



AN CHÚIRT UACHTARACH
THE SUPREME COURT

S:AP:IE:2021:000067

High Court Record No. 2019/249 MCA

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O'Donnell C.J.
MacMenamin J.
O'Malley J.
Baker J.
Hogan J.

**IN THE MATTER OF THE EUROPEAN COMMUNITIES (ACCESS TO
INFORMATION ON THE ENVIRONMENT) REGULATIONS 2007-2018**

BETWEEN/

RIGHT TO KNOW CLG

Appellant/Respondent

- AND -

COMMISSIONER FOR ENVIRONMENTAL INFORMATION

Respondent/Respondent

- AND -

**MINISTER FOR COMMUNICATIONS, CLIMATE ACTION AND THE
ENVIRONMENT, IRELAND AND THE ATTORNEY GENERAL**

Respondents/Appellants

- AND -

OFFICE OF THE SECRETARY GENERAL TO THE PRESIDENT (OSGP)

Notice Party

JUDGMENT of Ms. Justice Baker delivered on the 29th day of April 2022

Introduction

1. At first glance it may seem strange that there is little or no judicial authority concerning the role of the President of Ireland or the place of the President in the constitutional order. There is also little case law on whether the President is subject to legal constraints capable of being enforced in appropriate legal proceedings.

2. As will appear in the course of this judgment, the dearth of authority must be seen as a direct consequence of the broad and far-reaching immunity enjoyed by the President in the exercise of his or her constitutional roles. This judgment contains an analysis of the power of the President and concludes that the immunity from suit has the effect of precluding the High Court action from which the present appeal arises.

3. Article 13.8.1^o of the Constitution provides for presidential immunity in the performance by the President of the powers vested by the Constitution:

“The President shall not be answerable to either House of the Oireachtas or to any court for the exercise and performance of the powers and functions of his office or for any act done or purporting to be done by him in the exercise and performance of these powers and functions.”

4. In *The State (Walshe) v. Murphy* [1981] I.R. 275 Finlay P. for the Divisional High Court (Finlay P., Gannon and Hamilton JJ.) said as follows:

“... the terms of Article 13 s.8 sub-s. 1, cover not only the performance by the President of the powers and functions of his office and any act done by him in the exercise and performance of those powers but they also cover any act “purporting to be done by him” in the exercise and performance of those powers and functions”. (at p. 282)

5. Central to these appeals is the nature of the constitutional immunity, although as may be noted from the title to the proceedings, and as I will later consider in detail, the President is not expressly named as a respondent.

6. The appeals concern a request for information held by the President and his offices and by the Council of State. The legal status of the entity described in the title to the proceedings as the “Office of the Secretary General to the President” (“OSGP”) also arises, and in the second appeal, the legal status and the role and place in the constitutional order of the Council of State. The argument that EU law requires a relaxation of the immunity from suit enjoyed by the President for the purpose of the enforcement of EU rights to access to environmental information is also considered.

7. The appeals are from the High Court judgment on a statutory appeal from the refusal of the Commissioner for Environmental Information (“the Commissioner”) of requests made by Right to Know CLG for information and documents under the European Communities (Access to Information on the Environment) Regulations 2007-2014.

8. For ease, these Regulations will be referred to as the “AIE Regulations” but, for reasons that will become apparent, I propose separately to refer to the amendments made by European Communities (Access to Information on the Environment) (Amendment) Regulations 2018 (S.I. No. 309 of 2018) which will be called “the Regulations of 2018”.

9. On appeal to the High Court pursuant to Article 13 of the AIE Regulations, Barr J. delivered one judgment governing both appeals by which he allowed the appeal in part: [2021] IEHC 273.

10. This is the appeal of the Minister for Communications, Climate Action and the Environment, Ireland and the Attorney General (“the State parties”) from that part of the decision of Barr J., and also the appeal of Right to Know from the High Court’s refusal to compel production of documents by the Council of State. While, strictly speaking, the second question arises in a separate appeal, the parties have for convenience called this

aspect of the appeal a “cross-appeal” as both appeals were heard together in the High Court and resulted in the single judgment of Barr J.

Background facts

11. Right to Know is a company limited by guarantee, with stated objects to improve, promote and advocate for increased rights of public information. The requests in the first appeal were for documents concerning two speeches given by the President of Ireland, and, in the second appeal, for certain records held by or on behalf of the Council of State concerning the Planning and Development Bill 1999, and s. 24 of the Housing (Miscellaneous Provisions) (No. 2) Bill 2001.

12. There being no reply to the requests, on the basis of the deemed refusal of access, Right to Know sought an internal review, and when it then received no response it appealed to the Commissioner under Article 12 of the AIE Regulations.

13. The Commissioner determined that the two applications for access to information should be declined on the grounds that the President, the OSGP and the Council of State were excluded from the AIE Regulations in the light of the immunity of the President contained in Article 13.8.1° of the Constitution.

The first request

14. The information sought in the first appeal concerns two speeches given by President Higgins, and Right to Know requested the following:

- (i) A copy of all records – to include emails, memos, letters, briefing notes, draft speeches and so on – relating to a speech given by President Higgins in Paris, France in July 2015 at the Summit of Conscience for the Climate.
- (ii) A copy of all records – to include emails, memos, letters, briefing notes, draft speeches and so on – relating to an address given by President Higgins at the New Year’s Greeting Ceremony in January 2016.

The request was made on 9 February 2017 by e-mail, sent to the general information e-mail address for the President of Ireland as well as to the head of communication and information at Áras an Uachtaráin/Office of the President of Ireland. The email was also forwarded to Mr. Finín Ó Murchú, a press officer in the President's Office. The Commissioner accepted an appeal from the statutory deemed refusal of the President for the information. The broad response of the office of the President on that appeal was that the President is not a public authority for the purposes of the AIE Regulations, and was properly excluded from the definition of “public authority” under Article 2(2) of the AIE Directive and Article 13.8.1° of the Constitution, and could not be compelled to furnish the information.

15. The OSGP submitted that the President is also exempt from the definition of “public authority” under Article 3(2) of the AIE Regulations as he acts in a legislative capacity. Right to Know submitted that the President is a public authority by virtue of either Article 3(1)(a) or Article 3(1)(b) of the AIE Regulations, and that, while the President does on occasion act in a legislative capacity, the exemption thereby afforded to the President does not extend beyond the role played in this legislative process. It was also argued that the President was not acting in any legislative capacity when he delivered the speeches regarding climate change.

The second request

16. The request which was the subject of the second appeal was directed to records held by the Council of State as follows:

- (i) Copies of all submissions, memoranda, briefing notes, prepared with regard to the following pieces of legislation, which were considered by the Council of State: the Planning and Development Bill 1999, s. 24 of the Housing (Miscellaneous Provisions) (No. 2) Bill 2001;
- (ii) Copies of the minutes of the Council meetings held with regard to the above pieces of legislation;

- (iii) Copies of any communications between the Council of State and the President with regard to the above pieces of legislation;
- (iv) Copies of any operating documents or terms of reference prepared in relation to the meetings outlined above.

17. On 30 June 2000, Her Excellency, President Mary McAleese, after consultation with the Council of State, referred Part V of the Planning and Development Bill 1999 to this Court under Article 26 of the Constitution: see *Re Article 26 and the Planning and Development Bill 1999* [2000] 2 I.R. 321. The Council of State was convened by the President in respect of the Housing (Miscellaneous Provisions) (No. 2) Bill 2001 in 2002 but no reference to this Court was subsequently made.

18. The OSGP made similar responses in submission to this request to those responses to the request regarding the two speeches given by the President. Right to Know argued that the Council of State established under Article 31 of the Constitution is a distinct and independent public body from that of the President, and that the status of the President, and any constitutional immunity he enjoys by virtue of his office, is irrelevant to a consideration of the request.

The legislation permitting the request for disclosure: the Regulations and the Directive

19. As the request for information was made by Right to Know pursuant to the provisions of the AIE Regulations, it is useful at this juncture to identify the statutory provisions.

20. The AIE Regulations permit members of the public to seek access to environmental information; provides for participation in environmental decision-making; and, allows the public to seek redress when environmental law is infringed. The AIE Regulations give effect to the AIE Directive (Directive 2003/4/EC) This is the first of two Directives which implement the Aarhus Convention (UNECE Convention on Access to Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998), which provides certain rights to members of the public with regard to the environment in order to promote

citizens' involvement in environmental matters and improve the enforcement of environmental law.

21. Article 3(1) of the AIE Directive requires Member States to make provision for access to environmental information upon request:

“Member States shall ensure that public authorities are required, in accordance with the provisions of this Directive, to make available environmental information held by or for them to any applicant at his request and without his having to state an interest.”

22. Article 2(2) of the Directive envisages an exemption from access:

“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 of 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.”

23. This exception from access was implemented in Article 3(2) of the AIE regulations:

“Notwithstanding anything in sub-Article (1), ‘public authority’ does not include any body when acting in a judicial or legislative capacity.”

24. The Directive was transposed into domestic law by the AIE Regulations. The following statutory instruments give effect to the AIE Directive in Ireland: S.I. No. 133 of 2007 - European Communities (Access to Information on the Environment) Regulations 2007, S.I. No. 662 of 2011 - European Communities (Access to Information on the Environment) (Amendment) Regulations 2011, S.I. No. 615 of 2014 - European Communities (Access to Information on the Environment) (Amendment) Regulations 2014, S.I. No. 309 of 2018 - European Communities (Access to Information on the Environment) (Amendment) Regulations 2018. Together, these are known as the European Communities (Access to Information on the Environment) (Amendment) Regulations 2007 to 2018.

