

THE HIGH COURT

[2023] IEHC 57

Record No. 2021/299MCA

**IN THE MATTER OF AN APPEAL PURSUANT TO ARTICLE 13 OF THE
EUROPEAN COMMUNITIES (ACCESS TO INFORMATION ON THE
ENVIRONMENT REGULATIONS) 2007 - 2018**

BETWEEN

BORD NA MÓNA PLC

APPELLANT

- and -

THE COMMISSIONER FOR ENVIRONMENTAL INFORMATION

RESPONDENT

- and -

RIGHT TO KNOW CLG

NOTICE PARTY

JUDGMENT of Ms. Justice Niamh Hyland of 7 February 2023

Summary of Decision

1. The obligations imposed on public authorities under Directive 2003/4/EC on public access to environmental information apply both where the public authority is holding environmental information itself and where another body is holding that information for it. Holding information for a public authority is defined in the Directive as holding

information “on behalf of” the public authority. This appeal raises the novel question as to whether a body may be treated as holding environmental information on behalf of a public authority where it also holds that information on its own behalf. I conclude that it is possible to interpret “on behalf of” to cover situations where the holder of information is holding it both for its own purposes, and for the public authority. That being so, the principles underlying Directive 2003/4, including the imperative to ensure the widest access possible to environmental information, strongly point towards this interpretation.. A narrower interpretation would require the holder of the information to have no independent interest in the information if they are to be treated as holding for a public authority. Such an interpretation would considerably reduce the situations in which a body would be treated as holding information for a public authority and would potentially operate to reduce the right of access to environmental information.

2. In this case, the Commissioner decided that Bord na Móna Plc (“Bord na Móna”) were incorrect in refusing access to environmental information held by one of their subsidiaries, Biomass. The Commissioner decided that Biomass was holding information for Bord na Móna. Correctly, given the structure of the Directive, specifically the definition of public authority, the Commissioner did not treat control of Biomass by Bord na Móna as the determining factor in deciding that the information was held for Bord na Móna. Instead, he appropriately considered the legislative structure under the Turf Development Acts 1946 to 1998 (the “Turf Acts”) governing Biomass and Bord na Móna, as well as the surrounding factual context of the relationship between the two companies. He concluded that the information sought was held by Biomass for Bord na Móna’s commercial purposes as well as for its own commercial purposes and therefore was held for Bord na Móna within the meaning of the Directive. For the reasons explained below, I can see no error of fact or law in his Decision. The Commissioner was

entitled to consider the nature of the relationship between Biomass and Bord na Móna where he did so for the sole purpose of informing his Decision as to whether Biomass was in fact holding information for Bord na Móna.

3. Contrary to the submissions of Bord na Móna, the Commissioner's Decision did not undermine the distinction between parents and subsidiaries or disregard the concept of separate legal personality in the context of Directive 2003/4. The Directive acknowledges the concept of separate legal identities. The Commissioner expressly recognised the separate legal identities of Biomass and Bord na Móna and did not treat control as the determining factor in deciding whether Biomass held information for Bord na Móna. The Commissioner's conclusion was informed by the specific statutory and factual context in which the two companies operate.

Background to the Appeal

4. This is a statutory appeal brought under Order 84C of Rules of the Superior Courts ("RSC") by way of originating Notice of Motion of 12 November 2021 issued by Bord na Móna against a Decision of the Commissioner for Environmental Information (the "Commissioner") of 15 September 2021. By that Decision, the Commissioner decided that environmental information held by a subsidiary of Bord na Móna, Bord na Móna Biomass Ltd ("Biomass") was held "for" Bord na Móna within the meaning of Article 3 of the European Communities (Access to Information on the Environment) Regulations 2007 - 2018 (the "AIE Regulations" or the "Regulations").
5. Bord na Móna seeks an Order setting aside the Decision and substituting for it a determination that any such information held by Biomass was not held either by or for Bord na Móna and ancillary reliefs, including an Order remitting the matter back to the Commissioner.

6. The Decision of the Commissioner arose following a request from Right to Know Clg (the “notice party”) to Bord na Móna on 19 April 2019 seeking the following information:

“1. A breakdown (in excel format) of all biomass imports from January 2017 to present, to include:

a. The country of origin;

b. The amount imported (in tonnage);

c. The companies from whom Bord na Móna have purchased biomass;

d. The name of the Grower (e.g. name of plantation, producer, etc.), Miller and others (sic) known companies along the supply chain;

e. Documentation to show the biomass is purchased from certified sustainable sources.

2. The agenda, minutes (to include draft versions) and associated documents of any meetings with ESB and/or DCCAE representatives at which imported and/or domestic biomass was discussed from June 2018 to present.

3. All correspondence (to include attached and/or associated documents) with the Minister for Climate Action and/or the Secretary General of DCCAE that mentions imported and/or domestic biomass from June 2018 to present.”

7. On 17 May 2019 Bord na Móna responded, refusing access to the information. It stated that, to the extent that the information sought existed, it was not held by or for Bord na Móna but was held by Biomass. It stated that Biomass was not a public authority and was not subject to the AIE Regulations. In the alternative, it stated that the exceptions in Articles 9(1)(c), (9)(2)(a) and 9(1)(d) of the AIE Regulations would apply to a greater or

lesser extent to the information, with the result that there was no obligation to disclose it.

On 17 May 2019 the notice party requested an internal review of the decision.

8. On 11 June 2019 Bord na Móna affirmed its decision to refuse access to the information on the basis that the information was not held by or for it but was held by Biomass. Again, it stated that Biomass was not a public authority and was not subject to the Regulations. Again, it identified that exceptions would apply, although this time it only identified the exceptions at Article 9(1)(c) and (d) of the AIE Regulations.
9. It is somewhat unclear from the refusal letters whether the exemptions were being invoked on behalf of Biomass or Bord na Móna or both. The tenor of the decisions, quoted below in this judgment, suggests that certain of the exemptions were being invoked on behalf of both Biomass and Bord na Móna.

Decision of the Commissioner

10. The matter was appealed to the Commissioner on 24 June 2019. The Commissioner's office exchanged correspondence with Bord na Móna and ultimately on 15 September 2021 delivered a Decision under Article 12(5) of the Regulations. Before describing the detail of the Decision, it is important to emphasize the confined nature of the Decision under appeal. No decision was made on whether Biomass was a public authority. The Decision was solely concerned with the question of whether the information was held by Biomass for Bord na Móna as that concept is defined by the AIE Regulations. This was because no separate request was made by the notice party to Biomass when Bord na Móna refused to supply the information. Nor did Bord na Móna pass the request for information on to Biomass as it would have been obliged to do under Regulation 7(6) had it considered Biomass to be a public authority. Had either of those steps taken place, the Commissioner might have been obliged to decide whether Biomass itself fulfilled the definition of a public authority. That would have engaged Article 3 of the AIE

Regulations described below, and specifically, the definition of public authority at subparagraph (c) i.e. whether Biomass had public responsibilities or functions, or provided public services relating to the environment and whether it was under the control of a body or person falling within paragraph (a) or (b). The Commissioner would have been required to consider whether Biomass fell under the list of bodies deemed to be a public authority at Regulation 3(i) to (vii).

11. But none of that happened. Accordingly, the appeal to the Commissioner by the notice party focused exclusively upon whether the documents held by Biomass were held for Bord na Móna within the meaning of the AIE Regulations. On 15 September 2021, the Commissioner concluded that they were so held, annulled the decision of Bord na Móna refusing access, and indicated Bord na Móna was expected to notify the notice party of a fresh decision on whether it would provide access to the withheld information. No decision was made as to whether any of the exceptions invoked by Bord na Móna applied. The reasons given for the Commissioner's Decision are considered below.

