

**Decision of the Commissioner for Environmental Information on an appeal
made under article 12(5) of the European Communities (Access to
Information on the Environment) Regulations 2007 to 2014 (the AIE
Regulations)**

Case CEI/16/0007

Date of decision: 20 October 2016

Appellant: Francis Clauson

Issue: Whether Wexwind Limited (Wexwind) 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 Wexwind that it is not a public authority for the purposes of the AIE Regulations. Having considered the definition of "public authority" contained in article 3(1) of the AIE Regulations, and the jurisprudence of the Court of Justice of the European Union, he found that Wexwind is not a public authority for the purposes of the AIE Regulations as it does not constitute government or public administration under paragraph (a) of the definition, it does not perform public administrative functions relating to the environment under paragraph (b) of the definition, nor is it under the control of a public authority for the purposes of paragraph (c) of the definition.

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

Wexwind is a private limited company engaged in renewable energy generation through a wind farm development at Gibbet Hill, County Wexford.

In an email to the directors of Wexwind of 9 December 2015, the appellant made an AIE request for information concerning Gibbet Hill wind farm. Wexwind did not respond to the request, nor did it reply to the appellant's subsequent request for an internal review. The appellant appealed the deemed refusal of his request to my office on 26 February 2016.

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 submissions to my office, Wexwind contended that it is not a public authority under the Regulations. Consequently, a question of threshold jurisdiction arises which I must review.

Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (the Directive) 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. In making this decision I have had regard to the *Guidance for Public Authorities and others on implementation of the Regulations* (May 2013) published by the Minister for the Environment, Community and Local Government; and *The Aarhus Convention: An Implementation Guide* (Second edition, June 2014) [the Aarhus Guide].

Relevant Legal Provisions

The AIE Regulations

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".

In *National Asset Management Agency v Commissioner for Environmental Information* [2015] IESC 5,1 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) do not extend the primary definitions of "public authority" contained at (a) to (c).

The appellant's submission

The appellant submitted that Wexwind is a public authority under paragraph (c) of the definition, as a legal person providing public services relating to the environment under the control of a higher public authority. The appellant's submission did not address paragraphs (a) or (b) of the definition, neither did he suggest that Wexwind has public responsibilities or functions under paragraph (c).

The appellant stated that the activity of wind energy generation relates to the environment, and that this activity is a public service where it is carried out in the context of a system of state subsidies. The appellant cited two illustrative examples of control of Wexwind by the Commission for Energy Regulation and EirGrid, and contended that Wexwind did not have genuine autonomy in the way it provided a public service relating to the environment, as decisive control was exercised by state regulators and market operators.

The appellant submitted that certain decisions on wind farm developers by planning authorities supported the contention that wind farm undertakings were "emanations of the state".

Wexwind's submission

Wexwind submitted that the company does not have any public responsibilities or functions, and that it was not engaged in the provision of a public service. Wexwind categorised its generation activity as a private commercial matter negotiated between private companies. Wexwind contended that, although it operates in a regulated industry, its activities are not under the control of a public authority in the manner envisaged by the AIE Regulations. Wexwind outlined the operation of the REFIT price support mechanism, and emphasised that electricity generators do not receive direct subsidies under the schemes.

Wexwind submitted that, while it is subject to regulation, such regulation forms the normal background to the activity of wind energy generation, and is not attended by the additional elements of control considered necessary in law to render Wexwind subject to the AIE regulations.

Is Wexwind under the control of a public authority?

Jurisprudence

In *Fish Legal and Emily Shirley v Information Commissioner and Others* (C-279/12) (*Fish Legal*) the Court of Justice of the European Union considered the meaning of “public authority” under article 2(2)(c) of Directive 2003/4 (equivalent to paragraph (c) of the definition of “public authority” contained in the AIE Regulations). The Court set out the standard of control under article 2(2)(c), ruling that:

"Undertakings... 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."

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.

The European Court of Justice provided illustrative examples of decisive influence, stating at paragraph 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."

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."

I have also had 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 question of genuine autonomy can be usefully applied to the present circumstances. At paragraph 141, the Upper Tribunal found that "autonomy has to be judged not by reference to absolute liberty, but against the normal background radiation of the constraints that limit the freedom of action for every business". I am satisfied that this approach is an appropriate framework for consideration of control and autonomy.

