are special powers, it rejects that claim and states the concept of negative powers is incorrect as a matter of law. It notes that none of the three cases considered the scope of "special powers to extend to a limitation on the capacity of a natural or legal person to engage in a certain type of business". It also notes that the types of powers which have been found to be "special" in those cases are powers which confer on a body the power to act. It states that interpretation is consistent with the plain and ordinary meaning of the word "power" and section 22 of the Interpretation Act 2005.

Article 3(1)(c)

IPB Insurance acknowledges that the Aarhus Guide makes it clear that public services can be supplied by the State or private bodies. However, it rejects the appellant's claim that it has public responsibilities or functions relating to the environment. In support, it cites my decision in CEI/17/0015 (Mr. T and RPS Consulting Engineers Ltd), available at www.ocei.ie, and states that IPB Insurance's activities are not analogous to the examples of services cited in CEI/17/0015.

It submits that it is evident that the writers of the Aarhus Convention did not intend for article 3(1)(c) to apply to a private commercial insurer such as IPB Insurance. It states that, in providing insurance, it operates within the same framework as other insurers and is subject to the same legal and regulatory rules as other insurers. It also states that the 1926 Act does not require local authorities to get insurance from IPB Insurance. Rather, that Act provides a facility for local authorities to engage with a mutual insurer if they so wish. It says that not all local authorities are members of it and that its members often cease to be members of their own accord. It cites my decision in Case CEI/18/0025 (Right to Know CLG & Allied Irish Banks, p.l.c.), available at www.ocei.ie, and states that its position within the insurance market is comparable to AIB's position as a "commercial entity that is required to operate as an independent competitor in the financial market". It adds that its responsibilities, functions and services are solely related to the provision of insurance on the commercial insurance market which does not relate to the environment.

It denies the appellant's claim that it is under the control of a public authority falling within paragraph (a) and (b). It cites the AG's Opinion and the CJEU's judgment in *Fish Legal EU* in support of its position. It submits that the CJEU identified a 'control' test in *Fish Legal EU i.e.* that a body falls under article 3(1)(c) if it does not determine in a genuinely autonomous manner the way in which they provide those services since a public authority covered by Article 2(2)(a) or (b) of the AIE Directive is in a position to exert decisive influence on their action in the environmental field. It states that "it is a private commercial insurer in its own right which exercises decisive influence over [the] conduct of its Environment Liability Insurance". It continues that it is not controlled by any public authority with decisive influence over it in this regard to the extent that this would lead to loss of genuine autonomy.

It submits that the following supports its position that it is not under the control of its members or the Oireachtas:

- Its day-to-day governance is managed by its Board of Directors which operates in a genuinely autonomous manner, the obligations and responsibilities of which are set in its Terms of Reference.
- In accordance with the CBI's Corporate Governance Requirements for Insurance Undertakings 2015 its Board is made up of 10 constituents, nine directors and one company secretary. As per the CBI's Corporate Governance Requirements and reflected in its Terms of Reference, the majority of directors (five) are independent of IPB Insurance's members. The remaining four are from its membership in recognition of the mutual model.
- The members of IPB Insurance have no involvement in the Board's operations.
- The 1926 Act does not determine its legal form nor constrain its main objectives; rather, it sets down the criteria to be met by any private company seeking to establish a mutual.

Analysis and Findings

Article 3(1)(a)

IPB Insurance is a private company, limited by guarantee, established under the 2014 Act with registration pursuant to the Companies Acts 1908 - 1917. It has a commercial mandate in selling insurance products to its clients, including local authorities, as defined in the 1926 to 1935 Acts. However, I understand from its submissions and publications that it also provides insurance services to non-members. It is regulated by the CBI as an insurance undertaking. As an insurance undertaking it is subject to the same legal, regulatory, financial and technical requirements that apply to all insurers with which it competes with in the insurance market. For instance, its Board of Directors is constituted as per the CBI's Corporate Governance Code Requirements for Insurance Undertakings and the Board operates in accordance with its Terms of Reference.