Statutory Appeal

12. This appeal was brought by originating Notice of Motion of 12 November 2021. The Notice of Motion was grounded upon an affidavit of Sonya Mallon sworn on 12 November 2021. That was replied to by an affidavit of Deirdre McGoldrick sworn 31 January 2022 on behalf of the Commissioner. The notice party was joined by way of Order of 13 December 2021. No affidavit was filed on behalf of the notice party.
13. All parties filed written legal submissions in advance of hearing. Two of the parties filed submissions well in excess of the applicable word limit, being 5000 words. In the circumstances, I directed that those parties file revised submissions complying with the word limit and submissions were delivered after the conclusion of the oral hearing on 16 December 2022. Parties should avoid exceeding the word limit unless an application is

made to the Court and an extension is granted for specified reasons. The word limit is intended to permit the Court to manage its workload and should be observed, absent an extension.

14. This is a statutory appeal and as such governed by Order 84C. Order 84C does not identify the nature of the exercise the Court may engage in when hearing an appeal of this type. However, paragraph 13 of the AIE Regulations provides for an appeal to the High Court on a point of law. The approach to an appeal on a point of law in the context of access to information on the environment is by now well established. I should only disturb the Commission's conclusion if the findings of fact were ones that could not reasonably have been found or inferences that could not reasonably have been drawn (see *Minch v Commissioner for Environmental Information* [2017] IECA 223). If a question is one of pure law, I should afford no deference to the Decision of the Commissioner (see "*Enet*" - *Minister for Communications, Energy and Natural Resources v Information Commissioner* [2020] IESC 57).

Directive 2003/4

15. Directive 90/313/EC on freedom of access to information on the environment was the first legislative measure adopted at EU level to address access to environmental information. The object of that Directive was to ensure freedom of access to information on the environment held by public authorities. There was no provision in relation to information held for public authorities.
16. Following the signature by the European Community (as it then was) of the Aarhus Convention, it was necessary to ensure that provisions of Community law be consistent with the Convention and therefore a new legal instrument in respect of access to information on the environment was required. Directive 2003/4 was adopted on 28 January 2003. It was implemented in Irish law by the AIE Regulations. There is a

significant volume of case law on the purpose of Directive 2003/4, both from the CJEU and from the Superior Courts in this jurisdiction. There is no dispute about the fact that Directive 2003/4 should be interpreted in the widest fashion possible to promote maximum access to environmental information. This may be seen for example in paragraph 16 of the Preamble, which provides as follows:

“16. The right to information means that the disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for environmental information in specific and clearly defined cases. Grounds for refusal should be interpreted in a restrictive way, whereby the public interest served by disclosure should be weighed against the interest served by the refusal. The reasons for a refusal should be provided to the applicant within the time limit laid down in this Directive.”

17. Article 1 of Directive 2003/4 identifies that its objective is:

“(a) to guarantee the right of access to environmental information held by or for public authorities and to set out the basic terms and conditions of, and practical arrangements for, its exercise; and

(b) to ensure that, as a matter of course, environmental information is progressively made available and disseminated to the public in order to achieve the widest possible systematic availability and dissemination to the public of environmental information. To this end the use, in particular, of computer telecommunication and/or electronic technology, where available, shall be promoted.”

18. Under Article 2, the term “public authority” has a complex definition, being defined as follows:

“2. ‘Public authority’ shall mean:

- (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 (a) or (b).*

Member States may provide that this definition shall not include bodies or institutions when acting in a judicial or legislative capacity. If their constitutional provisions at the date of adoption of this Directive make no provision for a review procedure within the meaning of Article 6, Member States may exclude those bodies or institutions from that definition.”

19. This definition has recently been considered by the CJEU in Case C-279/12 *Fish Legal v Information Commissioner* (ECLI:EU:C:2013:853), which was in turn considered by the Supreme Court in *NAMA v Commissioner for Environmental Information* [2015] 4 IR 626. I return to that definition, and its relevance to the issues in the within proceedings, later in this judgment.
20. The definitions of information held by or for a public authority are, unsurprisingly, critical to the determination of the issues in this appeal. Article 2(3) defines “*information held by a public authority*” as “*environmental information in its possession which has been produced or received by that authority*”.
21. Article 2(4) defines “*information held for a public authority*” as “*environmental information which is physically held by a natural or legal person on behalf of a public authority*”. Paragraph 12 of the Preamble to Directive 2003/4 explains the approach in

this regard, identifying that “*Environmental information which is physically held by other bodies on behalf of public authorities should also fall within the scope of this Directive*”.

22. Article 3 obliges Member States to ensure that public authorities are required, in accordance with the provisions of Directive 2003/4, to make available environmental information held by or for them to any applicant at his request and without his having to state an interest.
23. Article 4 is important and somewhat curious. It is headed up “Exceptions”. Article 4(2) provides, *inter alia*, as follows:

“The grounds for refusal mentioned in paragraphs 1 and 2 shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure. In every particular case the public interest served by disclosure shall be weighed against the interest served by the refusal.”

24. The very first ground for refusal may be found at Article 4(1)(a) i.e. that the information requested is not held by or for the public authority to which the request is addressed. It is unusual that the question of whether Directive 2003/4 applies to a particular situation or not is treated as an exception and one that must be interpreted restrictively. Almost every regulatory instrument necessitates a scoping type exercise by the person applying the legal instrument to ascertain whether a given situation comes within the scope of the regulatory regime. The position is no different here: a public authority, when faced with a request for environmental information, must decide whether Directive 2003/4 applies. One of the first matters they are likely to consider is whether the information in question is held by or for them. That would not usually be characterised as considering whether an exception to Directive 2003/4 applies but rather whether Directive 2003/4 applies at all. However, Article 4 makes it clear that a decision by a public authority that the information sought is not held by or for them is to be treated as an exception to the right

to information. Critically in the context of this appeal, that means that such a ground must be treated in a restrictive way, weighing the public interest served by disclosure against the interest in refusing. The thinking behind Article 4 is made clear by the default position identified in paragraph 16 of the Preamble to the Directive that disclosure of information should be the general rule.

25. Insofar as the implementation of Directive 2003/4 in Ireland is concerned, the AIE Regulations transpose the Directive faithfully. Environmental information held by a public authority is defined in Regulation 3 (the Interpretation section) as “... *environmental information in the possession of a public authority that has been produced or received by that authority*”. Environmental information held for a public authority is: “... *environmental information that is physically held by a natural or legal person on behalf of that authority*”.

26. The definition of public authority is very similar to that in Directive 2003/4, save that it includes a list of bodies deemed to be public authorities within the meaning of the Regulations. The extent of the obligation of a public authority in respect of the provision of environmental information is made clear by Regulation 7(1) of the AIE Regulations, which provides:

“A public authority shall, notwithstanding any other statutory provision and subject only to these Regulations, make available to the applicant any environmental information, the subject of the request, held by, or for, the public authority.”

27. A consideration of the legislative history of Directive 2003/4, helpfully provided by the parties, throws some light on the genesis of the provision concerning environmental information held for a public authority. The initial proposal by the European Commission of 29 June 2000 proposed that information held for a public authority shall mean

“environmental information which is held by a legal or natural person on behalf of a public authority under arrangements made between that authority and that person”.

28. The Commission’s Explanatory Memorandum identifies the justification for same as follows:

“In many cases, experience shows that environmental information which public authorities are entitled to hold on their own account is kept physically on their behalf by other entities. Access to such information may be requested by the public. Public authorities should not be entitled to refuse access to this information on grounds that it is not physically in their possession. The proposal ensures that, if such information exists and is kept for the public authority concerned under arrangements with another person or body, it should be made available by the public authority in the normal way”.