25. There was no express exclusion in the AIE Regulations to deal with any constitutional exclusion, although the Regulations of 2018 did expressly exclude the President and the Council of State from its provisions. It will be necessary to analyse Article 2(2) in more detail in the second part of this judgment.

26. As is apparent, only public authorities are required to make available environmental information. A central issue identified in written submissions concerned whether the President, his office and/or the Council of State can properly be described as “public authorities” for the purposes of a request for information. That question will be considered later in this judgment.

The decision of the Commissioner on the request relating to the two speeches

27. The Commissioner’s decision concerning the two speeches made by the President was delivered on 29 May 2019 and runs to 14 pages. The Commissioner found that Article 13.8.1° of the Constitution precludes the OSGP from being subject to the review procedure under Article 6 of the AIE Directive insofar as the information sought relates to the exercise and performance of the powers and functions of the President. He held that the OSGP is not a public authority within the meaning of Article 3 of the AIE Regulations. The Commissioner therefore declined to hear the reviews on the basis that he had no jurisdiction to review the decision of the OSGP.

28. The Commissioner had regard to a Guidance Document provided by the Minister for the Environment, Community and Local Government on the implementation of the AIE Regulations, on the AIE Directive upon which the AIE Regulations are based, the Aarhus Convention and Implementation Guide to Aarhus (second edition published in June 2014) and to the Constitution of Ireland.

29. The Commissioner noted the change made by the Regulations of 2018 which at Article 3(2) expressly excluded the President, the OGSP, the Council of State, but considered the change to do no more than clarify the pre-existing legal situation.

30. The Commissioner relied on the opinion of Advocate General Sharpston in C-204/09, *Flachglas Torgau GmbH v. Federal Republic of Germany*, ECLI:EU:C:2011:413 as authority for a general proposition that two exclusions are envisaged in Article 2(2) of the AIE Directive:

- (i) One relates to bodies when acting in a legislative or judicial capacity; and
- (ii) the second where a member's constitutional provisions preclude a body's decision from the review procedures in the Directive.

31. The Commissioner considered that Article 2(2) of the AIE Directive "allows for the continuation of a member state's constitutional arrangements" with a view to avoiding a conflict between the provisions of the AIE Directive and a national constitutional order.

32. The Commissioner also had regard to the Aarhus Convention and the declaration made by the Council in relation to Article 9 of that Convention by which Member States were given the possibility "in exceptional cases and under strictly specified conditions, to exclude certain institutions and bodies from the rules on review procedures in relation to decisions on request for information". The declaration provides as follows:

"Therefore the ratification by the European Community of the Aarhus Convention encompasses any reservation by a member state of the European Community to the extent that such reservation is compatible with Article 2(2) and Article 6 of Directive 2003/4/EC."

33. The Commissioner then considered that Ireland's constitutional order meant that it was competent to exclude, and had in fact excluded, the office of the President from review.

34. Finally, the Commissioner was satisfied that Article 13.8.1° of the Constitution precludes the President from the review procedure in Article 6 of the AIE Directive and that express exclusion was not necessary for a Member State to avail of the exclusion in the AIE Directive.

35. The Commissioner determined that, as the administrative staff of the President are “integral to the exercise and performance of the powers and functions of the President”, insofar as the office of the President held the relevant material concerning the speeches given by the President, the information was held in its capacity “of providing the necessary administrative support to the President in carrying out his or her powers or functions” and making it subject to review would be inconsistent with the immunity of the President pursuant to Article 13.8.1° of the Constitution. He held therefore that the constitutional immunity afforded to the President is not limited to the person of the President but extends to his or her office and any means necessary to carry out the functions of that office.

The decision on the request to the Council of State

36. The decision was given by the Commissioner on 17 June 2019 and runs to 13 pages. Again he relied on the immunity afforded to the President under Article 13.8.1° of the Constitution and concluded first, that the request for information, while it was argued to have been made to the Council of State, was in substance made to the OSGP and that that office was the appropriate respondent. His conclusion was that the information requested concerned the legislative powers and functions of the President under the Constitution and again relied on *Flachglas Torgau GmbH v. Federal Republic of Germany*.

37. Specifically, the Commissioner decided that the constitutional immunity of the President in the exercise and performance of his powers and functions extended to the Council of State as any other view would undermine its constitutional advisory role to the President and would interfere with the exercise and performance of the President’s powers and functions. He concluded that he did not have any jurisdiction to review a decision by the Council of State under Article 12 of the AIE Regulations as this would “place an impediment between the President and his or her constitutional advisor, thereby interfering with the exercise and performance of the President’s powers and functions”.

The High Court decision

38. In the High Court Barr J. held that the Commissioner had erred in law because, whilst the AIE Directive did permit a Member State to exclude bodies which on the date of its adoption were constitutionally immune from review, this is an option to expressly exclude which was not exercised by Ireland in its implementing measures in the AIE Regulations.

39. He therefore allowed the appeal insofar as it relates to the request for documentation concerning the speeches made by the President, set aside the finding of the Commissioner that the notice party was not a public authority at the time of that request and remitted the matter to the Commissioner for him to consider the request in light of this conclusion.

40. Regarding the second request, on the Council of State appeal, Barr J. concluded that the Council of State was not amenable to review because it was assisting the President in the exercise of his legislative function under Article 26 of the Constitution and was therefore excluded under the first part of the exclusion in Article 3(2) of the AIE Regulations.

This appeal

41. The parties were granted leave to bring a leapfrog appeal pursuant to Article 34.5.4° of the Constitution to this Court on the grounds that the matters raised were of general public importance.

42. Extensive submissions have been furnished by the State parties, by the Commissioner and by Right to Know, and there are replying submissions by the State parties to the cross-appeal.

43. It is fair to say that the arguments evolved considerably in the course of oral submissions to this Court, where the primary issue engaged was the possible effect of the constitutional immunity of the President and whether this could provide a complete answer to the appeal. Counsel for the State parties argued that the immunity precluded the application to the Commissioner and *ipso facto* the appeal to the High Court and to this Court. Right to Know argued that the presidential immunity must have regard to the

supremacy of Union law and must give way where EU membership requires implementation of EU law with which it is inconsistent. That argument will in due course involve a consideration of whether the presidential immunity is to be understood as having been displaced by reason of the AIE Directive and whether transposition necessitated a relaxation of that immunity.

44. I propose to first deal with the parties to the appeal and their functions and place in the constitutional order before considering the constitutional immunity of the President.

The President

45. The office of the President of Ireland is created by Article 12.1 of the Constitution:
“There shall be a President of Ireland (Uachtarán na hÉireann), hereinafter called the President, who shall take precedence over all other persons in the State and who shall exercise and perform the powers and functions conferred on the President by this Constitution and by law.”

46. This overarching constitutional role of the President, albeit one constrained by the limitations of office analysed below, must be seen as a fundamental principle which guides any approach to an analysis of his or her powers, especially when taken in conjunction with the immunity conferred by Article 13.8.1°.

47. The President enjoys from the Constitution a number of different and sometimes overlapping roles. First, the President has a ceremonial role and takes precedence over all other persons in the State under Article 12. He or she is the Commander in Chief of the Defence Forces (Article 13.4 and Article 13.5). The President may communicate with the Houses of the Oireachtas by message or address on any matter of national or public importance and may address a message to the nation at any time on any such matter (Article 13.7). In each case the power is exercisable after consultation with the Council of State.

48. The President also performs constitutional functions, including those relating to the appointment of An Taoiseach and members of government (Article 13.1), the appointment

of judges (Article 34.6 and 35.1). (See on the role of the President in the appointment of judges: *Beades v. Ireland* [2016] IEHC 302, [2016] 2 I.R. 224)

49. Article 13.3.1° requires that every Bill passed or deemed to have been passed by both Houses of the Oireachtas “shall require the signature of the President for their enactment into law”. Article 13.5.2° provides that all commissioned officers of the Defence Forces “shall hold their commissions from the President.”

50. In all of these instances the President is implementing decisions made by the Executive and performing a function essential to the completion of a process. This does not mean, however, that the President is thereby exercising executive or decision-making power: he or she is in such instances implementing and completing the formal process to complete a decision made by the Executive, thereby emphasising the importance of the decision in question. The participation of the President in these decisions lends formality and dignity to the occasion.

51. Thus, while the President is part of the Oireachtas by reason of Article 15.1.2° which defines the Oireachtas as consisting of the President, a House of Representatives (Dáil Éireann) and a Senate (Seanad Éireann), he or she is not part of their decision or law-making powers. By signing a Bill into law, he or she is not in any sense approving the legislation which the Houses of the Oireachtas have presented for presidential signature, as at that stage of the formal process of enactment the President has no power to amend the legislation as passed by both Houses. Save for the special instances of the reference of a Bill to this Court under Article 26 or the reference of a Bill to the People under Article 27, Article 25.2.1° makes clear that the President must sign the Bill as passed by both Houses of the Oireachtas.

52. The President’s powers are constrained by the Constitution, and most are not exercised on his or her own authority, discretion or initiative, but on the direct advice of the Government. This is reflected in Article 13.9 of the Constitution:

“The powers and functions conferred on the President by this Constitution shall be exercisable and performable by him only on the advice of the Government, save where it is provided by this Constitution that he shall act in his absolute discretion or after consultation with or in relation to the Council of State, or on the advice or nomination of, or on receipt of any other communication from, any other person or body.”

