

Appeal to the Commissioner for Environmental Information Case
CEI/15/0011

**European Communities (Access to Information on the Environment)
Regulations 2007 to 2014 (The AIE Regulations)**

Appellant: Dr Edward Fahy

Body: Irish Fish Producers' Organisation Limited (the IFPO)

Issue: Whether the IFPO is a public authority within the meaning of the AIE Regulations

Summary of Commissioner's Decision: In accordance with Article 12(5) and Article 11(5)(a) of the Regulations, the Commissioner reviewed the contention by the IFPO that it was not a public authority for the purposes of the Regulations. Having considered the jurisprudence of the Court of Justice of the European Union and the specific rules applicable to the IFPO, the Commissioner found that the IFPO is not a public authority for the purposes of the AIE Regulations as it does not constitute government or public administration, nor does it have public administrative functions, nor is it under the control of a public authority.

Background

On 28 January 2015, the appellant wrote to the IFPO requesting “a list of the registration numbers of vessels” of IFPO members. On 10 February 2015 the IFPO’s solicitors replied to the appellant refusing the request on three grounds: that it was not a public authority under the Regulations; that the requested information was not “environmental information” as defined by the Regulations; and that disclosure of the information was prevented by the Data Protection Acts 1988 to 2003. The appellant’s request for an internal review was refused on the same grounds, and he appealed to my Office on 8 April 2015.

Producer organisations (POs) are legally recognised bodies under Regulation (EU) No 1379/2013 of the European Parliament and of the Council of 11 December 2013 (the Regulation), which provides for the common organisation of the markets for fishery and aquaculture products in the Union (the CMO). This decision concerns whether the IFPO, a recognised Irish fishery producer organisation, is a public authority for the purposes of the Regulations.

Recital 7 to Regulation 1379/2013 identifies the strategic role of recognised POs under the EU Common Fisheries Policy (CFP):

"Fishery producer organisations and aquaculture producer organisations ("producer organisations") are the key to achieving the objectives of the CFP and of the CMO. It is therefore necessary to enhance their responsibilities and to provide the necessary financial support to allow them to play a more meaningful role in the day-to-day management of fisheries, whilst respecting the framework defined by objectives of the CFP."

In the course of this appeal, I considered the extent of the enhanced responsibilities of POs under the CMO, and in particular, whether these responsibilities give rise to obligations under the AIE Regulations.

Scope of Review

Article 12(3) of the Regulations provides a right of appeal to my Office where a request for environmental information has been refused. Article 11(5)(a) of the Regulations specifies that I may review refusals made “on the grounds that the body or person concerned contends that the body or person is not a public authority”. In letters sent to the appellant on 10 February 2015 and 10 March 2015, the IFPO contended that it is not a public authority under the Regulations. Consequently, a question of threshold jurisdiction arises which I must review. In line with my decision in the case of Mr. Gavin Sheridan and Dublin City Council (CEI/12/0004), available online at www.ocei.ie, the scope of this review is restricted to the issue of whether the IFPO is a “public authority” for the purposes of the AIE Regulations.

Relevant Legal Provisions

The AIE Regulations

Directive 2003/4/EC implements the first pillar of the 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 Directive is

transposed into Irish law by the AIE Regulations, which apply to 'environmental information' held by 'public authorities'.

Article 3(1) of the Regulations provides the following definition of 'public authority':

"'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 subparagraphs (I) or (II) applies, having public administrative functions and responsibilities, and possessing environmental information".

The three categories of public authorities contained in Sub-Articles (a) to (c) reproduce the definition of "public authority" contained in the Aarhus Convention and the Directive. However, Sub-Articles (i) to (vii) are unique to the AIE Regulations. The Supreme Court addressed the meaning of the above definition in the case of *National Asset Management Agency v Commissioner for Environmental Information* [2015] IESC 51 (the *Nama* case). In his judgment, O'Donnell J. states at paragraph 34 that the most natural interpretation of the definition is "to see it 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) do not extend the primary definitions of "public authority" contained at (a) to (c).

Court of Justice of the European Union Jurisprudence

In his decision in the *NAMA* case, Judge O'Donnell applied the judgment of the Court of Justice of the European Union in *Fish Legal and Emily Shirley v Information Commissioner and Others* (C-279/12), which considers the meaning of "public authority" under Article

2(2)(b) and Article 2(2)(c) of Directive 2003/4 (equivalent to Sub-Articles (b) and (c) of the definition of "public authority" contained in the AIE Regulations).