29. The Common Position adopted by the Council on 28 January 2002 altered the original wording and substituted the wording now reflected in Directive 2003/4, i.e., environmental information physically held by a natural or legal person on behalf of a public authority, thus deleting the Commission’s proposed requirement for an arrangement between the holder and an authority. The Communication from the Commission to the Parliament concerning the current position of the Council of Ministers of 31 January 2002 notes that *“The definition of ‘information held for a public authority’ laid down in Article 2(3) of the proposal was simplified. The underlying principle of the definition in the Commission proposal is however ensured”*. The Statement of the Council’s Reasons of 29 January 2002, 11878/1/01 identifies the reasons for the change as follows: *“the Council explained that “information held” means “physically held” and deleted the Commission proposal’s limitative requirement for an arrangement between the holder and an authority”*. The wording of the definition ultimately adopted is in my

view a wider one than that originally proposed since it does not require any “arrangement” between the holder and the authority. That it was intended to be wider is confirmed by the legislative history, particularly the reference to the “limitative requirement” in the Council’s Statement of Reasons. The requirement for an arrangement to exist would indeed limit the situations in which a body could be said to be holding for a public authority; removal of that requirement signifies a desire to ensure that a body may be considered to hold for a public body absent any formal arrangement or agreement.

30. Finally, the parties refer to the Aarhus Implementation Guide. The decision of the Court of Appeal in *Right to Know CLG v Commissioner for Environmental Information (Raheenleagh Power)* [2022] IECA 210 makes it clear that account is to be taken of the wording and aim of the Aarhus Convention and the Aarhus Convention Implementation Guide in interpreting Directive 2003/4, although the Guide does not have binding or normative effect. The Guide refers to the Convention requiring parties to ensure that public authorities possess and maintain environmental information relevant to their functions. It goes on to observe as follows:

“In practice, for their own convenience, public authorities do not always keep physical possession of information that they are entitled to have under their national law. For example, records that the authority has the right to hold may be left on the premises of a regulated facility. This information can be said to be “effectively” held by the public authority. Domestic law may already define conditions for physical and/or effective possession of information by public authorities. Nothing in the Convention precludes public authorities from considering that they hold such information, as well as the information actually within their physical possession”.

31. This text suggests that the purpose of a provision identifying an obligation to provide information not physically held by the public authority is to ensure that the obligation is not circumvented where that information is not physically within the possession of the public authority but can be said to be effectively held by the public authority.
32. Somewhat surprisingly, the concept of environmental information held for a public authority does not appear to have been addressed by the CJEU or any Irish court to date. When faced with a question relating to the interpretation of Directive 2003/4, it is necessary to adopt a teleological approach. This is first because of the general obligation when interpreting domestic legislation intended to implement EU law to look to the purpose of the provision, as identified in the Supreme Court in *NAMA* (when interpreting the AIE Regulations) as follows:

“There are rules for the interpretation of legislation introduced implementing an international treaty. In particular, this specific obligation undertaken by Ireland as a member of the EU requires that the courts approach the interpretation of legislation in implementing a directive, so far as possible, teleologically, in order to achieve the purpose of the directive. But furthermore, the language used in this statutory instrument, and in particular subparagraphs (a) to (c) is derived directly from Directive 2003/4/EC addressed to member states and intended to take effect in different national legal systems. That language is in turn derived from an international treaty negotiated between and agreed upon by a large number of international states with different legal systems.”

33. However, Directive 2003/4 imposes obligations of interpretation even more pronounced than the normal obligation to interpret a measure implementing EU law in accordance with the aims of the measure being transposed (see for example *Environmental*

Protection Agency v Harte Peat Limited [2015] 1 IR 462 and *Redmond v Commissioner for Environmental Information* [2020] IECA 83).

34. I discuss these obligations later in this judgment when considering whether the reference to environmental information being held “on behalf of” the public authority excludes the possibility that the information may also be held independently by the holder.

Arguments of the parties

Arguments of Bord na Móna

35. The Notice of Motion identifies that Bord na Móna appeals the Decision on the following points of law:

- (i) The Commissioner applied an erroneous interpretation of the term “environmental information held for a public authority” in the AIE Regulations, which interpretation is not consistent with the AIE Regulations or Directive 2003/4/EC on public access to environmental information.
- (ii) The Commissioner failed to have any adequate regard to the following matters:
 - Biomass is a separate legal entity;
 - Biomass operates as a stand-alone self-funding business with its own management and employees in a competitive market;
 - Biomass does not exercise any delegated functions on behalf of, or act as agent of, Bord na Móna;
 - Biomass does not store information on behalf of Bord na Móna;
 - Bord na Móna does not have a legally enforceable right to obtain any information held by Biomass and does not control any such information.
- (iii) The Commissioner relied on irrelevant considerations, in particular the overall relationship between Bord na Móna and Biomass in making its determination.

- (iv) The term “environmental information held for a public authority” does not include environmental information created by, and held by, a subsidiary of a public authority for its own commercial purposes.
- (v) In relation to specific findings by the Commissioner it is pleaded as follows:
- The relationship between Bord na Móna and Biomass is no closer than the usual relationship between a parent and wholly owned subsidiary and in any case the degree of connection is not directly relevant to the question of whether information is held for the parent company;
 - The finding that Biomass presented no separate face to the public is denied where a member of the public seeking information from Biomass can do so by directly writing to it at its registered office and in any case, what is relevant is that Biomass is a separate legal entity.
- (vi) Biomass does not hold information for Bord na Móna’s commercial purposes.
- (vii) It is possible for Biomass to refuse consent to disclosure of information to Bord na Móna and that consideration is in any case irrelevant to the question as to whether the information was held “for” Bord na Móna.
- (viii) The fact that Bord na Móna could offer the view that exceptions in the Regulations applied to the information does not mean the information was held “for” Biomass.
- (ix) Bord na Móna group does not present itself to the public as a single entity.

Arguments of the Commissioner

36. The Commissioner pleads that he reached the determination on the basis of his findings of fact and that the conclusions of law that he made were properly made on the basis of the primary facts. He refers to the high threshold for disturbing decisions of expert bodies. He pleads that he carefully considered the submissions of Bord na Móna.

37. In his legal submissions, the Commissioner lays significant emphasis upon the teleological approach to interpretation of Directive 2003/4 and the AIE Regulations and refers to the decision in *Nama* referred to above. He contends he adhered faithfully to the wording of the definition in Directive 2003/4 when arriving at his conclusion. He characterises the six matters considered by him in his Decision as the headline factors with sub considerations contained therein. He argues he did not focus on the general legal relationship between the two companies, but rather examined the overall factual position. He treated their relationship as being an important factor, but not the only factor to be considered in deciding whether the requested information was physically held on behalf of the public authority.
38. He identifies that s.34(1) of the Turf Act 1998 was only one aspect of his finding that there was a very close connection between the two companies. He argues that under s. 37(5), Bord na Móna was entitled to direct Biomass to hold information in a particular way. He suggests that the interpretation given to s.32(1) of the Turf Act 1998 by Bord na Móna, i.e. that it prevents Biomass providing the documentation sought pursuant to a s. 37(5) direction, is incorrect. He observed that this interpretation would strip s.37(5) of much of its practical effect as it would limit the co-operation between two entities formed for the pursuance of the same ultimate objective.
39. He rejects the argument of Bord na Móna that the consequence of the Decision is that any information created owned and held by a wholly-owned subsidiary will inevitably be deemed to be held by that subsidiary for the public authority, which will undermine the whole purpose and intent of the definition of public authority in Directive 2003/4 and Regulations. He argues that this does not follow from his Decision, which makes it clear that his conclusions were reached on the facts of the particular case.