Regulation of Wexwind by the Irish State

Wexwind, as a Single Electricity Market (SEM) connected generator of electricity and participant in a Renewable Feed-In Tariff (REFIT) scheme, has a number of distinct regulatory and financial interfaces with the Irish State. The Commission for Energy Regulation (CER) licences the construction and operation of generators. The Single Electricity Market Operator (SEMO) manages trading and settlement aspects of the electricity market. Participants in the SEM are bound by the Trading and Settlement Code. EirGrid, in its capacity as Transmission System Operator (TSO) operates the transmission system, as governed by the Grid Code. ESB Networks Limited, as Distribution System Operator (DSO) manages the distribution system, as governed by the Distribution Code. The REFIT schemes are administered by the Department of Communications, Climate Action and Environment and subject to conditions. Planning applications for wind turbines are made to local authorities and An Bórd Pleanála, subject to Planning Guidelines issued by the Department of Housing, Planning, Community and Local Government

Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources creates targets for renewable energy usage for European Union member states. In order to meet these targets, the Department of Communications, Energy and Natural Resources operates a number of REFIT schemes. The REFIT schemes employ a price support mechanism, whereby electricity suppliers are paid a guaranteed price for qualifying renewable energy purchases from electricity generators. REFIT is

funded by the public service obligation (PSO) levy paid by electricity consumers. Under the REFIT scheme, renewable energy generators do not receive payments, but can benefit indirectly from the availability of REFIT support, as the purchase of renewable energy by suppliers can be contracted on more favourable terms as a result of the subsidy.

Schedule 4 of the Electricity Regulation Act 1999, as substituted by S.I. 556 of 2015, lists REFIT eligible power purchase agreements (PPA) between electricity suppliers and electricity generators. Wexwind is recorded in schedule 4 as having a PPA with Viridian Energy Limited, an electricity supplier trading as Energia. As a result of this PPA, Viridian can avail of REFIT price support for purchases of electricity generated by Wexwind at Gibbet Hill wind farm, up to a maximum capacity of 14.8 megawatts.

I must consider whether these provisions and mechanisms represent decisive influence over the way in which Wexwind provides services in the environmental field, and whether such influence results in a loss of genuine autonomy on the part of the company.

Powers of the Commission for Energy Regulation

The appellant submitted that Condition 19 and Schedule 2 of the Generation Licence, which are referred to in a published guidance document on CER's website ("Generation Licence Compliance Guidance Notes for Licence Holders - Version 1 August 2012") amounted to decisive influence over the company. Condition 19 and Schedule 2 provide that changes in corporate control of licensees must be notified to CER and enable CER to revoke a generation licence where control is transferred to a person with inadequate technical, financial or managerial strength. The appellant submitted that, following paragraph 69 of *Fish Legal* cited above, this condition amounted to a power to annul a decision of shareholders after the event, and was a power which could jeopardise the existence of the company. I also note that CER has statutory powers under the Electricity Regulation Act 1999 to modify generation licences, to direct that licensees discontinue or refrain from specific practices, and to make determinations on breaches of licence conditions.

In order to facilitate my review, Wexwind provided my Office with copies of its Electricity Generation Licence and its Authorisation to Construct or Reconstruct a Generation Station, as issued by CER. Having reviewed these documents in full, I am not satisfied that the powers and obligations set out in these documents, or the statutory powers to enforce a licence under the 1999 Act, can be said to amount to decisive influence on the part of the CER. I do not consider that the authorisation and licensing framework can be regarded as a particularly precise set of rules which determine the manner in which Wexwind carries out its generation activities - the licence creates a framework of legal obligations and sanctions. However, a large degree of autonomy is retained by the licensee in how it meets its obligations.

I do not regard the requirement to notify CER of a change of corporate control of a licensee (or CER's power to revoke a licence where persons lacking appropriate expertise take control of a licensee undertaking) to represent a loss of genuine autonomy. As has been noted in other jurisdictions, genuine autonomy is not judged by reference to absolute liberty. It would undermine the licensing framework if a licensee had absolute liberty to assign a licence to an

unqualified person. I therefore consider it to be within the bounds of normal regulatory practice that CER can revoke a licence where the licensee breaches fundamental conditions, and not an instance of control for the purposes of paragraph (c) of the definition.