With regard to the meaning of "public administrative function" in Article 2(2)(b), the CJEU proposed the "special powers" test in the following terms:

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

The Court also clarified the legal test to be applied when assessing whether a body is a public authority under Article 2(2)(c), ruling that:

"Undertakings, such as United Utilities Water plc, Yorkshire Water Services Ltd and Southern Water Services Ltd, 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."

European Union Law

Aspects of this case relate to the interface between the EU rules on competition as contained in Part III, Title VII of the Treaty on the Functioning of the European Union (TFEU), and provisions relating to agriculture and fisheries under Part III, Title III of the TFEU.

Article 42 of the Treaty on the Functioning of the European Union states:

"The provisions of the Chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the European Parliament and the Council within the framework of Article 43(2) and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 39."

Article 43(2) of the TFEU provides:

"The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall establish the common organisation of agricultural markets provided for in Article 40(1) and the other provisions necessary for the pursuit of the objectives of the common agricultural policy and the common fisheries policy."

Article 101(1) of the TFEU provides:

"1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

The preamble to Regulation 1379/2013 notes that it was adopted "Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 42 and 43(2) thereof". The extent to which competition rules apply to fishery POs is detailed in Article 41 of the Regulation. Article 41 provides that, subject to certain conditions, Article 101(1) of the Treaty on the Functioning of the European Union shall not apply to agreements, decisions and practices of POs which concern the production or sale of fishery and aquaculture products, or the use of joint facilities for the storage, treatment or processing of fishery and aquaculture products.

Regulation 1379/2013 also specifies legal powers, rights, and obligations of POs:

- Article 7 sets objectives to be pursued by POs, including the promotion of sustainability and compliance with conservation policy;
- Article 8 lists measures which may be adopted by POs to achieve their objectives, including adjusting and channelling supply of fish to markets, and planning the fishing activities of members;
- Article 14 contains conditions for official recognition of POs, which are subject to checks by member states and the EU Commission. Member states may withdraw recognition of a PO where there is non-compliance with Article 14;
- Article 17 identifies principles that form the basis for internal functioning of POs, including the requirement for an internal compliance function;
- Articles 22 to 26 provide that a PO may apply to a national authority to “make the rules agreed within a producer organisation binding on producers who are not members of the organisation and who market any of the products within the area in which the producer organisation is representative”;
- Article 28 provides that each PO must submit a production and marketing plan (PMP) to the relevant national authority for approval, setting out how the PO will meet its Article 7 objectives; and
- Articles 30 and 31 provide that POs may receive funding for the storage of fish products for which no buyer can be found above a designated trigger price. A trigger price is set by the member state, having examined proposals made by POs.

IFPO's Position

In submissions to my Office, the IFPO argued that it does not fall within any of the three categories of public authority under the AIE Regulations, and that the AIE Regulations do not apply to the IFPO as a result.

In relation to the *Fish Legal* test concerning Article 2(2)(b), the IFPO argued that, other than creating an obligation to produce a production and marketing plan, Regulation 1379/2013 is aspirational in character, and confers no special powers on POs. It submitted that Regulation 1379/2013 does nothing to improve the IFPO's relationship with respect to third parties. In particular, the IFPO submitted that Articles 22 to 26 of the Regulation which provide for the extension of internal rules of POs to non-members have not been applied in Ireland, and stated that it does not engage in the storage of fish products under Article 31.

The IFPO submitted that it is primarily a representative body, and that its functions are directed towards protecting the commercial interests of its members. The IFPO emphasised the fact that it does not have a quota management function under Irish law, unlike many of its European counterparts, and stated that the agenda of the IFPO is set by its Board and is not controlled by the State.

Appellant's Position

In submissions to my Office, the appellant argued that the IFPO is a public authority under Sub-Article (b) of the definition. The appellant submitted that, taken as a whole, the special powers granted to the IFPO under Regulation 1379/2013 allow it to coordinate its members' commercial activities as an exception to the normal rules of competition law, to have its rules imposed on non-members, and to coordinate publicly funded intervention in the market when prices fall below a certain point. Addressing the *Fish Legal* test, the appellant submitted that these powers are beyond the normal rules of private law as they would otherwise entail a breach of competition rules, and in some cases are compulsive in nature.