I accept that IPB Insurance was not established by the 1926 Act. Rather, the 1926 Act facilitates the formation of mutual assurers such as IPB Insurance once a body established under the 2014 Act satisfies the requirements of section 2. Thus, I accept that the 1926 Act applies to any company registered in Ireland which meets the conditions set down in section 2 of that Act. The 1926 Act does not provide a limitation on the number of companies to which the Act can apply. Section 3 of the 1926 Act enables local authorities to become members of a company which meets the criteria of section 2.

While the conditions in section 2(1) of the 1926 Act form part of IPB Insurance's objects, I consider that it is not restricted to these objects as is evidenced by the large number of additional objects in its Memorandum of Association. In addition, I note that IPB Insurance can voluntarily opt to wind up in the same manner as other companies; thus I accept that any decision to dissolve it does not rest solely with the State.

Having regard to the facts of this case and the jurisprudence of the CJEU, in particular *Fish Legal EU,* and the Supreme Court in *NAMA,* I find that IPB Insurance is not a public authority within the meaning of article 3(1)(a).

Article 3(1)(b)

In accordance with paragraphs 52 and 56 of the CJEU's judgment in *Fish Legal EU*, when assessing whether the functions being performed by a body are public administrative functions one should examine whether:

1. National law has entrusted it with the performance of services of public interest inter alia in the environmental field; and for this purpose
2. National law has vested it with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law (which I will refer to as the 'special powers test').

I note that the Supreme Court in *NAMA* stated that the CJEU's judgment in *Fish Legal EU* "provides an authoritative interpretation of the Directive, and moreover does so in the context of a common law system" and that it applied the special powers test in *NAMA.*

It is not disputed that IPB Insurance is a legal person.

Has IPB Insurance been entrusted with the performance of services of public interest pursuant to national law?

As I have observed in previous decisions, "services of public interest" is not a term that is used or defined in the AIE Directive and appears to have been used for the first time by the CJEU in *Fish Legal EU.* I note that the bodies at the centre of *Fish Legal EU* and *NAMA* are of a very different character to IPB Insurance. While the water companies at the centre of *Fish Legal EU* are commercial companies, they are, as described by the Upper Tribunal in *Fish Legal UK v Information Commissioner & Others* [2015] UKUT 52 (AAC) (*Fish Legal UK)*, available at www.administrativeappeals.decisions.tribunals.gov.uk, "effectively monopoly suppliers". The water companies are the sole appointed service providers for water supply and sewerage treatment services for large areas, with the effect that no other bodies can provide those services. The services the water companies provide were previously delivered by the State and were privatised pursuant to national legislation, specifically the Water Act 1989.

I have found above that the 1926 Act facilitates the formation of mutual insurers such as IPB Insurance, and that the Act applies to any company which meets the conditions of section 2. I note that the 1926 Act does not require local authorities to insure with IPB Insurance or any other company to which section 2 applies, and, therefore, local authorities are free to choose to purchase their insurance from IPB Insurance or from other insurance undertakings. This is in contrast to the water companies in *Fish Legal EU*, which, as I have noted directly above, are effectively monopoly suppliers of the services they provide. In this sense, the water companies are functionally providing services once delivered by the administrative authorities in the State. Furthermore, the water companies' powers and duties are set out in an Instrument of Appointment (licence) for each company. IPB Insurance's position can also be distinguished from that of NAMA which is the sole, state wide body established by the 2009 Act for the purposes of acquiring bank assets from participating institutions and holding, managing and realising the value of the acquired assets. I am not persuaded that IPB Insurance, as a mutual insurer providing insurance to its local authority members, is performing services which the administrative authorities of the State once provided or would otherwise carry out if IPB Insurance did not provide them.

Does national law vest IPB Insurance with 'special powers'?

I do not accept that the "negative" powers are "powers". In my view, not only is the concept of a negative power not in keeping with the CJEU's findings in *Fish Legal EU,* it is also contradictory. I note that the Upper Tribunal in *Fish Legal UK* stated that the CJEU used the term 'powers' in the general sense of an ability to do something. The powers which were

found to be special powers by the Upper Tribunal in *Fish Legal UK* conferred on the water companies the power to act or do something. Similarly, the powers which the Supreme Court in *NAMA* held were special powers conferred on NAMA the power to act or to do something. Thus, I consider that a power is something which enables a body to carry out a specific duty or action or gives it an ability to do something. The "powers" identified by the appellant in this case do not enable IPB Insurance to carry out a specific duty or action or give it the ability to do something. In fact, as the appellant has submitted, they do the opposite, in that the alleged "powers" restrict or constrain IPB Insurance. Thus, I am not satisfied that the alleged "powers" in this case are powers at all.