53. The sole autonomous and discretionary power enjoyed by the President is the power granted by Article 13.2.2° to refuse a dissolution of Dáil Éireann where the Taoiseach requesting the dissolution has lost the support of a majority of the Dáil. The other independent powers enjoyed by the President are exercisable only following prior consultation with the Council of State: these include, for example, the power to convene a meeting of either or both Houses (Article 13.2.3°), the power under Article 22 to refer a question to a Committee of Privileges to assess whether a Bill is a Money Bill, and the power to agree to abridge the time for the consideration by the Seanad of a Bill which the Taoiseach has certified is “urgent and immediately necessary” by reason of a public emergency (Article 24.1°). The power to refer a Bill to this Court by virtue of Article 26 is another such example. I propose to return below to consider this and the other discretionary powers of the President.

54. The Attorney General who personally represented the State parties at the hearing of the appeal suggested that the President does not exercise any political power in the real sense. This must be correct as he or she is disconnected from the Government and Government decisions and is often described as being “above politics” in the sense that the President does not make political decisions, albeit the President is directly elected by the people.

The Secretary General to the President

55. The secretary to the President was established by the Presidential Establishment Act 1938 (“the Act of 1938”) to assist the President in the carrying out of his duties and functions as President under the Constitution.

56. Section 6 of the Act of 1938 created the position then known as the secretary to the President and since the enactment of s. 27 of the Civil Service Regulation (Amendment) Act 2005 the office or post is now known as the “Secretary General to the President”.

57. Section 6(3) of the Act of 1938 provides that the appointment is made by government but “no such appointment shall be made while there is an elected President in office without consultation with such President”. This power of the President does not amount, however, to a power of veto. Section 7 provides that every officer or person attached to the office of secretary to the President shall be appointed by the Taoiseach with the concurrence of the Minister for Finance, as well as the secretary to the President, are subject to the Civil Service Regulation Acts 1956-2005.

58. The person appointed holds a permanent post in the Civil Service and has such duties and functions in relation to the President under Article 14 of the Constitution as the Government shall from time to time direct. The position is treated as part of the Department of the Taoiseach but is recognised as a separate office.

59. The Secretary General acts as “clerk” or secretary to the Council of State.

Discussion: the identity of the notice party

60. As will be apparent from the title to these proceedings there is named as notice party and entity known as the “Office of the Secretary General to the President”. In the course of oral argument before the Court it became clear that there does not exist a statutory office or corporation sole with that name, or which is capable of being treated as a separate legal entity for the purposes of litigation. No such entity was created by the statutory scheme which instead envisages the appointment of a Secretary General to the President, a natural person who is a civil servant holding a permanent post in the civil service of the State and whose function is to advise and assist the President. That person has no autonomous power of decision-making and cannot in any sense be seen as an autonomous body with separate legal personality. The office does not therefore exist as a statutory or corporate entity which can

be sued as holding separate legal status, and whilst it may well be the case that Right to Know opted, for reasons of propriety or on account of the constitutional immunity, not to name the President, the joinder of an entity called “OSGP” is impermissible at law.

61. Further, and as I will more fully explore in this judgment, the Secretary General to the President works on behalf of the President and at his or her direction. It is therefore incorrect to suggest that the Secretary General holds any relevant information or documents under his or her own autonomous control or direction, or that that the Secretary General may by autonomous decision disclose, or refuse to disclose, that information on request.

62. I note that the amendment made by the Regulations of 2018 expressly excluded the President, the Council of State and a body there called “the Office of the Secretary General to the President” from the definition of “public authority”. It may be that the title by which the notice party is named derives from that, but no such entity can be said to exist at law notwithstanding these provisions.

63. This question of standing was not argued in the High Court. Nonetheless, I must conclude for these reasons, that the joinder of the notice party is procedurally and legally incorrect and that no relief may be sought against the notice party.

The Council of State

64. The Council of State was established by virtue of Article 31.1 of the Constitution:
“There shall be a Council of State to aid and counsel the President on all matters on which the President may consult the said Council in relation to the exercise and performance by him of such of his powers and functions as are by this Constitution expressed to be exercisable and performable after consultation with the Council of State, and to exercise such other functions as are conferred on the said Council by this Constitution.”

65. Some of the powers vested in the President are exercisable only after consultation with the Council of State in accordance with Article 32 of the Constitution:

“The President shall not exercise or perform any of the powers or functions which are by this Constitution expressed to be exercisable or performable by him after consultation with the Council of State unless, and on every occasion before so doing, he shall have convened a meeting of the Council of State and the members present at such meeting shall have been heard by him.”

66. The President must consult with the Council of State before referring a Bill to this Court as provided in Article 26.1.1° of the Constitution:

“The President may, after consultation with the Council of State, refer any Bill to which this Article applies to the Supreme Court for a decision on the question as to whether such Bill or any specified provision or provisions of such Bill is or are repugnant to this Constitution or to any provision thereof.”

67. The power to convene a meeting of the House of the Oireachtas is also subject to constraints under Article 13.2.3°:

“The President may at any time, after consultation with the Council of State, convene a meeting of either or both of the houses of the Oireachtas.”

68. Article 13.7 provides that the power to communicate with the Houses of the Oireachtas and the Nation are exercisable only after prior consultation with the Council of State:

“1°: The President may, after consultation with the Council of State, communicate with the Houses of the Oireachtas by message or address on any matter of national or public importance.

2°: The President may, after consultation with the Council of State, address a message to the Nation at any time on any such matter.”

69. The same is true where the President is asked to agree to an abridgment of time for the consideration of a Bill by the Seanad where the Taoiseach has certified that the Bill is urgent and immediately necessary “for the preservation of the public peace and security or

by reason of the existence of a public emergency, whether domestic or international.” Article 24.1 requires the President to consult first with the Council of State before making any such decision.

70. Under Article 27 of the Constitution, a petition may be submitted that requests the President to decline to sign and promulgate a Bill if it contains a proposal of such national importance that the will of the people thereon ought to be ascertained, and the President can exercise discretion in considering this request under Article 27.4.1° again after consultation with the Council of State:

“Upon receipt of a petition addressed to him under this Article, the President shall forthwith consider such petition and shall, after consultation with the Council of State, pronounce his decision thereon not later than ten days after the date on which the Bill to which such petition relates shall have been deemed to have been passed by both Houses of the Oireachtas.”

71. The Council of State is, like the President, a creature of wholly constitutional origin and, for the reasons I will now explain, I consider that the Council of State has no function material to this appeal separate from its advisory role to the President.

72. The Council of State cannot meet without being convened by the President. The President activates a request for a consultation with the Council of State in order to seek its advice and counsel. The Council of State has no independent status or role outside that of the President and its advisory role is invoked by him or her under the constitutional discretionary power.

73. The constitutional role of the Council of State is, in the words of Article 31.1, to “aid and counsel” the President. It does have an independent role to act in lieu of the President under Article 14.4 in certain circumstances as defined by Article 14.5, a power not relevant to any issue arising in the course of this appeal.

74. For the purpose of the present appeal, the Council of State could not have met without the presence of the President or have made an independent determination to disclose some of its working documents or the documents sought in the request.

75. The Council of State does have a separate legal personality or status, but its powers are limited to affording assistance to the President and, on request, to giving him or her advice. It is properly to be considered as protected by the constitutional immunity of the President insofar as it assists the President in the performance of his or her functions or powers. No order could be made against the Council of State if that directly or indirectly interfered with that immunity. I return later to a more complete discussion of this point.

Analysis of the powers of the President

76. A significant part of the President's role is to speak to the People of Ireland, and, in appropriate cases, on behalf of the Nation. Having consulted with the Council of State, he or she may convene a meeting of the Houses of the Oireachtas, address the Houses of the Oireachtas and address the Nation. Every such message or address, however, must have received the approval of the Government.

77. Recent Presidents have promoted the causes of diversity, innovation and encouraged the sciences and the arts. It could be said that the exercise of these functions the President benefits the public, advances the common good, expresses the ideals of democracy or the ideals of good neighbourliness at home and at an international level. These functions are in no sense decision-making or policy-making functions, but rather operate at a constitutional level and as a reflection of domestic values and principles.

78. As Doyle said at p. 77-78 in *The Constitution of Ireland: A Contextual Analysis* (Hart Publishing, 2018, 1st ed.)

“In more recent years, Presidents have informally expanded this role into one of generally speaking on behalf of civil society, without seeking Government approval.

This has allowed Presidents to articulate themes for their presidencies, which they can then implement through their choice of engagements.”

79. Doyle echoes the description given by counsel for the State parties at the oral hearing of the appeal, that the President is “above politics”:

“There is now a popular expectation that the President be a leader of civil society, resolutely removed from party politics and impeccably neutral in the performance of constitutional functions, while engaging public debate on broad themes of public concern.” (at p. 79)

80. I turn now to examine the powers of the President under Article 26 to refer a Bill to the Supreme Court and to speak to, or on behalf of, civil society, both of which are engaged in the circumstances giving rise to the request the subject of this appeal.