In considering Sub-Article (c) of the definition of "public authority", the appellant suggested that this provision may also apply to the IFPO, and drew my attention to a written statement by solicitors for the IFPO that it was "under the control of the Irish Authorities in so much as they are the ones commended and commanded to deal with the policing of the Common Fisheries Policy".

The appellant did not argue that the IFPO was a public authority under Sub-Article (a) of the definition.

Analysis and Findings

The IFPO does not constitute government or public administration under Sub-Article (a) of the definition of "public authority" contained in Article 3(1) of the AIE Regulations, therefore it falls to be considered whether the IFPO is a public authority under Sub-Article (b) or (c) of the definition.

The "special powers" test under Article 2(2)(b) of Directive 2003/4/EC

In this case, I considered whether, under the applicable national law, the IFPO is vested with special powers beyond those which result from the "normal rules applicable in relations between persons governed by private law". In the present case, the applicable law which governs the IFPO is Regulation 1379/2013.

It was first necessary to consider whether the Regulation meets the description of “national law” as referred to in Article 2(2)(b) of Directive 2003/4, considering that it is an EU legislative measure. Under EU law, regulations are binding in their entirety and have direct application, without the need for transposition by member states. It follows that the provisions of Regulation (EU) 1379/2013 are directly applicable in Ireland, and form part of the “national law” for the purpose of the definition of a public authority.

This view is supported by the Aarhus Implementation Guide (The Aarhus Convention: An Implementation Guide, Second Edition, June 2014) at page 45, which states:

"Note that in the case of the EU as a Party, EU legislation has the characteristics of national legislation. Similarly, as noted by the Compliance Committee to the Aarhus Convention in its findings on communication ACCC/C/2006/18 (Denmark), applicable EU law relating to the environment should be considered to be part of national law of EU member States."

On basis of the above, I must consider powers vested under EU legislation when deciding what constitutes a public authority.

A body may be vested with legal powers without being a public authority carrying out public administrative functions. At paragraph 55 of the *Fish Legal* judgment, the court states "It is for the referring tribunal to determine whether, having regard to the specific rules attaching to them in the applicable national legislation, these rights and powers accorded to the water companies concerned can be classified as special powers." Inherent in this statement is the possibility that powers other than "special powers" can exist where the test set out by the CJEU is not met. To assess whether a body carries out public administrative functions, *Fish Legal* requires a comparative analysis of powers vested in the body with the normal rules applicable in relations between persons governed by private law.

Powers relating to exemptions from competition law

In respect of rights and powers vested in POs by Articles 8, 28, 30, and 31 I have considered whether the exemption from the full extent of competition law provided by Article 41 of Regulation 1379/2013 represents a special power beyond the normal rules of private law.

Irish competition law includes a private right of action under Section 14(1) of the Competition Acts 2002 to 2014, insofar that any "person who is aggrieved in consequence of any agreement, decision, concerted practice or abuse which is prohibited under section 4 or 5, or by Article 101 or 102 of the Treaty on the Functioning of the European Union, shall have a right of action under this subsection..." Article 41 of Regulation 1379/2013 therefore places certain agreements, decisions and practices of POs outside the scope of private competition law actions.

However, when assessing what is meant by "the normal rules applicable in relations between persons governed by private law" I also considered the fact that the limitation of competition law with respect to fishery products has a legal basis in Articles 38 to 44 TFEU. The TFEU is one of two treaties on which the EU is based. Article 1(1) of the TFEU states: "This Treaty organises the functioning of the Union and determines the areas of, delimitation of, and arrangements for exercising its competences." TFEU competences include agriculture and fisheries, and rules on competition. In this instance, the TFEU provides a delimitation of competition rules in respect to agriculture and fishery : Article 42 TFEU states that competition rules contained in the TFEU apply to production of fishery products "only to the extent determined by the European Parliament and the Council within the framework of Article 43(2) and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 39." I consider that the provisions of the TFEU represent a

statement of the "normal rules" applicable, and therefore the delimitation of competition rules with respect to fishery products represents part of the normal rules. Accordingly, I am not satisfied that the modified competition rules contained in Article 41 of Regulation 1379/2013 can be considered to be "beyond the normal rules" for the purposes of the *Fish Legal* test.