Arguments of the Notice Party

40. In its legal submissions, the notice party focuses upon the Turf Acts and identifies that Biomass was established pursuant to the 1998 Act as a wholly owned subsidiary of Bord na Móna to perform its public administrative functions. It contends that it would contravene Article 4(3) of the Treaty on European Union to allow this separation to be used to defeat the objective to make information widely available. It emphasises the provisions of s.37(5) of the 1998 Act. It notes that Biomass acquired some of Bord na Móna's functions and powers. It argues that, even on the *Fish Legal* analysis, Bord na Móna and Biomass are public authorities. In summary, it points out that the Commissioner has reached the right conclusion but for incomplete reasons. Although at the hearing counsel for the notice party made it clear that, contrary to the position adopted in the written submissions, the notice party was no longer asking that the matter be remitted to the Commissioner to have the reasoning corrected, he nonetheless argues that Biomass and Bord na Móna are a single economic entity. The notice party refers to EU competition law in support of its argument that the corporate veil does not bar two organisations being considered as one unit for the purposes of relevant European law. It points out that Bord na Móna and Biomass are both emanations of the State and bound to give effect to the obligations resulting from EU law. It argues that Biomass ought to be treated as a public authority.
41. It points out that there is no suggestion in the jurisprudence relating to the scope of an appeal on a point of law that curial deference should apply in respect of a matter that is quintessentially a question of law. It characterises the relevant question as being whether Bord na Móna has control over Biomass, applying a European law test to a relationship established by Irish statute. It argues that this a question within the expertise of the Court and that curial deference does not apply.

42. It concludes by noting that, insofar as there may be any sustainable separation between the two entities, the objectives of Directive 2003/4 require that such separation should not become a means to prevent dissemination of environmental information and that this objective is served by treating Biomass as holding information “for” Bord na Móna.

Extraneous case law relied upon by the parties

43. The parties relied upon case law concerned with Directive 2003/4 and the AIE Regulations, as well as case law on the standard of review in a statutory appeal of this type. I found that case law useful in determining this appeal. However, all three parties also sought to rely upon case law from other sources by way of analogy.

44. Bord na Móna focused heavily on discovery case law referring variously to the Supreme Court decision in *Therma International Fund Plc v HSBC Institutional Trust Services (Ireland) Ltd* [2013] 1 IR 274, *Johnston v Church of Scientology* [2001] 1 IR 682, and *Gambro v Fresenius Medical* [2002] FCA 1359. It also referred to the decision of *Keating v Shannon Foynes Port Company* [2022] IEHC 505 in support of the proposition that the primary duty of directors is to act in the best interests of the company and not the shareholders. Reliance was also placed on the textbook *Bowstead and Reynolds on Agency* (22nd ed., Sweet & Maxwell) in support of the proposition that the subsidiary is not the agent of a company.

45. The Commissioner relied upon *Westwood v Information Commissioner* [2015] 1 IR 489 in respect of the concept of control under the Freedom of Information Act 1997. That Act is not related to Directive 2003/4 or the AIE Regulations in any way, despite both being concerned with access to information, and is a piece of domestic legislation that does not derive from, or transpose, any EU law measure. Its value as an interpretative aid to the Regulations is therefore distinctly limited in my view. He also relied upon case law on agency, including *VLM Holdings Ltd v Ravensworth Digital Services Ltd* [2013] EWHC

228 (Ch), *Redfern v O'Mahony* [2010] IEHC 253, *Fyffes Plc v DCC Plc* [2009] 2 IR 417, as well as case law on separate legal personality of the subsidiary, such as *Power Supermarkets Ltd v Crumlin Investments Ltd* (Unreported, High Court, Costello J, 22 June 1981), *Re Bray Travel Ltd and Bray Travel (Holdings) Ltd* (Unreported, Supreme Court, 13 July 1981) and *Environmental Protection Agency v Harte Peat Limited* [2014] IEHC 308. In relation to discovery, he relied upon the cases of *Northern Bank Finance v Charlton* (Unreported, High Court, Finlay P., 26 May 1977) and *Yates v Ciba Geigy Agro Ltd* (Unreported, High Court, Barron J., 29 April 1986).

46. The notice party sought to argue the relevance of a decision of the CJEU in Case C-882/19 *Sumal S.L. v Mercedes Benz Trucks Espana S.L.* (ECLI:EU:C:2021:800), a competition law decision that was concerned with the concept of an undertaking and its application in the case of parent and subsidiary companies. Also, in the context of competition law, it referred to the EC Regulation No.139/2004 (the “Merger Regulation”) and the definition of control in that Regulation. Finally, it referred to Case-261/18 *Commission v Ireland (Derrybrien Wind Farm)* (ECLI:EU:C:2019:955).
47. I do not consider any of this law to be particularly helpful in the context of the decision I have to make. Case law on discovery arises in the specific context of discovery. It constitutes a developed body of law based on specific wording from Rules of Court in both the United Kingdom and in Ireland. It derives from an entirely different context to the instant one i.e. where the exclusive purpose of providing materials is so that they may be used fairly in litigation. No abstract principle of access to information for the purposes of protecting the environment underlies that case law, unlike the position under Directive 2003/4. Equally the law on agency, derived from the common law, arises in a commercial context and cannot be considered as applicable to the context of the AIE Regulations. The provisions on mergers and on the concept of an undertaking are again grounded in a

highly specific legal context i.e. competition law, which aims to ensure fair competition between undertakings. It is not useful in my view as an aid to interpreting Directive 2003/4 which is *sui generis* and entirely unrelated to competition law.

48. In summary, I understand the parties sought to employ analogy in circumstances where there is no case law on the correct interpretation of the term “information held for a public authority”. However, I consider the parallels sought to be drawn largely irrelevant, given both the specific nature and purpose of Directive 2003/4, and the distinct and separate context in which each of those parallels arise. Accordingly, I do not propose to consider the caselaw identified by the parties by way of analogy any further.

Provisions of the Turf Acts

49. Before considering the Decision, it is appropriate to first consider the legislative context in which Biomass and Bord na Móna operate, as this was central to the reasoning of the Commissioner. The provisions of the Turf Development Acts 1946 to 1998 govern the relationship between Bord na Móna and Biomass. I am quite satisfied that the Commissioner had regard to these provisions and that they informed his Decision. This may be seen from various parts of the Decision. For example, at paragraph 7 he identifies that he has considered all materials submitted in the course of the investigation, which includes the Turf Acts. At paragraph 30 he identifies the statutory context relating to Biomass. In the conclusion section, reference is made to various provisions of the Turf Acts.
50. It is therefore necessary to consider in some detail the relevant statutory provisions. The 1946 Act established Bord na Móna. The duties of Bord na Móna are identified in the Act, including the production and marketing of turf and turf products. The 1998 Act established Bord na Móna as a public limited company (the “Company”). Section 9(2) provides that the principal objects of the Company shall be those comprised in the

functions conferred on Bord na Móna by the Turf Development Acts 1946 to 1995. Section 32 provides that a person shall not disclose confidential information obtained in the context of their relationship with the Company or a subsidiary unless they are duly authorised by law to do so.

51. Part 3 of the Act establishes subsidiaries. Section 34 provides that, for the purpose of enabling its principal activities to be carried on by subsidiaries of the Company, the Company shall cause companies to be formed and registered under the Companies Acts. Section 36 is important. It provides that the objects of the subsidiaries, as stated in their memoranda of association, shall be that the principal activities, at least, of the Company are carried on by the subsidiaries. Section 37 permits there to be included among the objects of each of the subsidiaries such other functions of the Company as may be approved by the Company with the consent of the Minister for Public Enterprise and the Minister for Finance.
52. Section 37(4) provides that where any function of the Company is a function of a subsidiary, enactments relating or applied by the Act to the Company shall in respect of that function apply to the subsidiary as it applies to the Company, with any necessary modifications. Section 37(5) was considered in some detail by the Commissioner in the Decision and was the subject of submissions by counsel for the three parties at the hearing. It provides as follows: *“A subsidiary shall perform its functions in compliance with such directions as the Company may give to it in writing from time to time”*.
53. The combined effect of those provisions appears to be as follows. Subsidiaries are created to enable Bord na Móna’s principal activities to be carried those subsidiaries. Those activities are the functions of Bord na Móna as identified in the Turf Acts. Functions include the powers and duties of Bord na Móna. Where a function of Bord na Móna is a function of a subsidiary, enactments applying to Bord na Móna apply to the subsidiary

in respect of the function. Bord na Móna is entitled to direct the performance of the function of the subsidiary and the subsidiary is obliged to comply with such directions.

