Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 3 December 2020[1]

Case C-470/19

Friends of the Irish Environment Ltd
v
Commissioner for Environmental Information,
joined party:
The Courts Service of Ireland

(Request for a preliminary ruling from the High Court (Ireland))

(Reference for a preliminary ruling – Access to environmental information held by public authorities – Aarhus Convention – Directive 2003/4/EC – Concept of 'acting in a judicial capacity')

I. Introduction

1. Friends of the Irish Environment Ltd is a non-governmental organisation. It requested third-party access to court records of a closed case relating to the granting of planning permission for the construction of wind turbines in County Cork (Ireland). That request was denied. The rejection decision stated that the institution holding the court records, which under national law was the Courts Service of Ireland, did so in a 'judicial capacity' on behalf of the judiciary. When acting in such a capacity, that institution was not a 'public authority' within the meaning of Directive 2003/4/EC.[2]

2. It is in this context that the High Court (Ireland) seeks to ascertain the scope of the concept of 'judicial capacity' for the purposes of defining the concept of 'public authority' within the meaning of Article 2(2) of Directive 2003/4. More broadly, the question arises to what extent courts are subject to the obligations imposed by that directive, and therefore also to those imposed by the Aarhus Convention, to grant access to environmental information to members of the public upon request?

1 Original language: English.

2 Directive of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ 2003 L 41, p. 26).

II. Legal framework

A. International law

3. The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('the Aarhus Convention') is an international convention that aims to grant the public rights, and imposes on its signatories and their public authorities obligations regarding access to information, public participation in decision-making, and access to justice relating to environmental matters. It was signed by the then European Community in 1998 and was subsequently approved by Council Decision 2005/370/EC.[3]

4. The preamble of the convention provides, in part, as follows:

'Aiming thereby to further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment,

Recognising the desirability of transparency in all branches of government and inviting legislative bodies to implement the principles of this Convention in their proceedings.'

5. Article 2 of the Aarhus Convention defines the term 'public authority' as:

'(a) Government at national, regional and other level;

(b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;

(c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;

(d) The institutions of any regional economic integration organisation referred to in article 17 which is a Party to this Convention.

This definition does not include bodies or institutions acting in a judicial or legislative capacity.'

B. EU law

6. Directive 2003/4 replaced Council Directive 90/313/EEC[4] to align EU law with the text of the Aarhus Convention and to remove disparities between the laws of the Member States concerning access to environmental information held by public authorities.[5]

7. In accordance with Article 1 of Directive 2003/4, the objectives of that directive are, first, to 'guarantee the right of access to environmental information held by or for public authorities and to set out the basic terms and conditions of, and practical arrangements for its exercise'; and, second, 'to ensure that, as a matter of course, environmental information is progressively made available and disseminated to the public to achieve the widest possible systematic availability and dissemination to the public of environmental information'.

3 Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (OJ 2005 L 124, p. 1) ('the Aarhus Decision').

4 Council Directive of 7 June 1990 on the freedom of access to information on the environment (OJ 1990 L 158, p. 56).

5 Recitals 6 and 7 of Directive 2003/4.

8. By virtue of Article 2(2) of that directive:

‘ “Public authority” shall mean:

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

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

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

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

C. National law

9. The European Communities (Access to Information on the Environment) Regulations 2007 to 2018 (S.I. No 133 of 2007 and S.I. No 309 of 2018) (‘the AIE Regulations’) transpose the provisions of Directive 2003/4 into Irish law. In substance, Regulation 3(1) thereof transposes Article 2(2) of that directive.

10. Pursuant to Regulation 3(2) of the AIE Regulations, Ireland excludes from the definition of ‘public authority’ ‘any body when acting in a judicial or legislative capacity’.

III. Facts, national proceedings and the question referred

11. On 25 February 2016, the High Court (Ireland) delivered its judgment in the case *Balz & Heubach v An Bord Pleanala* ([2016] IEHC 134]). That case concerned a challenge to a decision of a public body to grant planning permission for the construction of wind turbines in County Cork (Ireland).

12. On 9 July 2016, Friends of the Irish Environment (‘the applicant’) wrote to the Central Office of the High Court to request copies of the pleadings, affidavits, exhibits and written submissions filed by all parties, as well as the perfected orders, from that case (‘court records’). That request was made pursuant to the Aarhus Convention, Directive 2003/4, and the AIE Regulations. At the time of that request, no appeal against the judgment in *Balz & Heubach v An Bord Pleanala* was pending.

13. The management of the Central Office of the High Court is assigned to a court officer nominated by the Courts Service of Ireland (‘the Courts Service’). After consultation with the President of the High Court, the Courts Service rejected the applicant’s request on 13 July 2016. It based that decision, inter alia, on the fact that the AIE Regulations did not extend to cover ‘court proceedings or legal documents filed in Court proceedings’.

14. On 18 July 2016, the applicant requested that the Courts Service review that decision. Having received no response within a set period of time, the applicant was entitled to appeal to the Commissioner for Environmental Information (‘the defendant’). It filed its appeal on 15 September 2016.