For the reasons set out above, I find that powers under Article 8, Article 28, Article 30, Article 31 and Article 41 of Regulation 1379/2013 do not constitute special powers.

Powers relating to extension of rules

Articles 22-26 of Regulation 1379/2013 allow for the extension of internal rules of POs to third party producers who are not members. Article 22(1) states:

"A Member State may make the rules agreed within a producer organisation binding on producers who are not members of the organisation and who market any of the products within the area in which the producer organisation is representative, provided that:

(a) the producer organisation has been established for a period of at least one year and is considered to be representative of production and marketing, including, where relevant, the small-scale and artisanal sector, in one Member State and makes an application to the competent national authorities;..."

Under Article 25, member states must notify the Commission of any rules they propose to extend, on foot of which the Commission may authorise, or refuse to authorise, the extension. Article 22 has the potential to extend internal PO rules to producers who, as a matter of private contract law, have never agreed to be bound by such measures. The powers to authorise extension of rules under Articles 22-26 are primarily vested in member states and the Commission, however I also considered the effect of Articles 8(1)(d) and 17(e). Article 8(1)(d) states that POs may apply measures "controlling and taking measures to ensure that their members' activities comply with the rules established by the producer organisation concerned". Article 17(e) states that the internal functioning of POs shall be based on "the imposition of effective, dissuasive and proportionate penalties for infringement of obligations laid down in the internal rules of the organisation concerned, particularly in the case of non payment of financial contributions".

POs therefore have an express compliance role with respect to their own members, which must form part of their internal rules. It is therefore possible that an authorised extension of rules could have the effect of extending compliance powers to non-member producers, including the power to levy penalties on non-members.

In his submissions, the appellant suggested that I should have regard to the judgment of the United Kingdom Upper Tribunal in *Fish Legal v Information Commissioner* [2015] UKUT 0052 (AAC), which applies the judgment of the CJEU in *Fish Legal*. Although I am not bound to follow the Upper Tribunal's judgment, some aspects of the Upper Tribunal's approach to the special powers test can be usefully applied to this case.

The Upper Tribunal interpreted meaning of the word "special" in the CJEU's test, stating at paragraph 103 - "We do not read special as adding some additional element that would otherwise be absent. Rather, we read it as part of the composite phrase that captures the contrast between the powers vested in the bodies in question and those that result from the rules of private law." I consider this to be a logical interpretation of the special powers test.

The Upper Tribunal adopted a practical approach to what constitutes a power, looking to the substance and not the form. At paragraph 106, the Upper Tribunal held that the relevant question was whether the power gives the body an ability that confers on it a practical advantage relative to the rules of private law. I am satisfied that this is an appropriate question to ask when considering if a provision in law creates a special power.

The Upper Tribunal also considered the status of so called "tandem" or "contingent" powers at paragraph 107. Such powers are exercised with the consent of a higher public authority, and cannot be implemented unilaterally. The Upper Tribunal examined whether a contingent power could be a 'special power', and held that this is possible where practical benefits result from the existence of the unimplemented power.

In this case, the application of internal PO rules to non-member producers is contingent on authorisation by the European Commission and member states. At the present time, the IFPO has not applied to have its internal rules extended to non-member producers, and in submissions it argued that special powers are not created in the absence of such an authorisation. I consider that there is merit in the approach of the Upper Tribunal above, and that the correct approach is to ask whether the latent power is of such significance that it would provide a practical advantage relative to the normal rules of private law.

Applying this analysis to the current facts, I was not satisfied that the mere entitlement to apply to extend unspecified rules to non-member producers would be of practical benefit to the IFPO in the course of its activities. In particular, I found that the supervisory role of the European Commission in authorising such extensions mitigates against the perception that the IFPO could easily have access to such powers. For these reasons, I am satisfied that the Articles 22 to 26 taken together do not constitute a special power in circumstances where they remain unimplemented by the IFPO. Should the IFPO be successful in making an application under Article 22 in future, the resultant powers could potentially give rise to public administrative functions under the AIE Regulations, and may require a reappraisal of the question of whether the IFPO is a public authority under Sub-Article (b) of the definition contained in the AIE Regulations.

On the basis of the above, I am satisfied that the IFPO is not a 'public authority' under Sub-Article (b) of the definition.