In any case, I am not satisfied that the 1926 Act vests the "powers" identified by the appellant in IPB Insurance. As I have stated above, the 1926 Act applies to any company which meets the conditions of section 2. In my view, it does not vest in or confer anything on such companies.

Even if such "negative" powers were capable of being powers, I am not satisfied that the alleged powers would be special powers within the meaning of *Fish Legal EU.* In order for a body to have special powers it must be vested with special powers beyond those which result from the normal rules applicable between persons governed by private law. The Upper Tribunal in *Fish Legal UK* stated that the issue was really a practical one looking at substance rather than form. The question was whether relevant powers “give the body an ability that confers on it a practical advantage relative to the rules of private law?” (paragraph 106). In my view, a power which has been vested in a body is only capable of being a special power where it enables the body to carry out a specific duty or action or confers on it a practical advantage over and above that which applies in the normal rules applicable in private law. The appellant does not explain how the alleged powers are over and above those which result from the normal rules applicable in relations between persons governed by private law or how they confer a practical advantage relative to the rules of private law. In fact, I note that the appellant submits that IPB Insurance "lacks powers that would result from the normal rules applicable in relations between persons governed by private law". The CJEU's judgment is clear that the relevant powers must be over and above the normal rules applicable in relations between persons governed by private law. Having regard to the facts of this case and the jurisprudence on the matter, I am satisfied that the "powers" identified by the appellant do not go beyond those which result from the normal rules applicable in relation between persons governed by private law.

In any event, I consider that a finding that the alleged "powers" in this case are special powers would not be consistent with the special powers test laid down by the Court in *Fish Legal EU* and referred to by the Supreme Court in *NAMA.* In my view, the powers cited by the CJEU at paragraph 54 *Fish Legal EU* are illustrative of the type of powers which are capable of being 'special powers' depending on the specific rules attaching to them in the relevant national legislation. The "powers" identified by the appellant in this case are not comparable to the powers and rights in *Fish Legal EU*. The statutory powers listed by the CJEU in *Fish Legal EU* were the power of compulsory purchase, the right to make byelaws, the power to discharge water including into private watercourses, the right to impose temporary hosepipe bans, the power to decide to cut off the supply of water. I note that the water companies had additional powers under national law which were not included in the list of powers referred to by the CJEU. Neither are the powers identified in this case akin to the powers vested in NAMA which the Supreme Court in *NAMA* held were special powers.

The special powers vested in NAMA were "substantial powers of compulsory acquisition, of enforcement, to apply to the High Court to appoint a receiver and to set aside dispositions" and the restriction or exclusion of certain remedies against NAMA. I note that in both *Fish Legal EU* and *NAMA* the special powers vested in the bodies included powers over individuals or their property.

For the reasons above, I am satisfied that IPB Insurance does not perform services of public interest and is not for that purpose vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.

Furthermore, I note that the bodies which the United Kingdom Information Commissioner (ICO) has held perform public administrative functions include the owner and operator of the gas distribution network in the North of England which is licenced as a public gas transporter (Decision Notice FER0621831 (NGN Gas), available at www.ico.org.uk). It is also noteworthy that the ACCC has held that type of entity which performs public administrative functions include a state owned enterprise with responsibilities for the atomic power industry (ACCC/C/2004/01 (Kazakhstan), available at www.unece.org). I believe that the ICO's and the ACCC's findings support my approach that a body has public administrative functions where it is providing the type of services which were traditionally provided by the State.

Having regard to the facts of this case and the jurisprudence of the CJEU in particular *Fish Legal EU,* and the Supreme Court in *NAMA,* I find that IPB Insurance does not perform public administrative functions. Accordingly, I find that IPB Insurance is not a public authority within the meaning of article 3(1)(b).