On the basis of the above, I am satisfied the CER's authorisation and licensing framework does not bring Wexwind under CER's control for the purposes of paragraph (c) of the definition of public authority.

Powers of EirGrid and ESB Networks Limited

The appellant also contended that the TSO is in a position to exercise decisive influence over the company through the requirements of the Grid Code, and in particular, section WFPS1 of the Grid Code which regulates controllable Wind Farm Power Stations (WFPS). Further to this, I note that Gibbet Hill wind farm is connected to the distribution system, and is therefore regulated by the DSO and the Distribution Code. The stated purpose of the Grid Code is to regulate "all material technical aspects relating to the use of Plant and or Apparatus connected to the Transmission System or to the Distribution System." The stated objective of section WFPS1 is "to establish the technical rules which Controllable WFPSs and WFPS Extensions must comply with in relation to their connection to and operation on the Transmission System". Section DCC11 of the Distribution Code similarly establishes "the technical rules to which WFPSs must comply in order to ensure that the DSO and the TSO can operate the Distribution System and Transmission System reliably, maximising wind penetration on both systems."

The appellant submitted that Section WFPS1 allows EirGrid to control the generated output of the wind farm, and to take the wind farm offline where technical requirements are not met. It is accurate to say that a precise technical requirements apply to aspects of Wexwind's power distribution and transmission activities, however the constraints placed on wind generators by the DSO and TSO must be considered in the context of what is appropriate to the electricity market. Wexwind's facilities are connected to the distribution system. Electricity cannot easily be stored, and must be produced constantly to meet demand. Wind energy generation poses particular challenges for grid operators, due to the variable and unpredictable nature of the weather. Technical control and monitoring of generation units by the system operators is necessary to ensure capacity requirements are met, and that power is transmitted and distributed in a safe and reliable manner. I consider that it is within the bounds of normal regulatory practice that the system operators have oversight and limited control of generators where such control is essential to the proper functioning of the distribution and transmission systems. Wexwind, like many other businesses, is obliged to provide a service in a safe and effective manner, which in this case is achieved by compliance with the relevant codes. I do not consider that compliance with technical standards necessary for grid integration amounts to a loss of genuine autonomy on the part of the company, as the wider corporate, financial and strategic decisions necessary to develop and operate the wind farm are determined by Wexwind.

Conclusion on control and autonomy

Considering the position of Wexwind, it is clear that regulations and constraints apply to the manner in which it generates and markets electricity. Industry regulators and operators place

numerous obligations on Wexwind, commensurate with the complex legal, financial, and technical requirements of the energy market. Public authorities control many important aspects of the activity of power generation, including planning approval, construction and operation, transmission and distribution, marketing, and the provision of subsidies.

At the same time, I note that Wexwind is privately owned and financed. Wexwind's directors are not appointed by the State and it is not owned by the State. Wexwind may assign its generation licence and may transfer its shares to new owners. The development of Gibbet Hill wind farm was on Wexwind's own initiative. Wexwind's electricity is sold to a private supplier on the basis of a private contract. The routine operation of the wind farm is carried out by private staff and management. I consider that the Court in *Fish Legal* set a high standard for control under paragraph (c) of the definition of public authority, where control is defined as decisive influence by a public authority leading to a loss of genuine autonomy. I consider that although Wexwind is a participant in a highly regulated industry and benefits indirectly from a system of subsidies, nevertheless, the manner in which it generates electricity is substantially determined by decisions made solely by the company.

I therefore find that Wexwind retains genuine autonomy in the way in which it generates and markets electricity, and is not under the control of a body or person falling within paragraph (a) or (b) of the definition of "public authority" set out in article 3(1) of the AIE Regulations. Accordingly, I find that Wexwind does not fall within paragraph (c) of the definition of public authority.

Does Wexwind provide public services in relation to the environment?