54. Sections 38 to 50 deal with the structure of the subsidiary and its relationship with the Bord na Móna. It is clear from those provisions that Bord na Móna exercises enormous control over the subsidiary. Sections 38 and 39 provide that the Memorandum of Association and the Articles of Association of each of the subsidiaries must be approved of by the Company with the consent of the Minister and the Minister for Finance. Section 41 provides that the whole of the issued share capital of each subsidiary shall be held by the Company or nominees of the Company. Shares in a subsidiary may not be issued or transferred to a person other than the Company or person holding them in trust for the Company without the consent of the Minister and the Minister for Finance. The chairperson of the subsidiary shall be appointed by the Company with the consent of the Minister under s.42. Section 43 provides that the directors of a subsidiary shall be appointed and may be removed by the Company with the consent of the Minister. The remuneration of the chair and directors of a subsidiary and the other terms and conditions upon which they hold their office shall be determined by the Company with the consent of the Minister. Equally, the remuneration and terms and conditions of employment of the staff of each subsidiary shall be such as the Company may determine.
55. What is striking about the statutory regime is the extent of integration of Bord na Móna and its subsidiaries. The subsidiaries are carrying out the functions of Bord na Móna under the Turf Acts and must do so in accordance with the direction of Bord na Móna if it chooses to so direct them. In my view, the statutory provisions disclose an unusually close relationship between the two companies, with features additional to those that might normally exist between a parent and a subsidiary.

Discussion and Decision

Separate legal identity of Biomass from Bord na Móna /Control of Biomass by Bord na Móna

56. At paragraph 48 of the Decision, under the “Conclusions” section, the Commissioner concludes that the information within the scope of the request held by Biomass is held for Bord na Móna for the reasons set out in the following paragraphs. There follow six paragraphs identifying the basis for his finding, each of which I deal with below. The first of these may be found at paragraph 49:

“49. First, although BnM Biomass has a separate legal personality and operates independently of BnM plc in relation to its commercial operations, there is a very close connection between the two companies, closer than the usual relationship between a parent company and a wholly owned subsidiary. This close connection is expressly envisaged by the 1998 Act. Section 34(1) of the 1998 Act provides that subsidiaries shall be formed by BnM plc “for the purposes of enabling its principal activities to be carried on”. BnM plc has a 100% shareholding in, and has guaranteed the liabilities of, BnM Biomass (see section 41 of the 1998 Act and the 2020 annual Report, p.58). BnM plc and BnM Biomass share the same Board members and Company Secretary (see the 2020 Annual Report, p.10). BnM plc appoints the chairperson and directors of BnM Biomass, determines their terms and conditions and remuneration and is responsible for their removal (sections 42 to 44 of the 1998 Act). BnM plc retains an express power to direct BnM Biomass to carry out its activities in any way that BnM plc sees fit (section 37(5) of the 1998 Act). The debates in the Oireachtas during passage of the Bill support the continuing close connection between the companies, as they indicate that the purpose of forming

subsidiaries was not to create wholly independent commercial entities, but to ensure compliance with European law on state aid and competition, should state financing of BnM take place in future?”

57. Bord na Móna argues that the Commissioner was incorrect both in his substantive conclusion that the information was held for Bord na Móna, and in considering that the relationship between the two companies generally was a relevant consideration. It argues that the Commissioner erred in considering the general nature of the relationship between the two companies, when he ought to have only been considering whether Bord na Móna was entitled to hold such information on its own account. Using an analogy with the decision in *Johnston* (a decision on discovery and as such of limited relevance for the reasons I identify above) it argues that the Court should only be concerned with the Company’s relationship so far as it was relevant to the documents in issue.
58. I agree that the only matter the Commissioner was charged with deciding was the narrow question of whether Biomass held the information for Bord na Móna within the meaning of Directive 2003/4. However, it is unrealistic to consider that question can be decided in the absence of a consideration of the relationship between the two companies. I consider it was quite permissible to look at the nature of their relationship. If the Commissioner had then proceeded to decide the question of access to information exclusively on the basis of that relationship, I agree he would have erred. However, it is clear from the Decision, particularly paragraphs 48 onwards, that his consideration of the relationship between the parties was undertaken to inform his response to the question he was charged with i.e. was the information held for Bord na Móna.
59. In respect of the Commissioner’s conclusions on the closeness of the relationship between the companies, Bord na Móna relies heavily on the separate and distinct identity of Biomass. Bord na Móna emphasises that Biomass does not exercise any delegated

functions on behalf of, nor act as agent of, Bord na Móna and that Bord na Móna is not involved in the day-to-day running of the business. It argues that any link between the commercial aims of Biomass and those of Bord na Móna could not have the consequence that Biomass held information for or on behalf of Bord na Móna within the meaning of Directive 2003/4, arguing that such an approach would result in subsidiaries inevitably being treated as holding information for their parents, contrary to the distinction drawn in Directive 2003/4 between different entities in a group. Bord na Móna places heavy emphasis on the fact that it neither owns nor controls the information and has no power to decide how the information is treated by Biomass.

60. The Commissioner makes it clear that the information sought was not held by Bord na Móna. He records the submission of Bord na Móna that the information is both in the ownership and physical possession of Biomass, and that Biomass created the information and is responsible for adding to, removing, editing and storing that information. At paragraph 37 of the Decision, in considering the question whether the information was held by Bord na Móna, the Commissioner makes it manifest that he is treating Biomass and Bord na Móna as entirely separate companies as follows:

“37. Although they are related companies, BnM plc and BnM Biomass are separate legal entities with separate legal personalities. I accept BnM plc’s submission that the scheme of the AIE Regulations makes a clear distinction in the definition of public authority between parent companies and their subsidiaries, such that information held “by” a subsidiary is not automatically considered to be information held “by” its parent company. This position does not necessarily undermine the objectives of the AIE Directive. Information held by a subsidiary may, in some circumstances, be held “for” the parent company.

Equally, the subsidiary may, in some circumstances, be itself a public authority to whom an AIE request may be made.

38. In this case, I am satisfied that any additional information within the scope of the request which is held by BnM Biomass is not held “by” BnM plc.”

61. In my view, Bord na Móna has failed to establish that the Commissioner has erred by failing to recognise the separate legal personality of the two companies or given insufficient weight to their separate identities. The Commissioner clearly acknowledged the separate legal identity of the two companies. He certainly considered the nature of the relationship between them as established by the legislative structure pursuant to which they both operate.
62. I have dealt in some detail above with the provisions of the Turf Acts, considered by the Commissioner, because in my view they establish that the two companies did indeed have a connection closer than that usually existing between a parent and wholly owned subsidiary. I can see no error or flaw in the Commissioner’s conclusions in this respect. The factors relied upon by Bord na Móna, such as the fact that it is not involved in the day to day running of the business of Biomass and does not own the information and is not the agent of Bord na Móna do not undermine this conclusion. Moreover, certain of its observations, such as the submission that Biomass does not exercise any delegated functions on behalf of Bord na Móna, fail to recognise the unusual statutory relationship. Pursuant to s.36, the principal activities of Bord na Móna are carried on by the subsidiaries. Biomass as a subsidiary is therefore carrying on the principal activities of Bord na Móna. Pursuant to s.37(5), Biomass as a subsidiary shall perform its functions in compliance with such directions as Bord na Móna may give in writing. Those statutory provisions confirm in my view the accuracy of the conclusion of the Commissioner that the two companies enjoy an unusually close relationship, while acknowledging they have

separate legal personalities. That alone does not answer the question as to whether Biomass holds the information for Bord na Móna; but it is a factual context that cannot be ignored in answering the question.