Two presidential discretionary powers in the present appeal

81. In the making of a reference of a Bill to the Supreme Court under Article 26 the President is to be seen as guardian of the Constitution or guardian of the public interest regarding the constitutionality of Bills which have been passed by both Houses of the Oireachtas. A reference under Article 26 could not, however, be called the exercise of a “legislative function”, and I consider that the High Court was incorrect to so determine. The President does not exercise political or legislative power in making a reference. It is true that, taking advice from the Council of State, the President exercises personal judgment regarding whether to refer a Bill. Apart from legal and political considerations, the principles which guide that decision may be said to involve a judgment as the desire for legal certainty in regard to a Bill on the one hand balanced against the desirability that the constitutionality of the measure be tested in the ordinary way before the High Court.

82. Thus, for example, the President might be personally doubtful as to the constitutionality of the Bill in question but think that this issue would be better tested in the ordinary way before the High Court in which the respective parties would have the

opportunity of leading evidence so that an Article 26 reference was not appropriate in the circumstances. Conversely the President might entertain few personal doubts regarding the constitutionality of the measure, but he might nonetheless consider that an Article 26 reference was appropriate on the basis that legal certainty in respect of this particular measure was desirable.

83. The power to refer is not the power to influence or decide policy and is genuinely a power which is *sui generis*, a constitutional power that promotes the position of the Constitution in the legislative process, and to avoid the possibility of unconstitutional legislation having effect whilst an individual challenge is ongoing and not yet determined in the courts.

84. In his or her role under Article 26, the President performs a role which is protective of the legislation and the Constitution, but the President does not thereby exercise any legislative power.

85. It may equally be said by analogy that the power to refuse the dissolution of the Dáil where the requesting Taoiseach has lost the support of the Dáil, while also a wholly discretionary power, does not vest in the President a power comparable to the legislative powers enjoyed by the Dáil or Seanad. This is an instance of where the President acts as guardian of the public interest to prevent the dissolution of the Dáil at that juncture in order to give thinking or negotiating space to the members of the House and generally to avoid an election where this might be premature or unnecessary. While this power has never yet been exercised, we know as a matter of constitutional history that there have been occasions when in the past the President of the day seriously considered refusing a dissolution in such circumstances, for example, in May 1944 when An Taoiseach, Éamon de Valera sought a dissolution from the President Douglas Hyde having (narrowly) lost a Dáil vote on the Transport Bill 1944.

86. Similar considerations apply to the President's power provided by Article 13.2.3° to convene a meeting of either or both Houses of the Oireachtas following a meeting of the Council of State. While Article 15.7 requires that the Oireachtas shall hold "at least one session every year", there might nonetheless be circumstances where it might be thought appropriate or expedient to require either or both Houses to sit. Here again the Constitution reflects our historical experience: the drafters were presumably thinking of the disputed events which occurred following the election of the Third Dáil on 16 June 1922, the start of the Civil War on 28 June 1922 and the first sitting of that new Dáil which was itself postponed on several occasions until 9 September 1922. This experience presumably informed the decision to provide for an independent political personage such as the President who could be called upon to make an independent judgment as to desirability of requiring either or both Houses to sit. This is, in the words of Ó'Dálaigh J. in *Melling v. O Mathghamhna and the Attorney General* [1962] I.R. 1 at p. 39, a constitutional safeguard "against an improbable but not-to-be-overlooked future; and it is for this reason the Constitution enshrines it."

87. The second power of the President under consideration in the present appeal is the exercise of his role as Head of State to represent Ireland internationally.

The immunity

88. The High Court judge at paras. 71-73 of his judgment held that the Commissioner was correct in his finding that by making the President amenable to a review before him, he would in effect be making the President answerable to the courts contrary to the immunity conferred on the President by Article 13.8.1° of the Constitution, and that the immunity enjoyed by the President extends to the Council of State. He held however that the supremacy of EU law did not permit this conclusion as Ireland had not expressly excluded the President from review.

89. The President did not appear and was not represented in the High Court or on this appeal. The Council of State was also not represented at the appeal hearing nor did it make any submission to the High Court. The same can be said of the secretary to the President and submissions and arguments were made in the High Court and on these appeals by the Attorney General, who appeared in person and with senior and junior counsel, in fulfilment of his function as guardian of the public interest and the Constitution. The Minister for the Environment, Climate Action and Communications was joined in response to a declaration that the Regulations of 2018 are invalid.

90. The conduct of the appeal in practical terms reflects the reality and importance of the constitutional immunity from suit enjoyed by the President. It reflects too the approach in the few cases in which the Courts have considered whether the President of Ireland was correctly joined in proceedings. In *Draper v. Attorney General* [1984] I.R. 277 it is recorded (at p. 27) that the plaintiff had named the President of Ireland and An Taoiseach as defendants but that this Court struck out these defendants from the proceedings “being satisfied that the joinder of the President of Ireland was a breach of Article 13, s. 8, sub.-s. 1, of the Constitution”. The claim against An Taoiseach was dismissed on wholly different grounds concerning the dearth of evidence that would have justified his joinder.

91. Similarly, in *O’Malley v. An Taoiseach* [1990] ILRM 461 an application for an injunction restraining An Taoiseach from advising the President to dissolve the Dáil was rejected by Hamilton P. in a single paragraph:

“The constitutional duty of dissolving the Dáil is vested in the President and he is not answerable to any Court for the exercise and performance of this duty. The constitutional duty of advising the President in relation to this question is vested in the Taoiseach and in my opinion the Courts have no jurisdiction to place any impediment between the President and his constitutional advisor in this important matter, which is solely the prerogative of the President.”

92. In *Haughey v. Moriarty* [1999] 3 I.R. 1, this Court dismissed *in limine* that part of the challenge to the validity of an order made by the Houses of the Oireachtas grounded on the alleged failure by An Taoiseach to advise the President regarding the first meeting of the Seanad. The statement by Hamilton C.J. is short and is to the effect that the impugned order “was made by the President in the exercise of the powers and functions of her office” and therefore on account of Article 13.8.1° “this ground of challenge to the validity of the resolution must fail.” (p. 51)

93. It is clear that the same question concerning the absence of jurisdiction arises in the present appeal, and I agree with the observations of counsel for the Commissioner that the consistent approach of the Courts has been to decline to adjudicate upon any challenge to the President in the performance of his or her functions. I would go further and say that the approach of the courts has been consistent with the clear terms of the constitutional immunity and when the issue has arisen, the courts have not assumed jurisdiction to make the President answerable in respect of any of his or her constitutional roles. The prohibition is stated in the broadest terms to provide immunity from suit “for the exercise and performance of the powers and functions of his office”. I agree with counsel that this is more than an immunity from a legal sanction or order but is a constitutional prohibition on any court analysis of, challenge to, adjudication upon, or order in relation to, the performance of the President’s functions.

94. The language of Article 13.8.1° is expressed in clear mandatory terms and leaves no scope for doubt. It is important to note the constitutional language: the President is not “answerable” to either House of the Oireachtas or to any court in respect of the performance or exercise of his duties, and this must mean that he is not open to scrutiny from those institutions, may not be called to account in respect of that performance, or be asked or compelled to answer questions in regard thereto. The only means by which a President can

be called to account is by the Houses of the Oireachtas and only then by virtue of the impeachment process provided for under Article 12.10 of the Constitution.

95. In a similar vein Article 15.13 provides that the members of each House of the Oireachtas are not in respect of any utterance in the House “amenable” to any court or any authority other than the House itself. In *Kerins v. McGuinness* [2019] IESC 11, [2020] 1 I.R. 1 this Court concluded that the constitutional exclusion afforded privileges and immunities on the Houses of the Oireachtas and its members and that the people intended by the constitutional measures to make the members answerable to the Houses and not to the courts. A similar conclusion was arrived at in *O’Brien v. Clerk of Dáil Eireann* [2019] IESC 12, [2020] 1 I.R. 90, where this Court held that the immunity extends to utterances which relate indirectly or collaterally to utterances made in the Houses.

96. The immunity of the President and that afforded to members of the Houses of the Oireachtas perform similar functions of acknowledging, and affording protection to, the separation of powers.

97. In regard to the President, the People must be understood to have adopted a constitutional order that limited the courts from engaging in any form of scrutiny of the exercise by the President of his or her powers. That reflects the fact that the President has no power to affect, limit or enhance the rights of individuals or legal persons, and the President does not need to be answerable to the judicial branch of Government, precisely because he does not have such power.

98. This makes the President different from those other organs of State which exercise political, legislative or administrative power. It does not merely mean that he is “above politics”, as I observed above, a commonly used phrase to describe the office of the President, but rather that it means that he or she stands constitutionally in a role which is *sui generis* and outside those structures which are amenable to court interference.

The powers of the Commissioner to invoke the court process

99. I propose to now consider the various elements of the Commissioner's powers and functions to illustrate the proposition that the President could not opt to engage in the process of the Commissioner.

100. The Commissioner has a number of statutory powers which engage the courts. The Commissioner may refer a question to the High Court for clarification under Article 12(9)(a) of the AIE Regulations, and has broad powers in support of the performance of his or her functions, including the power to enter any premises occupied by a public authority and there request such environmental information as he or she may reasonably require, or take such copies of, or extracts from, any environmental information found or made available on the premises, under Articles 12(6)(b) and 12(6)(c) of the AIE Regulations.

101. Even more telling is the fact that the Commissioner has a power of enforcement under Article 12(5) of the AIE Regulations, by which the Commissioner can, following receipt of an appeal and a review of the decision of a public authority, require a public authority to make available environmental information to an applicant, and under Article 12(6), by which the Commissioner can require the public authority to attend before the Commissioner for the purpose of making environmental information available to the Commissioner, who can examine and take copies of any environmental information and retain it in his or her possession for a reasonable period.