In making this decision, I have addressed the second limb of paragraph (c) of the definition, focussing on the question of whether Wexwind is "under the control of a body or person falling within paragraph (a) or (b)". The concept of a public service is not static, and what constitutes a public service is often a matter of social consensus. Prior to deregulation of the electricity market, the activity of electricity generation was one aspect of a single public service carried out by a vertically integrated state company, the Electricity Supply Board. Since the deregulation process resulting from Directive 96/92/EC, independent power stations also supply power to the market. Having found that the wind generation activities of Wexwind are not conducted under the control of a public authority, it is not necessary for me to make a specific finding on whether power generation is a public service relating to the environment.

Consideration of paragraphs (a) and (b) of the definition of public authority

Notwithstanding the fact that the appellant limited his submission to the question of whether Wexwind was a public authority under paragraph (c) of the definition, I have also considered the position of the company under paragraphs (a) and (b) of the definition of "public authority", set out fully above. I find that Wexwind, as a private company operating in the interests of its shareholders, is plainly not government or other public administration for the purposes of paragraph (a).

The Court in *Fish Legal* described a test for persons or bodies under paragraph (b) of the definition, stating at paragraph 56

“...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 appellant brought to my attention the decision of An Bord Pleanála in case RL3436. This case concerned whether an underground electricity cable linking two wind farms was development, or was exempt development. The Board found that the wind farm developer was a statutory undertaker within the meaning of the Planning and Development Act 2000, and that certain works carried out by the developer relating to the provision of electricity fell within a class of exempt development under the Planning and Development Regulations 2001 (and were not otherwise subject to de-exemption). In effect, the Board decided that a private wind developer was equivalent to a body such as ESB Networks Limited for the purposes of certain planning provisions. The appellant submitted that this finding supported the contention that a wind farm was an "emanation of the state". However, the Board's findings are founded on legislative definitions which do not have general applicability in national law. I am not satisfied that a limited equivalence in planning law between private bodies and conventional state authorities is, of itself, sufficient to bring Wexwind within the definition of a "public authority".

Although the appellant did not suggest that the classification of certain works by private electricity undertakings as exempt development was a "special power" vested with Wexwind, I have also considered his remarks in this context. In my decision in case CEI/15/0011 (*Dr Edward Fahy and the Irish Fish Producers Organisation*), I stated that I do not do not interpret the word "special" in this context as requiring some additional element; rather, I consider that the Court referred to "special powers" to emphasise the difference between such powers, and the normal rules of private law. I also consider that the relevant question is whether the power gives the body an ability that confers on it a practical advantage relative to the rules of private law.

The class of exempt development referred to in case RL3436 is Class 26 of Part 1 of Schedule 2 to the Planning and Development Regulations 2001, as amended. This is one of a number of classes of exempt development relating to electricity undertakings, as set out in that Schedule. In the broadest sense, the classification of certain works as exempt development is a power, in that it allows an electricity undertaking to do something (i.e. carry out works) without the need for prior approval by the State (albeit subject to certain statutory conditions). I must decide whether this power is a special power for the purposes of paragraph (b) of the definition of "public authority". Section 4(2)(a)(i) of the Planning and Development Act 2000 provides that the relevant Minister may, by regulation, provide for classes of exempt development where "by reason of the size, nature or limited effect on its surroundings...the carrying out of such development would not offend against principles of proper planning and sustainable development". Accordingly, I do not comprehend the classification of certain works in this context as the vesting of a power in electricity undertakings beyond the normal rules of private law. Rather, the limited exemption of certain types of development is a commonplace

mechanism by which the Minister ensures the proper functioning of the planning system by setting appropriate thresholds for the requirement of planning permission.

I am therefore satisfied that that Wexwind is not vested with special powers beyond the normal rules that apply between persons governed by private law, and accordingly I find that Wexwind does not perform a public administrative function under national law for the purposes of paragraph (b).

Decision

In accordance with Article 12(5) and Article 11(5)(a) of the Regulations, I have reviewed the contention by Wexwind that it is not a public authority for the purposes of the AIE Regulations. Having considered the definition of "public authority" contained in article 3(1) of the AIE Regulations and the jurisprudence of the Court of Justice of the European Union, I find that Wexwind is not a public authority for the purposes of the AIE Regulations as it is not government or other public administration under paragraph (a) of the definition, it does not perform public administrative functions relating to the environment under paragraph (b) of the definition, nor is it under the control of a public authority for the purposes of paragraph (c) of the definition.

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
20 October 2016