63. Separately, in its arguments, the notice party seeks to elide the distinction between Bord na Móna and Biomass on the basis that, in EU law, the concept of separate legal identity is often pierced. As identified above, it sought to rely on examples of same in EU law such as in the competition law context. But Directive 2003/4 does not seek to undermine the distinction between separate legal entities to facilitate access to environmental information. The notice party has not identified any provision of Directive 2003/4 in support of this argument.
64. Nor can the question of control of one company over another company resolve the issue of whether the company being controlled holds information “for” the controlling company. The notice party seeks to suggest that the control Bord na Móna exercises over Biomass means either that they are one entity and/or that the control establishes that Biomass holds the information for Bord na Móna. But the definition of a public authority under Directive 2003/4 demonstrates that control alone is unlikely to be determinative of whether environmental information is held by one body “for” another. The third category of bodies defined as public authorities within the meaning of Directive 2003/4 under Article 2(c) are as follows:

“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 with paragraph (a) or (b),”

65. If control by a body within the definition of a public authority was sufficient to result in the company being controlled being treated as the same legal entity for the purposes of

Directive 2003/4, Article 2(c) would be meaningless since there would be no need to ever consider whether a company so controlled also met the other tests in Article 2(c).

66. In short therefore, the notice party's argument that the Commissioner's Decision should be upheld on the basis that Bord na Móna controls Biomass and that therefore the material must be treated as being held for Bord na Móna, elides the distinction Directive 2003/4 itself draws between separate legal entities. Further, the structure of Directive 2003/4 makes it clear that the control of a company by another company does not determine the issue of whether the company, under the control of another, holds information "for" that company. Rather Directive 2003/4 identifies a definition: is environmental information physically held by a person on behalf of a public authority.
67. In short, the Commissioner was correct in treating Biomass and Bord na Móna as two separate companies and not permitting the issue of the general control of Biomass by Bord na Móna to determine the question before him.

Control over the information

68. At paragraph 52 of the Decision, the Commissioner concludes that the board of Biomass could not realistically refuse consent to disclosure of information to Bord na Móna. Bord na Móna argues the Commissioner erred in that regard. It contends that in the absence of rights of ownership or control over the information, Bord na Móna cannot be said to have any entitlement to hold such information on its own account, or that Biomass is holding the information "for" it. At paragraph 70 of its submissions, it is submitted that this is reinforced by the absence of a legally enforceable right to obtain the information, such a right by necessity being implicit in an entitlement to hold information on one's own account.
69. I agree that if Bord na Móna had no control over the information, the information could not be considered as held for Bord na Móna. However, I cannot agree that the

Commissioner was incorrect to conclude Bord na Móna in fact has a legally enforceable right to obtain the information. Section 37(5) of the Turf Act 1998 makes it clear that Bord na Móna may require a subsidiary to perform its functions in compliance with directions from Bord na Móna. As defined in the Act, a function includes powers and duties and references to the performance of a function include, as respects a power or a duty, references to the exercise of the power or the carrying out of the duty. Biomass must be taken to have the power to provide information to a third party while complying with its obligations to maintain confidentiality under s.32. Additionally, it is hard to imagine that Biomass does not have a duty to provide information to Bord na Móna to allow its parent to ensure that it is complying with its obligations under s.36 to carry on the principal activities of the Company. Having regard to those powers and duties, Bord na Móna must be entitled to direct Biomass to carry out its functions in a specific way i.e. to direct Biomass to provide specified environmental information to Bord na Móna. Accordingly, in my view, Bord na Móna must be entitled under s.37(5) to request Biomass to provide it with the information coming within the scope of the request. There is no limitation on the nature of the directions in the subsection.

70. To interpret the subsection as Bord na Móna does, i.e. as only permitting the Company to direct it to perform its functions in a specified way but not to give a direction requiring environmental information, is not an interpretation that reflects the wording of the section. Separately, Bord na Móna seeks to resist this interpretation of the subsection on the basis of s.32(1) of the 1998 Act, which prevents directors or members of the staff of subsidiaries, or advisers to subsidiaries, disclosing confidential information unless duly authorised or required by law. However, if a direction is made pursuant to s.37(5) then in my view it must be considered as being duly authorised and/or required by law, and

so provisions on confidentiality cannot be treated as restricting the disclosure of such information.

71. In summary, insofar as entitlement to the information goes, I am satisfied that the provisions of s.37(5) give Bord na Móna the entitlement to access the information sought by the notice party by way of a direction. Accordingly, I can see no error in the conclusion of the Commissioner at paragraph 52 of his Decision that Biomass could not realistically refuse consent to disclosure of information to Bord na Móna having regard to s.37(5). However, access to the documents is necessary but not sufficient to establish that documents are held for Bord na Móna. In those circumstances the Commissioner correctly went on to consider other factors.

Approach of Bord na Móna to the exceptions

72. At paragraph 53, the Commissioner concluded that Bord na Móna had sufficient knowledge of the information sought by the notice party and the activities of Biomass to offer its view that exceptions in the Regulations applied and that this situation was inconsistent with the view that the material was not held for Bord na Móna. To understand this conclusion, it is important to recall that, as detailed below, when the original application was made by the notice party for information, Bord na Móna not only refused because the information was held by Biomass but also, without prejudice to that position, identified that various exceptions in the AIE Regulations applied such that the notice party was not entitled to the information in any case.
73. Bord na Móna criticises this finding and suggests that the Commissioner erred in interpreting the correspondence as supportive of his conclusion that the relevant information was held for Bord na Móna. I cannot agree. The material before the Commissioner was in my view strongly supportive of his conclusion. It suggests that Bord na Móna was in possession of, and/or able to access, and/or very familiar with

certain parts of the information sought by the notice party. If one looks at the first instance decision of 17 May 2019 of Bord na Móna refusing the information, it is argued that even if the Regulations did apply to Biomass, the exception at Article 9, which permits refusal where same would adversely affect commercial or industrial confidentiality, is engaged. The letter states inter alia:

“The information you are requesting is confidential and there is a real and substantial risk that Bord na Móna’s commercial interests would be threatened should this information be released... It is my opinion in this instance that the commercial sensitivities would outweigh the public good of releasing this information. Bord na Móna is a commercial semi-state body. One of the mandates with which we have been tasked is to deliver on government policy. In order to do this, Bord na Móna must be able to function and provide its services in a competitive environment. This competitive environment would be lost if the information were to become public and could be shared with our direct competitors in the market”.

74. If, by the reference to Bord na Móna, the author is referring to the parent Company, the reliance upon Bord na Móna’s commercial interests rather than those of Biomass is striking. If on the other hand the reference to Bord na Móna is a reference to both Biomass and the Company and perhaps other subsidiaries, it demonstrates the extent to which the companies do indeed have the close relationship referred to by the Commissioner in his Decision and the degree of familiarity that the Company clearly has with the business of Biomass.

75. In the same letter Bord na Móna stated:

“We would rely on the exemption set out in Article 9(2)(a) of the Regulations as the information requested is “manifestly unreasonable having regard to the

volume or range of information sought”. The principal activity of Bord na Móna Biomass Limited is the import and use of biomass. As such, there are thousands of documents that would need to be reviewed to respond to your queries.”

76. The exemption in relation to commercial confidentiality is again invoked in relation to the request for documents from meetings with ESB and/or Department for Communications Climate Action and Environment (“DCCAE”) representatives on the basis that Bord na Móna is a commercial body that must be able to function and provide its services in a competitive environment. In relation to the request for correspondence with the Minister for Communications, Climate Action and Environment and the Secretary General of the DCCAE, it is stated that the Minister is a shareholder in Bord na Mína Plc and as such is often consulted in relation to various matters in which Bord na Móna Plc and/or its subsidiaries are involved. The letter is signed by Anne-Marie Curry, who signs off as “*Company Secretary and General Counsel, Bord na Móna Plc and its subsidiaries*”. It is striking that there is no separation identified between the business and activities of Biomass and those of Bord na Móna and that a commonality of interests is asserted.