102. Under Article 12(7), public authorities must comply with a decision of the Commissioner within 3 weeks after its receipt. Article 12(8) further provides that where a public authority fails to comply, the Commissioner may apply to the High Court for an order directing compliance.

103. Finally, the decision of the Commissioner made under Article 12 of the AIE Regulations is amenable to appeal to the High Court, and thereafter to this Court, or the Court of Appeal, under Article 13 of the AIE Regulations, by a party to an appeal under

Article 12 of the AIE Regulations or any other person affected by the decision of the Commissioner.

104. It is wholly unclear how Right to Know envisages that the Commissioner can properly or fully engage his function without the assistance of these judicial remedies, or how the Commissioner is to deal with circumstances where the President does engage with a request but gives reasons for refusing access which the Commissioner regards as unsatisfactory or incomplete. Could the Commissioner in those circumstances interrogate those answers, and if so, could the Commissioner seek the assistance of the High Court on any legal interpretation arising from those answers? The constitutional immunity in its clear terms precludes the courts from holding the President to account. The appellant's reasoning fails to have regard to these difficulties, but that no answer is apparent is not surprising, as the difficulties stem from the clear reach and express depth of the presidential immunity, allied with the general proposition from the authorities that indirect or collateral enforcement is constitutionally impermissible where such an immunity or privilege arises.

105. For these reasons I accept the argument made by the Commissioner that his process is inextricably linked with the judicial process.

Collateral challenge?

106. In the light of established jurisprudence, the immunity of the President may not be circumvented by an action which would amount to an indirect enforcement. The appellant argues that an order made either by the Commissioner or by a court against either the secretary to the President or the Council of State would not directly involve the person of the President. That argument presupposes first, that each of those bodies has a separate legal personality and is capable therefore of acting independently or separately from the President, a proposition I have already rejected above. Leaving that point to one side for the present, the approach for which the appellant contends is not consistent with the principle explained by Clarke C.J. in *Kerins v. McGuinness*:

“It also seems to the Court to follow that that which cannot be achieved directly cannot be achieved by collateral means. It would clearly be impermissible to ask a court to intervene in a way which would, by necessary implication, require the Court to at least indirectly make a member amenable or breach a privilege conferred on a member. Thus, there is a clear area of non-justiciability which surrounds utterances made in the Houses or their committees or matters which are sufficiently closely connected to such utterances as to enjoy the same privileges and immunities.” (p. 55)

107. This proposition was affirmed in a consideration of the immunity of parliamentarians in *O’Brien v. Dáil Éireann*.

108. Similar considerations must be said to apply in the present case and any review in the High Court or on appeal to this Court or to the Court of Appeal would be an indirect or collateral attempt to make the President answerable for a refusal to disclose information or otherwise respond to the Commissioner.

109. Right to Know invokes the decision of the High Court in *The State (Walshe) v. Murphy*, which concerned a challenge to an order made by a person appointed as judge of the District Court who did not meet the qualifying requirements prescribed by statute. The decision of the Divisional Court rejected the argument of the respondent that the challenge was inadmissible on account of the presidential immunity. Finlay P. held that the challenge there was not to the appointment by the President of Ireland of that person to judicial office, but rather that of the decision of the Executive that he be appointed, albeit, as Finlay P. noted, the appointment required the “intervention” of the President for its effectiveness in law. The impugned decision and act were those of the Executive and not of the President:

“The President has a very great number of powers and functions which he performs on the advice of the Government, without any discretion on his part. In respect of these matters, apparently, he cannot refuse to exceed to that advice within the Constitution.” (p. 283)

110. Explaining the role and power of the President later, Finlay P. said:

“If the submission made on behalf of this respondent were correct, it would mean that the Executive would be in a position to act under the Constitution in respect of a number of matters contrary to the law and even contrary to the Constitution: and that, if such act required for its effectiveness the exercise of a function by the President, such illegal or unconstitutional act could not be reviewed by any court.”

(p. 283)

111. The recent decision of Haughton J. in *Beades v. Ireland* in which the plaintiff sought to restrain the appointment of a new President of the High Court relied on *The State (Walshe) v. Murphy* and described the function of the President as one which he was “mandated” to perform (at p. 241). That judgment therefore is not authority for any proposition that limits or restricts the immunity of the President from suit and offers no support to the arguments of Right to Know.

112. The starting point in those two cases was the identification of the impugned decision as being one of the Executive and not the President. The powers exercised by the President which gave rise to the requests in the present appeal are part of the small class of powers which the President may exercise in his or her discretion (albeit, save for one instance, only following prior consultation with the Council of State): the power to give speeches (although the content may be reviewed by the Executive under Article 13.7.3°) and the power to make a reference to the Supreme Court under Article 26 of the Constitution on the advice of the Council of State. But the argument from *State (Walshe) v. Murphy* and *Beades v. Ireland* concerned not immunity of the person of the President, but whether it extended to exclude review of actions or decisions of a person other than the President. Those authorities, while they throw light on the role of the President and illustrate the limitations of presidential power and the extent to which many of those powers are exercisable without any discretionary element of choice by the President, involved the courts looking at the substance

of the decision and its source, and in each case the decisions were in substance not those of the President.

113. The appellant argues that the correct approach to the immunity would be a somewhat narrow one: the President could opt in or out of the process before the Commissioner, and could for example decline to answer at all, or give reasons for declining a request. He could, for example, have refused in the present case to furnish any information regarding his meetings with the Council of State by invoking his personal immunity, but it is argued that the President could as readily opt to furnish the information or engage with the Commissioner up to a point but not thereafter.

114. This argument discloses a number of problems. First, it would render the Commissioner, in effect, toothless and would preclude the Commissioner from engaging the very powers that enable the fulfilment of his statutory mandate.

115. Second, the possibility that the President could arbitrarily choose to engage or not engage at his or her absolute discretion would lead to a degree of uncertainty, and again would render the Commissioner powerless. Such an absurd result could not reflect the legislative intent, but importantly is in conflict with the constitutional protection for the President generally.

116. Third, and more fundamentally, the immunity operates not merely as a privilege conferred on the President, but also as a limitation on the court or the legislature engaging in acts of scrutiny. This immunity is a corollary to the prohibition of making the President answerable to either House of the Oireachtas or to any court for the exercise and performance of the powers and functions of his office under Article 13.8.1°, and as such the immunity cannot be waived or opted out of at the discretion of the President. The presidential immunity precludes the President making a choice to submit to the Commissioner and/or to a court, as the immunity must be seen as absolute in the sense that it has the effect of limiting

scrutiny by the courts and is not a voluntarily assumed privilege but one inherent in the constitutional order.

117. The difficulty with the approach for which Right to Know contends is apparent from the pleadings as the originating notice of motion seeks, in addition to declaratory relief, *inter alia* an order that the Commissioner direct the release of the information to the applicant (para. j).

118. This pleading is in substance a plea that the President answer for the performance of his powers and functions. It illustrates that the purpose of the High Court proceedings and this appeal is to compel the President to furnish information to Right to Know. The prayer that the President be subject to an order directing him, whether directly or indirectly, to comply is incompatible with the constitutional immunity.

119. As is apparent from the examples above, this is a plea no court could entertain and illustrates the reality of the case. Furthermore, it also illustrates the profound error underlying the proceedings: the President, consistent with the Constitution, is not a party to the proceedings and did not take part in the proceedings before the Commissioner, yet the Court is being asked to make an order which in substance is an order against the President. The President was being put in the very dilemma from which the Constitution was meant to protect him: in order to defend himself and his position he would have to make himself answerable to a court or other authority. There is something very disquieting about the position of the President being debated, and ruled upon, in the absence of argument from the President.

120. I return to a proposition, advanced earlier, that the Council of State and the Secretary General to the President assist, advise and counsel the President in the performance of his or her functions and to require either of them to engage with a request from the Commissioner, and thereafter to permit the invocation of court scrutiny of that request by the various means available from the AIE Regulations, would involve scrutiny of an answer by those bodies

who act at all times on behalf of the President. The Secretary General to the President cannot be said to hold papers on his or her own personal behalf but does so in the course of assisting the President in the performance of his or her duties. The Council of State equally has no independent existence, and it has the constitutional role of advising and the President at his request to “aid and counsel” the President in the performance of his or her functions. It has no separate or independent function by which it would independently hold information that might be the subject of a request for disclosure.

121. This proposition is apparent not only from the general principle that the immunity may not be avoided by a collateral request, but also from the language of the constitutional provision which provides a broad immunity including for acts “purporting” to be done by the President and extends the reach of the immunity to acts which are not directly and personally done by the President but to those done by or on behalf of the President.

122. It is also apparent from the fact that the Constitution provides that the only method of reviewing the President’s conduct is under Article 13.8.2°.

123. In summary, and as already noted, no request was made directly to the President for the documents or information. Nonetheless, the request was made to his Secretary General, and because of the view that I take that the Secretary General to the President is a person and not a corporation sole or statutory office with separate legal personality, the request must be one which was in truth made to the President himself. It had the function of seeking to compel the President through his Secretary General to furnish those documents and information.

124. Equally, a request for information or documentation under the AIE Regulations cannot be made to the Council of State as this is also in substance a request to the President and a request thus framed cannot be entertained, as it has as its effect, or purpose, the circumvention of the presidential immunity.