The Control Test under Article 2(2)(c) of Directive 2003/4/EC

An entity may be a "public authority" under any one of the three categories set out in the definition under Article 3(1) of the AIE Regulations: as government or public administration; as an entity empowered by the State to act on its behalf; or as an entity controlled by the State. In assessing whether the IFPO is a public authority, I applied the test for entities controlled by the State set out in Paragraph 73 of the *Fish Legal* judgment. Following *Fish Legal*, paragraph (c) of the definition of public authority applies where a body does not determine in a genuinely autonomous manner the way in which it provides public services, or carries out its functions or responsibilities, because the State, or an entity empowered by the State, is in a position to exert decisive influence on the body's actions in the environmental field.

I am of the view that Regulation 1379/2013 was adopted with the clear purpose of vesting public responsibilities and functions of an environmental nature in POs, concerning the regulation and management of fishery activities, as set out in Recital 7 and the objectives contained in Article 7. However, such responsibilities and functions are not sufficient to meet the *Fish Legal* test without the element of control by a higher public authority.

Regulation 1379/2013 provides that member states, competent national authorities, and the European Commission all play a role in regulating the activities of POs under the CMO. Under Articles 18 and 20, POs are subject to checks to ensure they meet the requirements for official recognition set out in Article 14. Recognition may be withdrawn from non-compliant POs. Under Article 26, the Commission may withdraw authorisation for an extension of internal PO rules to non-members where certain conditions are not met. Under Article 28, POs are obliged to submit a Production and Marketing Plan to the competent national authority for approval, setting out details of production, marketing and compliance measures. POs may access financial support under the European Maritime Fisheries Fund when implementing the CMO.

Fish Legal provides illustrative examples of decisive influence, stating at paragraph 69:

"...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."

I have compared the above examples of influence to the system of regulation that applies to POs, and I am satisfied that the controls specified by Regulation 1379/2013 fall short of creating decisive influence. In particular, I note that the shareholders, management, and board of the IFPO are fully independent of the State, I note the absence of any express power to modify decisions of a PO or to issue directions to a PO, and, in relation to the present facts, I note the representative nature of the IFPO, which could continue as a legal entity notwithstanding withdrawal of EU recognition and financial support.

Fish Legal also describes the type of legal framework that would govern the public functions of a Sub-Article (c) body, stating at paragraph 71:

"If the system concerned involves a particularly precise legal framework which lays down a set of rules determining the way in which such companies must perform the public functions related to environmental management with which they are entrusted, and which, as the case may be, includes administrative supervision intended to ensure that those rules are in fact complied with, where appropriate by means of the issuing of orders or the imposition of fines, it may follow that those entities do not have genuine autonomy vis-à-vis the State, even if the latter is no longer in a position, following privatisation of the sector in question, to determine their day-to-day management."

Regulation (EU) No. 1379/2013 does not create a precise legal framework for the performance of functions; the objectives to be followed by POs are detailed at a high level, but the manner in which those objectives are to be met is not clearly set out. Neither can it be said that public functions and responsibilities entrusted to POs under Article 7 of the

Regulations are subject to a system of close administrative oversight - the Regulation provides for checks, and reserves the right to withdraw recognition from non-compliant POs. However, POs are not subject to directions or administrative fines from higher authorities under the CMO, and carry out their day-to-day functions with a very high level of autonomy.

In light of the foregoing, I am satisfied that the IFPO carries out its public responsibilities in a genuinely autonomous manner, and that under the CMO, national and EU authorities do not exercise decisive influence over the manner in which the IFPO carries out its functions in the environmental field. Accordingly, I am satisfied that the IFPO is not a 'public authority' under Sub-Article (c) of the definition.

Conclusion

In accordance with Article 12(5) and Article 11(5)(a) of the Regulations, I reviewed whether the IFPO is a public authority within the meaning of the AIE Regulations. I considered the jurisprudence of the Court of Justice of the European Union, and examined the law applicable to the IFPO. I am satisfied that the IFPO is not part of government or other public administration for the purposes of Sub-Article (a) of the definition of 'public authority', nor is it vested with special powers to perform public administrative functions for the purposes of Sub-Article (b) of that definition, nor is it under the control of a public authority for the purposes of Sub-Article (c) of that definition. For these reasons, I found that the IFPO is not a public authority subject to the AIE Regulations.

Appeal to the High Court

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

Peter Tyndall
Commissioner for Environmental Information