Article 3(1)(c)

As I have stated in previous decisions, there are three elements to consider when determining whether a body is a public authority within the meaning of article 3(1)(c). They are:

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

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

The appellant submits that IPB Insurance's environmental impairment liability insurance is a public responsibility or function as it provides it for its local authority members on a mutual basis as an alternative to the market. It states that IPB Insurance's status under the 1926 to 1935 Acts supports its position that IPB Insurance's responsibilities and functions are public ones.

I am not aware of any case law directly on the issue of when a body has public responsibilities or functions within the meaning of article 3(1)(c). I am not satisfied that the provision of environmental impairment liability insurance by IPB Insurance is a public responsibility or function. I have found above that IPB Insurance was not established by the 1926 Act. IPB Insurance is a private commercial company which is regulated by the CBI. I have not seen anything during the course of my review to indicate that IPB Insurance is any

different to other insurance undertakings regulated by the CBI. I note that its Board of Directors is constituted as per the CBI's Corporate Governance Code Requirements for Insurance Undertakings and that the majority of directors, five, are independent of IPB Insurance's members. I also note that the Board operates in accordance with its Terms of Reference and that IPB Insurance members are not involved in the Board's operations.

Moreover, IPB Insurance offers its products or services on the commercial insurance market both to members and non-members. Local authorities are not required to purchase their insurance from IPB Insurance and are free to purchase insurance from elsewhere on the commercial insurance market. I note that the environmental impairment liability insurance to which the request in Case CEI/18/0032 relates is available in a comparable context in the insurance market, and that local authorities are free to purchase insurance, including environmental impairment liability insurance, from other insurers in the market.

Furthermore, I accept that IPB Insurance's responsibilities, functions and services are commercial ones relating to the provision of insurance on the commercial insurance market and do not relate to the environment. There is nothing before me to suggest that IPB Insurance has any public service type obligations.

For the reasons above, I am satisfied that IPB Insurance does not have public responsibilities or functions relating to the environment within the meaning of article 3(1)(c).

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

Accordingly, I find that IPB Insurance is not a public authority within the meaning of article 3(1)(c).

Emanation of the state

As summarised above, the appellant submits that IPB Insurance is an emanation of the state, and as an emanation of the state it is a public authority under article 3(1)(b). The AIE Directive, and the AIE Regulations, contain a specific definition of public authority. As I have set out above, the referring court in *Fish Legal EU* specifically asked the CJEU whether a body, which is an emanation of the state, is a public authority pursuant to Article 2(2)(c) of the AIE Directive. The CJEU clarified that the precise meaning of the definition of public authority must be interpreted in light of the AIE Directive's own objectives. The legal test contained within the definition of public authority in the AIE Regulations, and the AIE Directive, is what I apply when I am determining whether a body is a public authority for the purposes of AIE. I have found above that IPB Insurance is not entrusted with the performance of services of public interest nor is it vested with special powers beyond those which result from the normal rules applicable between individuals. In the circumstances, it is not necessary for me to make a determination as to whether IPB Insurance is an emanation of the state.

In addition, the case law cited by the appellant in support of its position that IPB Insurance is an emanation of the state is in a different area of EU law. The test established by the CJEU in that area is one that, in effect, straddles article 3(1)(b) and 3(1)(c). In my view, to adopt that test in AIE would, in effect, amount to taking a shortcut from the specific definition of

"public authority" under AIE. I consider that this would be dangerous and misleading. The Supreme Court in *NAMA* cautioned against using shortcuts when interpreting the AIE Regulations. Moreover, it would have the effect of undermining the purpose of the carefully crafted definition of "public authority" adopted by the EU and national legislatures in AIE, and would be contrary to the CJEU's judgment in *Fish Legal EU* and the Supreme Court's in *NAMA.*

Decision

Having carried out a review under article 12(5) of the AIE Regulations, I find that IPB Insurance Company Limited by Guarantee is not a public authority within the meaning of the definition in article 3(1) of the AIE Regulations. Accordingly, it was not obliged to process the appellant's request for access to environmental information and I have no further jurisdiction in relation to this matter.

Appeal to the High Court

A party to the appeal or any other person affected by this decision may appeal to the High Court on a point of law from the decision. Such an appeal must be initiated not later than two months after notice of the decision was given to the person bringing the appeal.

Peter Tyndall

Commissioner for Environmental Information

18 December 2019