125. It will be necessary to return to EU law later in this judgment, but the proposition that a request for information that indirectly has the effect of compelling compliance by an excluded body may be impermissible is also found in the jurisprudence of the CJEU. The decision of the CJEU in C-204/09, *Flachglas Torgau GmbH v. Germany*, ECLI:EU:C:2012:71 concerned the scope of the exemption under Article 2(2) of the AIE Directive in regard to institutions acting in a “legislative capacity”. The question that arose there concerned *inter alia* an argument that the request for information might interrupt the legislative process, and whether the executive branch was exercising a legislative function or a function “at the interface between executive and legislative activity”. On this point, Advocate General Sharpston stated at para. 60 *et seq.*:

“60. Yet, although the two functions can clearly be seen, it is impossible to separate them, at least in the context and during the course of the legislative process proper, from submission of the draft measure to final enactment of the legislation. They are, in that context, two sides of the same coin.

61. Consequently, it seems to me, the concern to ensure that the legislative process takes place without disruption must prevail in that context, or the very purpose of the exclusion would be frustrated. The conduct of the procedure would not be protected by an exclusion which applied to only one route of access to information (a request to the legislature itself) while another route (a request to the relevant part of the executive) remained open.”

126. The CJEU rejected a narrow interpretation of the meaning of “legislative function” in the AIE Directive and proposed that the exemption be considered to apply to “consultation and advice during the course of the legislative process” although two functions could “clearly be seen”. They could not be separated “in the context and during the course of the legislative process proper”. The Court adopted a “functional interpretation of the phrase” and associated those ancillary powers with the legislative process itself.

127. The same must be said of domestic provisions and is mirrored in the jurisprudence concerning an impermissible collateral process as outlined above. It is not correct to separate the powers of the Council of State or the Secretary General to the President from the powers vested in the President by the Constitution.

128. Accordingly, I conclude that the Commissioner was correct that the President's immunity from Article 13.8.1° is such as to preclude the request to the President or, because this would be an indirect means of making a request to the President, a request to his Secretary General or to the Council of State for the release of the information. The High Court was in error in coming to the view that the response to the first request could be reviewed by the Commissioner and also incorrect in the approach taken to the request to the Council of State. The Council of State is excluded from such requests not because it engages or assists the engagement by the President in a legislative function, but rather because the Council of State is a body that acts under and by the direction of the President and it could not independently hold information nor decide to furnish the information sought.

129. In both cases the request was an indirect means of requiring information from the President personally, and this is not permissible as a matter of constitutional law.

Supremacy of EU law

130. The focus of the appeal changed somewhat in the course of oral submissions and counsel for Right to Know, while he submitted that the constitutional immunity of the President did not exempt review by the Commissioner, argued that the supremacy of EU law requires that the President be subject to a request for environmental information under the AIE Directive, and *ipso facto* to the jurisdiction of the Commissioner, and thereafter on appeal, or for the purposes of enforcement, to the courts.

131. The trial judge at para. 119 *et seq.* of his judgment concluded that Article 13.8.1° and the AIE Directive were “in direct conflict” and concluded by reference to Article 29.4.6° of the Constitution that the AIE Directive and the implementing AIE Regulations must be read

in the light of the supremacy of EU law. His conclusion is in essence that whilst the exclusion of the President from the AIE Directive may have been permissible, the provisions of the AIE Directive were to be read as being “necessitated” by the obligations of membership.

132. As Hogan *et al* in *Kelly: The Irish Constitution* (Bloomsbury Professional, 2018, 5th ed.) noted, the correct interpretation of Article 29.4.6° of the Constitution has become “a quagmire of complexity” and the matter is of particular complexity when discretion is vested in a Member State as to the particular manner in which obligations of membership are to be met. It was argued in the course of the oral hearing by counsel for Right to Know that European Union membership required or “necessitated” that there be either an express exclusion of the President from the scope of the implementing measures, or, and this it is argued is the correct approach, that domestic legislation be read in such a way as to be consistent with European law, and specifically that proper effect and meaning is given to the exclusion provisions in Article 2.2 of the Directive if, and only if, domestic measures are interpreted in a way that permits the widest access by the public to environmental information.

133. It will be necessary to return to ask whether the President is a “public authority” within the meaning of the Directive, but for the present I propose to explain why the exception for which Article 2(2) provides does not preclude the immunity to which the President is entitled under Article 13.8.1°.

134. Right to Know limited its arguments to the provisions of Article 2(2) of the Directive and argued that the mere fact that the President is Head of State does not exclude him from the obligations under the Directive and that the implementing AIE Regulations may not be read to so exclude the President from the Directive.

135. Counsel for the State parties argued that nothing in the AIE Directive necessitates the inclusion of the President as a body answerable to a request for environmental

information. It is argued also that the legislature was not competent to make the President answerable to the Commissioner and *ipso facto* to the High Court because this was not necessitated by membership on a correct reading of the AIE Directive.

The scope of Article 2.2 of the AIE Directive

136. Article 2(2) of the AIE Directive permits Member States to exclude certain bodies from the definition of public authority in limited circumstances:

“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 of 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.”

137. Right to Know argues that the constitutional provision must give way to the Directive on account of the supremacy of EU law. The Commissioner and the State parties argue that by reason of the exclusions contained in the second sentence in Article 2(2), an exemption may exist from domestic constitutional provisions without express derogation, and that the effect of Article 13.8.1° is such that domestic law “... made no provision for a review procedure within the meaning of Article 6.”

138. Advocate General Sharpston in *Flachglas Torgau GmbH v. Federal Republic of Germany* at para. 43 considered that this exemption was a standalone exemption “entirely separate” from the other excluding provisions of Article 2(2) and must be seen as being protective of domestic constitutional provisions.

139. It is useful to briefly examine here the evolution of the exemption from review in the case law of the CJEU.

140. The Aarhus Convention was approved on behalf of the (then) European Community by Council Decision 2005/370 and its declaration was contained in an annex to the effect that Article 9 of the Aarhus Convention gives Member States the possibility “in exceptional

cases and under strict specified conditions” to exclude certain bodies and institutions from the review procedures for review of decisions on request for information.

141. At the time of the ratification by the European Union of the Aarhus Convention, Sweden entered a reservation in relation of Article 9.1 with regard to access to a review procedure before a court of law of decisions taken by the Parliament, the Government and Ministers on issues involving the release of official documents. A reservation was also lodged in relation to Article 9.2 not relevant to this judgment.

142. At the time, although declarations were made by several other EU countries, none was made, nor was a reservation entered, by Ireland.

143. It is settled that implementation of a Directive does not necessarily require legislative action in each Member State and that the existence of general principles of constitutional or administrative law may render implementation by specific legislation superfluous, subject only to the principles of equivalence and effectiveness: see, for example, the early case of Case C-29/84, *Commission v. Germany*, EU:C:1985:229.

144. That principle formed the backdrop to the argument some years later in 2012 in a request for a preliminary ruling in *Flachglas Torgau GmbH v. Federal Republic of Germany*. The question specifically concerned which authorities of the state might be regarded as acting in a legislative capacity for the purposes of the exclusion from the definition of “public authority” within the Directive. The Court held that where the domestic law of a Member State provides for the confidentiality of certain proceedings of public authorities, that may provide a ground for refusing access to environmental information provided the confidentiality of proceedings is provided for under national law by an express provision with a precisely defined scope and not merely arising from a general legal context.

145. In *Flachglas Torgau GmbH v. Federal Republic of Germany* the Court accepted the opinion of Advocate General Sharpston that two independent options to exclude were envisaged. She thought that the second option was intended to permit the in the light of the

declaration by the EU gives Member States the possibility of such exclusion and “encompasses” or “embodies” any reservation by a Member State compatible with those Articles.

146. At para. 46 of its judgment in *Flachglas Torgau GmbH v. Federal Republic of Germany* the CJEU agreed and said as follows:

“That provision was intended to deal with the specific situation of certain national authorities, and in particular authorities acting in an administrative capacity, whose decisions, at the date of adoption of Directive 2003/4, could not, according to the national law in force in certain member states, be subject to review in accordance with the requirements of that Directive.”

147. The matter came for consideration again in 2021 in the Opinion of Advocate General Bobek in Case C-470/19, *Friends of the Irish Environment v. Commissioner for Environmental Information*, ECLI:EU:C:2020:986 considering the scope of “judicial capacity” within the meaning of Article 2(2) of the AIE Directive. He expressed a view that the second part of the exclusionary provision was intended to address the position of certain national authorities whose decisions could not be reviewed according to national law in force at the date of the adoption of the Directive. He noted (at para. 39) that Ireland confirmed at the hearing that such a situation “does not arise” in Irish law, although that seems to be to have been given in answer to a question concerning the precise issue in that case, namely, whether the Courts Service of Ireland was acting in a judicial capacity.

148. The decision of the Court and the opinion of Advocate General Bobek in *Friends* concerned a body that did come within the definition of “public authority”, as did those in *Flachglas Torgau GmbH v. Federal Republic of Germany*. As will appear later in this judgment, I am of the view that the President is not a “public authority” within the meaning of the AIE Directive or the Irish implementing Regulations, but the case law suggests that EU law envisages that where the constitutional or legal provisions of domestic law exclude

a review of a refusal to afford access to information, those national provisions can be accommodated within, and are not incompatible with the AIE Directive, provided the national excluding measure is clear and was in existence at the date of the adoption of the Directive.