77. In the decision of 11 June 2019 following an internal review, the decision maker John Reilly, described as Head of Powergen Development, states as follows:

“While the Company has entered into agreements in respect of the purchase of biomass, those agreements are commercially sensitive in nature and also compel us to adhere to confidentiality obligations. The release of this information would be of great competitive advantage to similar entities competing for the same or similar supplies of biomass, as they essentially would be capable of outbidding the Company for those supplies. Further, the release

of any such information would mean that the Company would struggle to secure supplies, at a competitive price, which in turn would jeopardize a core part of our business.”

78. He therefore affirmed the decision to refuse the request for information in accordance with Article 9(1)(c) of the Regulations, which permits refusal due to the confidentiality of the information. In relation to a further exemption under 9(1)(d), under the heading “Public Benefit”, Mr. Reilly refers to the following:

“I would reiterate that Bord na Móna is a commercial semi-state body where its subsidiary companies compete in a range of different market segments and in order to do this they must be able to function and provide its services or purchase materials in a highly competitive environment. Any competitive advantage achieved through our rigorous procurement processes would be lost if the requested information were to become public and could be shared with our direct competitors in the market”

79. There are two striking aspects to this letter. First, the reference to “us” and “our” is significant in my view. There is a clear commonality of purpose and closeness of connection displayed in the response. Second, the letter suggests that in fact Bord na Móna knew of the content of the agreements for the purchase of biomass as well as the procurement processes engaged in by Biomass, suggesting a familiarity and identification with the information sought.

80. In the circumstances, I can see no error material or otherwise, in the conclusion of the Commissioner expressed at paragraph 53 of his Decision that Bord na Móna had sufficient knowledge of the information sought by the notice party and the activities of Biomass to offer its view that exceptions in the Regulations applied and that this situation was inconsistent with the view that the material was not held for Bord na Móna.

New evidence sought to be admitted

81. In the affidavit sworn by Sonya Mallon of 12 November 2021, company secretary and general counsel of Bord na Móna, she averred that in respect of the letter of 17 May 2019 from Anna-Marie Currie and the invocation of exemptions by her, “[t]o the best of my information and belief, Ms. Curry [sic] had not requested BnM Biomass for sight of the information in order to consider the application of Article 9”. The Commissioner criticised this averment on the basis that there was no affidavit from Ms. Currie and nor was there any affidavit from the internal reviewer Mr. Reilly of Powergen. He queries Ms. Currie’s means of knowledge.
82. I do not have to resolve these disputes since I am reviewing the Decision of the Commissioner made on the material before him and the affidavit of Ms. Mallon obviously post-dates the Decision. The Decision does not contain any findings about whether Bord na Móna accessed the material to respond to the request. In the context of a statutory appeal on a point of law, I consider it inappropriate to take into account new material and therefore I do not propose to consider this averment.

Holding of information by Biomass both for own purposes and those of Bord na Móna

83. What I consider to be the core conclusion underpinning the Decision may be found at paragraph 51 as follows:

“Third, while I accept the submission that BnM Biomass created and holds the information requested for its own commercial purposes, I am satisfied that it also holds the information for BnM plc’s commercial purposes. The commercial aims of both companies are inextricably linked. This is evidenced by regulation 4.3 of BnM Biomass’s Constitution, which states that “the business of the Company shall be conducted in accordance, and in a manner consistent, with

the functions of Bord na Móna as set out in the Turf Development Acts 1946-1998 and in accordance with the Turf Development Acts...” Bord na Móna Group’s 2015 “Sustainability 2030” statement relies heavily on the development of biomass in achieving the reorientation of “Bord na Móna from being nearly solely focused on energy peat into other business areas” (p.1). In that statement, the Group CEO states that Bord na Móna’s future beyond 2030 will not be in energy peat. He states: “Our land is a huge asset and we will continue to produce energy but it will be through biomass, solar, landfill gas, wind and waste to energy.” The interview continues: “Biomass is central to Bord na Móna’s sustainability agenda for the future – already, the company is the largest user of biomass in Ireland, consuming 320,000 tonnes last year. The company is also developing a biomass briquette. ...As an illustration of the centrality of biomass for the business, the company has created a new division lead by a Head of Biomass, Patrick Madigan, who reports directly to the CEO. ... Biomass already contributes significantly to Bord na Móna’s bottom line....”(see pp.2-5).I cannot accept that BnM plc, as the parent company in the Group, has no commercial interest in the development of Biomass as a central part of the whole Group’s business, particularly in circumstances where energy peat, which BnM plc professes to be its core function, will no longer be the Group’s future beyond 2030.”

Holding of information for a dual purpose

84. By accepting that the information was held for the commercial purposes of both Biomass and Bord na Móna, the Commissioner is recognising that a person may hold information on its own account while also holding it “for” another person within the meaning of

Directive 2003/4. Bord na Móna argued that the Commissioner was wrong in so deciding, contending as follows in its written submissions (paragraphs 43 and 44):

“As is evident from the Commission’s Proposal, “information held for a public authority” clearly intended a separation of ownership and physical possession of the information, with ownership/rights over the information at all times resting with the public authority and physical possession with the other person... Thus, existence of rights of ownership and control over the information by another person is inconsistent with such information being held by such person by a public authority”.

85. Accordingly, in deciding whether the Commissioner erred in his interpretation, I must consider whether the words “information held for a public authority” must be interpreted to exclude a situation where the information is held both by a company on its own account but also for another company. In other words, does the definition permit of a holding of environmental information for a dual purpose? Given the principles of interpretation that I must apply, in my view the answer to this question must be a resounding yes for the following reasons.
86. First, this is a question of pure legal interpretation and does not necessitate any deference to the Commissioner’s view. In deciding it, I must follow the approach identified by Directive 2003/4. As identified earlier in this judgment, Article 4 of Directive 2003/4 requires me to interpret specified grounds for refusal including that the information is not held for a public authority in a restrictive way, taking into account the public interest served by disclosure. Paragraph 16 of the Preamble identifies that the right to information means that the disclosure of information should be the general rule. The objectives of Directive 2003/4, identified at Article 1, are to guarantee the right of access to environmental information held by or for public authorities and to ensure that

environmental information is progressively made available and disseminated to the public to achieve the widest possible systemic availability (see also Recital 9). The CJEU has referred to those objectives of Directive 2003/4 as being directed towards ensuring a general principle of access to environmental information held by or for public authorities and to ensure the widest dissemination of same (see Case C-442/14 *Bayer Crop Science* (ECLI:EU:C:2016:890) and *Fish Legal*). In *Bayer Crop Science*, a suggested interpretation of the term “emissions into the environment” that would have been contrary to Directive 2003/4’s objective of the widest possible disclosure of environmental information was rejected, *inter alia*, having regard to the purpose of Directive 2003/4.

87. Bearing in mind this interpretative approach, I turn to the term “on behalf of”, employed in the definitions section of the Directive to explain what holding for means. There are two possible approaches to this term. The first is that it can only cover the situation where the holder of the documents has no separate interest in the information and is holding it exclusively for the account of the public authority e.g. as per the example given by Bord na Móna in its submissions of the holder of the information being an archive storage facility or a document cloud system. In support of this interpretation, Bord na Móna relies upon the passage in the European Commission’s Explanatory Memorandum accompanying its proposal: “*In many cases, experience shows that environmental information which public authorities are entitled to hold on their own account is kept physically on their behalf by other entities*”.
88. An alternative, and wider, interpretation is that the definition of holding “for” encompasses both the above situation and a situation where the holder of the information holds it both for its own purposes and for those of a public authority.