149. It follows therefore that as a matter of EU law the availability of a judicial remedy from a refusal of the President to afford access to information is not necessitated by EU membership, and that Article 2(2) may be seen as protective of domestic constitutional provisions.

150. The one requirement apparent from the decision of *Flachglas Torgau GmbH v. Federal Republic of Germany* and that is that the domestic legal provision be clear:

“According to settled case-law, while it is essential that the legal situation resulting from national implementing measures is sufficiently precise and clear to enable the individuals concerned to know the extent of their rights and obligations” (at para. 60)

151. And later:

“[...] national law must clearly establish the scope of the concept of ‘proceedings’ of public authorities referred to in that provision, which refers to the final stages of the decision-making process of public authorities.” (at para. 63)

152. For the reasons set out above it seems to me that the constitutional prohibition on making the President answerable contained in Article 13.8.1° is “sufficiently precise and clear” and has been treated as such by domestic courts on the rare occasions when the immunity has been invoked in litigation. The Irish constitutional immunity has been present since 1937 and long pre-dated the adoption of the Directive. EU law permits the exclusion of a power of review where the Member State’s constitutional order so requires, and therefore does not necessitate that the clear constitutional immunity of the President be abrogated for the purpose of the AIE Directive.

The option to exclude: must it be invoked expressly?

153. The trial judge found that a Member State must expressly elect to exclude a body from the AIE Directive and that as Ireland had not so elected in the AIE Regulations, the President, the OSGP and the Council of State are not excluded from an application and are amenable to the jurisdiction of the Commissioner.

154. It was argued by the State parties that the use of the words “may exclude” in the second sentence of the second subparagraph of Article 2(2) does not support the conclusion drawn by the High Court judge that an exclusion must be made expressly in the transposing legislation and the State parties point to the fact that the Directive does not make any provision as to how an exclusion might be implemented, thereby leaving to the Member States, in the words of Article 288(3) TFEU, the “choice and form of methods” regarding the mode of its transposition.

155. The Directive recognises the constitutional specificity of the Member States and that constitutional exemption did not need legislative action on the part of the Member States concerned. In the case of Ireland, it arises by virtue of the Irish constitutional order as a separate free-standing prohibition provided for by Article 13.8.1°. Given the clarity of the constitutional prohibition on making the President answerable to any legal or administrative process (other than that specified by Article 13.8.2°), it would have been “superfluous” or unnecessary to make express provision for any such exemption in the national implementing measure. As the CJEU said in Case C-29/84, *Commission v. Germany*, ECLI:EU:C:1985:229:

“the existence of general principles of constitutional or administrative law may render implementation by specific legislation superfluous, provided however that those principles guarantee that the national authorities will in fact apply the directive fully and that, where the directive is intended to create rights for individuals, the legal position arising from these principles is sufficiently precise and clear ...”.

156. Thus, if a structurally superior constitutional immunity exists, legislation did not need to repeat it, and the immunity was not required to be express in legislation, provided the relevant measures are sufficiently clear and precise. The form in which the exclusion is found is not mandated by EU law.

157. The CJEU has in fact answered the question regarding the requirement of express derogation or exclusion. EU law accepts that a restriction may exist at domestic level and may lawfully be seen to have the effect of excluding that body from the provisions of the Directive and any national transposing legislation. The exclusion may pre-exist the Directive, as occurred in Ireland, and in that instance, there is no requirement of express derogation or exclusion.

158. Finally, I reject the argument of Right to Know that, as the purpose of the Directive is to make available access to environmental information generally, that the President must be made amenable to this request. No power or function of the President involves him or her making decisions on environmental matters, or in holding environmental information which is relevant to individual decision-making. The information or documentation that might have been read or consulted by the President for the purposes of giving the two speeches for example, must be regarded as documentation of high principle and not ones that show or illustrate any decision or administrative act by the President which might have impacted individual persons or bodies.

Is the President and/or the Council of State a “public authority”?

159. As already discussed above, Article 2(2) of the AIE Directive permits the exclusion of certain national bodies or institutions from the requirement of disclosure in order to protect the constitutional order of a Member State. But it is useful to consider the question arising in this appeal from an analysis of the logically prior question of whether either the President and/or the Council of State could properly be described as a “public authority” for the purposes of the Directive and the domestic Regulations. A resolution of that question

has important consequences for the operation of the Regulations generally, and a decision that the President and/or the Council of State do not fall within the definition is capable of resolving the appeal.

160. The scope of the exemption and the interpretation of the definition of “public authority” was not considered in the High Court judgment, but the Determination granting leave did propose that this question be addressed in submissions.

161. A “public authority” is defined at Article 2 of the AIE Directive as:

“(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 service 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).”

Article 3 of the AIE Regulations transposes this definition exactly and added a non-exhaustive list of bodies (i) to (vii).

“3. (1) In these Regulations—

[...]

“public authority” means, subject to sub-article (2)—

(a) government or other public administration, including public advisory bodies, at national, regional or local level,

(b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment, and

(c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within paragraph (a) or (b),

and includes—

- (i) a Minister of the Government,
- (ii) the Commissioners of Public Works in Ireland,
- (iii) a local authority for the purposes of the Local Government Act 2001 (No. 37 of 2001),
- (iv) a harbour authority within the meaning of the Harbours Act 1946 (No. 9 of 1946),
- (v) the Health Service Executive established under the Health Act 2004 (No. 42 of 2004),
- (vi) a board or other body (but not including a company under the Companies Acts) established by or under statute,
- (vii) a company under the Companies Acts, in which all the shares are held—
 - (I) by or on behalf of a Minister of the Government,
 - (II) by directors appointed by a Minister of the Government,
 - (III) by a board or other body within the meaning of paragraph (vi),or
 - (IV) by a company to which subparagraph (I) or (II) applies, having public administrative functions and responsibilities, and possessing environmental information;

162. The list of excluded bodies was expanded by the Regulations of 2018 to include the President and the Council of State:

“2. Article 3 of the European Communities (Access to Information on the Environment) Regulations 2007 (S.I. No. 133 of 2007) is amended by the substitution of the following sub-article for sub-article (2):

“(2) Notwithstanding anything in sub-article (1), in these Regulations “public authority” does not include—

(a) the President,

(b) the Office of the Secretary General to the President,

(c) the Council of State,

(d) any Commission for the time being lawfully exercising the powers and performing the duties of the President, or

(e) any body when acting in a judicial or legislative capacity.”

163. The AIE Regulations contain an express provision excluding bodies that act in a judicial or legislative capacity from the definition of public authority, at Article 3(2):

“Notwithstanding anything in sub-article (1), “public authority” does not include any body when acting in a judicial or legislative capacity.”

164. For the reasons already explained earlier in this judgment, I do not consider that either the President or the Council of State acts in either a judicial or legislative capacity and therefore the exclusion in Article 3(2) is not applicable.

165. The State parties contend that the President, the OSGP and the Council of State fall outside the definition of public authority in Articles 2(2)(a), (b) and (c) of the AIE Directive. Right to Know argues that the President does have a public advisory or public administration function which are “quasi-public administrative functions”.

Discussion

166. The concept of “public authority” is an autonomous concept of EU law, and the fact that domestic implementing provisions use precisely the language of the Directive further compels an approach to interpretation in the light of recent CJEU jurisprudence.

167. In *NAMA v. Commissioner for Environmental Information* [2015] IESC 51, [2015] 4 I.R. 626 O'Donnell J. (as he then was) quoted from the decision of the Grand Chamber of the CJEU in Case C-279/12, *Fish Legal and Shirley v. Information Commissioner*, ECLI:EU:C:2013:853 which provided that the concept was to be seen as a European concept to be given an autonomous interpretation with a view to achieving uniform application of EU law.

168. It must also be borne in mind that in adopting the Directive, the EU intended to ensure the consistency of its law with the Aarhus Convention and this proposition, stated in the preamble to the Directive, was a factor in the decision of the CJEU in *Flachglas Torgau GmbH v. Federal Republic of Germany* discussed below.

169. The CJEU also said this in *Fish Legal and Shirley v. Information Commissioner* commenting that account is to be taken of the wording and aim of the Aarhus Convention and the Aarhus Convention Implementation Guide, although the latter does not have binding or normative effect.

170. In *Fish Legal and Shirley v. Information Commissioner* at paras 51-2 the CJEU identified 2 categories of public authorities, which O'Donnell J. quoted at para. 48 of *NAMA v. Commissioner for Environmental Information*:

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

52. The second category of public authorities, defined in Article 2(2)(b) of Directive 2003/4, concerns administrative authorities defined in functional terms, namely entities, be they legal persons governed by public law or by private law, which are entrusted, under the legal regime which is applicable to them, with the performance

of services of public interest, inter alia in the environmental field, and which are, for this purpose, vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.”

171. The defining features considered in *NAMA v. Commissioner for Environmental Information* were those exercisable by bodies which while they might have a commercial or private law power, had further powers which went beyond those normally applicable in private law, and *ipso facto* powers that could affect or impact upon private rights.

172. In his opinion in *Friends of the Irish Environment v. Commissioner for Environmental Information* Advocate General Bobek warned against an approach to meaning that was over-broad, or what he termed “an interpretative creativity”, notwithstanding that the overall aim of the instrument is to increase public participation and accountability in decision-making. Because of this aim, and in the light of the purpose of Aarhus, the bodies from which information may be sought should be those bodies or institutions “before which decision-making effectively takes place”.

173. It is important also to recognise that in *Flachglas Torgau GmbH v. Federal Republic of Germany* the CJEU held that the context, purpose and aims of the Aarhus Convention and the AIE Directive was to permit access to information from public authorities only to the extent that they act as administrative authorities holding environmental information in the exercise of their functions (paras. 40 and 48).

174. In *Flachglas Torgau GmbH v. Federal Republic of Germany* the CJEU adopted a “functional” approach to the interpretation of the phrase in the light of the varying constitutional administrative and legislative structures in the different Member States.

175. This approach was further modified and explained in the decision of the CJEU in Case C-470/19, *Friends of the Irish Environment v. Commissioner for Environmental Information*, ECLI:EU:C:2021:271 where it concluded that the excluding grounds in the second subparagraph of Article 2(2) of the AIE Directive arise only if the body in question

meets one of the three definitions of a public authority laid down in the first paragraph, and went on to say as follows:

“It follows from Article 2, point 2, of Directive 2003/4, taken as a whole, that the option available to Member States to exclude from the notion of ‘public authority’ bodies or institutions acting in a legislative or judicial capacity, provided for in the first sentence of the second subparagraph of Article 2, point 2, of that directive, which must be interpreted in a functional manner (see, by analogy, judgment of 14 February 2012, *Flachglas Torgau*, C-204/09, EU:C:2012:71, para. 49), can affect only bodies or institutions which correspond to the institutional definition of the notion of ‘public authority’ set out in the first subparagraph of Article 2, point 2, of that directive. Satisfaction of that definition is an essential prerequisite for the exercise of the power to derogate provided for in the first sentence of the second subparagraph of Article 2, point 2, of Directive 2003/4.” (para. 33)

176. The litigation in *Friends of the Irish Environment v. Commissioner for Environmental Information* concerned a request to the Central Office of the High Court under the AIE Regulations for pleadings, affidavits, documents etc. lodged by parties to an environmental case which had been fully determined in the High Court. The refusal of the Office to furnish the information was appealed to the Commissioner, and his refusal in turn was appealed to the High Court on a point of law under the Regulations. The conclusion was that the request ought properly to have been made to the Courts Service which is responsible for storing, archiving and managing court files on behalf of the court concerned. The question specifically considered by the High Court was whether the Courts Service was “acting in a judicial capacity” and that led to a reference under Article 267 TFEU which concluded that the courts are outside the scope of the definition of a public authority as they exercised institutionally judicial functions. The CJEU concluded that the concept of “public

authorities” encompassed administrative authority, and that courts themselves are not performing administrative functions under Article 2(2)(b) of the Directive at para. 35.

177. The opinion of Advocate General Bobek in *Friends of the Irish Environment v. Commissioner for Environmental Information* offers a useful analysis of the meaning of “public authority” and he concluded that the phrase should not be interpreted as “entertaining a purely functional or a purely institutional” interpretation. Instead, an “institutional definition with the functional corrective” is proposed

178. That proposition requires some further elucidation. In *Flachglas Torgau GmbH v. Federal Republic of Germany* the question concerned the application of the exclusion to all activities of the Federal Ministry, an entity which was undoubtedly a public authority. The CJEU determined that, in the light of the need to reconcile the plurality of processes in different Member States, the derogation from the general rules on access was to be interpreted in a “functional” manner (at para. 49). The question posed concerned whether that public authority was, in its decisions leading to the adoption of a law concerning the allocation of emissions licences and its implementation, acting in a legislative capacity or was rather to be seen as functionally different in that role and no longer legislative. As Advocate General Sharpston noted at para. 63 of her opinion, the body was structurally a branch of the executive, and therefore a public authority, but was functionally engaged in activities which were part of the protected and excluded legislative activities. She reasoned that what is institutionally included could temporarily be functionally excluded on account of the activity actually engaged by the body.

179. When the question came again before the CJEU in *Friends of the Irish Environment v. Commissioner for Environmental Information*, Advocate General Bobek reviewed that analysis and concluded that the decision in *Flachglas Torgau GmbH v. Federal Republic of Germany* did not mean that the entire definition in Article 2(2) of the Directive was “purely functional”, without regard being had to the institutional dimension:

“The functional use of the legislative capacity derogation was employed only in a second step, in order to temporarily exclude what would otherwise be ‘in’, but not in the first step, in order to define what will be covered by the definition in the first place” (para. 65)

180. That approach could logically have the effect of excluding a body on an *a priori* basis without reference to its functions: “what is already (permanently) excluded, does not need to be (temporarily) excluded again”.

181. On that test the President could be seen as institutionally not within the realm of “public authority” because, as the analysis in the earlier part of this judgment shows, he or she is outside the policy and decision making realm.

182. Advocate General Bobek thought also that “government” in Article 2(2)(a) is not to be understood as including all powers of state and the disjunctive in Article 2(2)(a) “government or other public administration” meant that for the purpose of the Directive government is linked to political power, and that was the preferred approach in the Aarhus Convention Implementation Guide (at para 52).

183. Advocate General Bobek also observed that, whilst Article 2(2)(b) provided greater flexibility, again by reference to the purpose and spirit of the Aarhus Convention, the bodies there included “should logically cover the type of bodies and institutions before which such decision making effectively takes place” (at para. 55).

184. He described it in memorable terms at para. 55:

“That is, *a priori* and from an abstract point of view at an institutional level, neither upstream in a legislature (where the rules for that decision-making or developed), nor downstream in cases of judicial review (where the legality of the decision once taken may be reviewed and, in the event of irregularities is typically referred back to the public authority so that it can adopt a new)”.

185. Thus it must be correct to say in the light of the opinion of Advocate General Bobek that functionality is not the sole, or perhaps even the primary, condition for the assessment of whether a body is exempt under the Directive.

186. Bodies which are included in the meaning of “public authority” are those “before which such decision-making effectively takes place”.

187. It follows that the decision-making power, the power to make decisions which affect or are capable of affecting the environment, or policy on the environment, is the key institutional and functional test. Institutionally the President does not have any decision-making functions in this sense, and functionally his powers are constitutionally defined and constrained to those ceremonial, symbolic and limited reserved or discretionary powers already explained in this judgment, none of which involve the President in any decision-making role, although his role is constitutionally essential in that some of his functions are exercised in order to complete the process such as the passing of legislation, the appointment of judges, or the commissioning of a member of the Defence Forces. In no case does the President exercise any role as decision maker in the realm of the environment or by which he or she impacts on policy or the rights of any individual.

188. Institutionally in the Irish constitutional order the President operates neither upstream in the legislative function nor downstream in the judicial function. The various roles vested in the President by the Constitution are roles of upholding the constitutional and democratic structures and systems of the State and of the rule of law. He or she is not a policy or decision-maker or a public authority in the sense explained in these authorities. Even in the exercise of the autonomous constitutional power under Article 26, the role of the President is not to approve, reject or amend legislation, but to make a choice on whether a reference to this Court is desirable.

189. Right to Know argues for a purposive or teleological approach to the definition of “public authority” in the light of the approach in the decision of the High Court in *Minch v.*

Commissioner for Environmental Information [2016] IEHC 91 and the Court of Appeal decision [2017] IECA 223. Hogan J., giving the decision in the Court of Appeal, applied a teleological approach because of the aim of the Directive and Aarhus to encourage effective public participation in environmental decision making and eventually to a better environment.

190. A similar teleological approach is found in *Redmond v. Commissioner for Environmental Information* [2017] IEHC 827, and the Court of Appeal decision [2020] IECA 83, where the Court noted that the question of what is a “public authority” for the purpose of the Regulations is one of some complexity.

191. The decisions in *Minch* and *Redmond* were mostly concerned with whether the information was environmental information and are not directly on point.

192. Further a teleological approach cannot lawfully result in an interpretation that offends the meaning of the exclusion found in the authorities discussed above, see the decision of the CJEU in Case C-71/10, *Office of Communications v. Information Commissioner*, ECLI:EU:C:2011:525.

Summary

193. In summary then the President does not come within the category (a) of Article 2 (2) of the AIE Directive because he or she is not involved in “government or other public administration”. Nor does the President perform “public administrative functions” under national law within the meaning of category (b) because he or she plays no administrative role, and is not a person having “public responsibilities or functions, or providing public services relating to the environment” under the control of the body or person falling within Article 2 (2) (a) or (b). The President has no such responsibilities, function or roles and is not a public authority for the purposes of European or domestic law.

Preliminary reference under Article 267 TFEU?

194. I consider that the meaning of the term “public authority” has already been sufficiently interpreted by the CJEU and its application does not accordingly give rise to any doubt, and although there is no judicial remedy under national law from the decision of this Court, in the light of the test explained in *Conorzio Italian Management* Case C-561/19 I consider that a reference to the court under Article 267 TFEU is not necessary.

Conclusion

195. In conclusion therefore, I consider that this appeal is answered by the presidential immunity from suit, that the President is not amenable to request under the Directive and the Regulations, and that, as a consequence of the immunity, this Court has no jurisdiction to engage the appeal from the decision of the Commissioner. I also conclude that the President is not a “public authority” within the meaning of the AIE Directive and the Regulations. The Commissioner was correct to conclude that the Regulations of 2018 did no more than restate the existing law.

196. I would for these reasons dismiss the cross-appeal of Right to Know and allow the appeal of the State parties. This has the effect that the decision of the High Court is overturned to the extent that it made any direction regarding disclosure by the President and/or the notice party.