89. The principles of interpretation deriving from Directive 2003/4 could not warrant an interpretation of the words “on behalf of” that is *contra legem*. But in my view the wider interpretation referred to above does not offend against the meaning of “on behalf of”. A person may be holding information on behalf of another person and may also be holding it on its own behalf or its own account. Stating that the information is being held on behalf of another does not necessarily exclude the possibility that the information is independently held by the holder. The fact that the holder holds the information on its own account does not render untrue the proposition that it is held on behalf of another.
90. Given that “on behalf of” permits of an interpretation where the holder of information is holding it both for its own purposes and for the public authority, the principles of interpretation deriving from Directive 2003/4 strongly point towards this interpretation. The narrower interpretation contended for by Bord na Móna would require the holder of the information to have no independent interest in the information if they are to be treated as holding for a public authority. Such an interpretation would considerably reduce the situations in which a body would be treated as holding information for a public authority and would potentially operate to considerably reduce the right of access to environmental information. I would be imposing a limitative requirement, not otherwise found in the definition, somewhat like that which was rejected by the Council of Ministers when excluding the requirement for an arrangement between the holder and the public authority. The reliance upon the reference in the Commission’s Explanatory Memorandum by Bord na Móna is not persuasive, given that the Council of Ministers expressly removed what they considered to be limitative language and adopted what they referred to as a “simplified” version. The simplicity of the definition permits of a wider interpretation than that contended for by Bord na Móna.

91. In summary, because of the approach I am required to take to “exceptions” under Directive 2003/4, and the imperative to ensure the widest access possible to environmental information, I conclude that a body may hold environmental information for its own use while simultaneously holding it for a public body. Accordingly, the Commissioner made no error of law in this respect.

Evaluation by the Commissioner

92. Having resolved that question of interpretation of Directive 2003/4, I must now turn to the Commissioner’s conclusion that, in this factual context, Bord na Móna had a commercial interest in the development of biomass as a central part of the whole Group’s business and that accordingly information held by Biomass was held not only on its own account, but also “for” Bord na Móna and its commercial purposes. Given the definition of holding “for” a public authority, that must mean the information was being held on behalf of Bord na Móna. I should only disturb that conclusion if the findings of fact could not reasonably have been made or inferences drawn from those facts were ones which could not reasonably have been drawn (see *Minch v Commissioner for Environmental Information* [2017] IECA 223).

93. Inferences may be reversed if they are based on an interpretation of documents and are incorrect or if the conclusions reached show that the decision maker has taken an erroneous view of the law. In this case, the Commissioner has interpreted the Turf Acts and therefore at least part of his Decision is premised on his view of the law. He is not entitled to deference in respect of those views. The only real contest in that respect is the meaning of s.37(5). I have identified above why I agree with the approach taken by the Commissioner i.e. that it means that Bord na Móna can direct Biomass to provide it with the information sought.

94. However, where he is applying his understanding of the law to the facts before him and arriving at a view as to whether the information was held for Bord na Móna, then I should only disturb those conclusions if findings of fact or inferences drawn from those facts were ones which could not reasonably have been drawn. Applying that test, it seems to me that his conclusion that the information was held by Biomass for Bord na Móna's commercial purposes and therefore, "for" Bord na Móna is not one that I should disturb. My reasons for so concluding are as follows:

- Under s.36 of the Turf Act 1998, the subsidiaries are carrying out the principal functions of Bord na Móna under the Turf Acts;
- Under s.37(5), the subsidiaries may be directed compulsorily by Bord na Móna to perform those functions;
- Biomass is controlled by Bord na Móna under the structure established by the Acts;
- Bord na Móna had the statutory power to direct Biomass to provide the information requested to it;
- In expressing its view on the availability of exceptions under Directive 2003/4 in respect of the information sought, Bord na Móna:
 - demonstrated its shared purpose with Biomass;
 - did not always distinguish between Biomass and Bord na Móna;
 - demonstrated its familiarity with at least some of the information sought;
 - invoked its own commercial position as a justification for the availability of those exemptions;
- Biomass and Bord na Móna have common commercial interests, as demonstrated by the material identified by the Commissioner, in particular Biomass's constitution, the document entitled Sustainability 2030 and the Bord na Móna Annual Report 2020.

95. Having regard to the above, I consider there was ample material before the Commissioner to allow him to conclude that the documents were held by Biomass “for” Bord na Móna. This was not in my view an unreasonable inference from the documents before him, does not disclose an erroneous view of the law and is not an erroneous or unreasonable conclusion.

Commissioner’s findings at paragraphs 50 and 54

96. Finally, Bord na Móna criticises the conclusions of the Commissioner at paragraph 50 and paragraph 54 to the effect Biomass presents no separate face to the public permitting information to be sought directly from it. Bord na Móna refutes this argument, pointing out that should a member of the public wish to access information held by Biomass, it can do so by writing directly to its registered office which is a matter of public record or complete the contact form on the Bord na Móna Group website. It points out that the notice party chose not to request information directly from Biomass. Bord na Móna adds that it is common for the website in relation to a group of companies to host the group’s subsidiary and related companies and this is in no way indicative of the legal relationship between such companies. The contents of a website cannot elide the consequences of separate legal personality. Nor does the presentation on the website have any bearing on issues of ownership and control of information created held and controlled by a subsidiary.

97. The Commissioner notes that a person seeking information held by Biomass has no option but to contact Bord na Móna to seek that information because Bord na Móna presents itself on its website as a single entity and members of the public are not offered the option of contacting the subsidiaries of Bord na Móna to make a request for information. The Commissioner observes that Bord na Móna’s website and the annual report presents the group as a single entity and does not distinguish between the parent

and its subsidiaries. The Commissioner observes that, in those circumstances, his conclusion that the information is held for Bord na Móna is consistent with the purposes of Directive 2003/4.

98. I agree with the submissions of Bord na Móna in that, taken in isolation, the initial impression given by a website and annual report could not justify a finding that the information was held for Bord na Móna. Further inquiry would necessarily elicit that the relationship between the companies was one between separate legal entities. Indeed, in this case, when Bord na Móna replied to the notice party and informed it that the entity holding the information was Biomass, the notice party could have sought the information directly from Biomass. Instead, the notice party chose to appeal the refusal by Bord na Móna.
99. Nonetheless, it is clear from paragraph 54 that his conclusions on this situation are not the core of his Decision and may be treated as very much ancillary to his substantive reasons for concluding that Biomass holds the information for Bord na Móna. His focus appears to be on the fact that Directive 2003/4 emphasises the need for effective and easy access to environmental information and that, where Biomass is not identified as a body from which information can be sought, then it is consistent with the purposes of Directive 2003/4 to find Biomass holds the information for Bord na Móna. Had this been the sole basis for arriving at his Decision, I consider it would have been insufficient. But where it is simply a secondary point, made largely to put his core conclusion in context– as I consider it to be – it is not a basis for undermining the legality of this Decision.

Consequences of upholding Commissioner’s Decision

100. Finally, I should address a point strongly emphasised by counsel for Bord na Móna to the effect that the import of the Decision is to undermine the distinction between parents and subsidiaries, and that the ultimate terminus of the Commissioner’s Decision is to

disregard the concept of separate legal personality. I cannot agree. The Commissioner's approach did not elide the distinction between legal entities, including a wholly owned subsidiary of another company. Directive 2003/4 acknowledges the concept of separate legal identities, as discussed above in this judgment, and the Commissioner expressly recognised the separate legal identities of Biomass and Bord na Móna. The reference to held "for" a public authority does not mean that any company with control over another or with a close relationship with the public authority can be considered as holding documents for them. Control of a company by a public authority cannot be treated as meaning information held by that company is held for the public authority.

101. Rather my decision that I should not disturb the Commissioner's conclusion that Biomass held the requested information for Bord na Móna was informed by the specific statutory and factual context. For that reason, I do not think that the fear expressed by Bord na Móna to the effect that upholding the Commissioner's Decision would mean that companies and subsidiaries will be treated as one legal entity for the purposes of the AIE Regulation is well founded.

Conclusion

102. For the reasons identified in this judgment, I reject the appeal of Bord na Móna. I will list the matter on a date to be agreed between the parties and notified to the Registrar for costs and any other Orders. The parties are not required to lodge written submission on costs in advance of the hearing.