15. On 19 June 2017, the defendant wrote to the applicant indicating that a decision had already been made in a similar case (Case CEI/15/0008 *An Taisce & The Courts Service*). While emphasising that each case would be considered on the merits, the defendant requested the applicant to identify any reasons that would justify a different decision in respect of its request for access to the court records in *Balz & Heubach v An Bord Pleanala*.

16. By reply of 26 July 2017, the applicant submitted its reasons for maintaining the appeal.

17. On 31 July 2017, the defendant rejected the appeal. It concluded that the Courts Service holds the requested records, including those in concluded proceedings, while acting in a 'judicial capacity' on behalf of the judiciary. Hence, the Courts Service was not a 'public authority' within the meaning of Regulation 3(1) of the AIE Regulations.

18. The applicant challenged that decision before the High Court. It considers that the derogation for bodies or institutions acting in a 'judicial capacity', as provided for in Article 2(2) of Directive 2003/4 and transposed in Regulation 3(1) of the AIE Regulations, does not cover the records of closed cases.

19. Harbouring doubts as to the correct interpretation of Article 2(2) of Directive 2003/4, the High Court (Ireland) decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Is control of access to court records relating to proceedings in which final judgment has been delivered, the period for an appeal has expired and no appeal or further application is pending, but further applications in particular circumstances are possible, an exercise of "judicial capacity" within the meaning of Article 2(2) of [Directive 2003/4]?'

20. Written observations were submitted by the applicant, the defendant, the Courts Service, Ireland and the Polish Government, as well as the European Commission. Those parties also presented oral argument during a hearing which took place on 16 September 2020.

IV. Analysis

21. This Opinion is structured as follows. I shall start with the scope of Article 2(2) of Directive 2003/4 (A). I will then turn to the concept of when a 'public authority' acts in a 'judicial capacity' (B). In the light thereof, I will address the question posed by the referring court (C). Finally, I shall conclude with several remarks on the broader context (D).

22. The present case concerns a rather specific body in a Member State: the Courts Service of Ireland. In its observations submitted before the Court, that body described itself as a 'body corporate with a legal personality and a remit quite separate and distinct' from the court offices of Ireland. Its activities include the storage, archiving and management of court records of (open or closed) cases.

23. The fact that the present case concerns a not entirely common institutional structure in one Member State, in which the national courts are assisted by a private law body created for a specific purpose, should not detract from the fact that the issue raised is general in nature. The administration of court files, pending or closed, might be assigned, in the various Member States, to different bodies, ranging from direct management and storage of the files by each court itself, to a central administration of the files by other institutions. Those latter institutions could again range from the Ministry of Justice or the National Council of the Judiciary to other, dedicated bodies or institutions. There might even be an institutional competence depending on the status of the file, with the pending files administered by the courts themselves and closed files, after a certain time, being passed on to a central storage facility.

24. In other words, there may be many facets to the administration of court records. That is why it would be ill-advised to address the present case and the issues raised by it by means of a detailed and technical discussion of the (essentially national law) status of the Courts Service and its specific position within the national judicial structure. That issue is in fact secondary.

25. The main issue to be addressed in the present case is precisely what constitutes the management of court files, in the structure of Directive 2003/4, (in particular, the type and nature of that activity), and whether the performance of that activity could qualify as 'acting in a judicial capacity', at a first stage *irrespective of which specific body* in the Member State carries out that activity. However, hidden within that question is yet another issue: how does the clarification (or derogation) concerning 'judicial capacity' in the second subparagraph of Article 2(2) of Directive 2003/4 relate to the main part of the definition of 'public authority' in points (a) to (c) of the first subparagraph of that very provision? Which bodies or parts of the Member States' structures should be covered by Directive 2003/4? At that point, one arrives at the indeed crucial element of the present case: are courts 'public authorities' for the purposes of Article 2(2) of that directive, thus possibly falling within the scope of the obligation to provide access to 'environmental information' pursuant to Article 1 and Article 3 of Directive 2003/4?

26. It is necessary to unstack that definitional Matryoshka just as one would with any other Russian doll: layer after layer, an endeavour to which I will now turn.

A. The scope of Article 2(2) of Directive 2003/4

27. Article 2(2) of Directive 2003/4 sets out the definition of 'public authority'. In the first subparagraph, it lays down, in points (a) to (b), the bodies and institutions of the State to which the obligations incumbent on 'public authorities' must apply. Those focus on the concept of 'government' in point (a), and of persons 'performing public administrative functions … in relation to the environment' in point (b). In point (c), the directive then includes a 'residual' clause for 'natural or legal persons … under the control of a body or person' falling within points (a) or (b).

28. The structure of that definition in the first subparagraph thus follows a positive list of entities. That list is succeeded by a second subparagraph which, in its first sentence, provides for a derogation from the scope of the directive for bodies or institutions 'acting in a judicial or legislative capacity'. In its second sentence, bodies and institutions acting in such capacities may then, in certain circumstances, also be excluded from the scope of the judicial review provisions of the directive.

29. It is agreed by all parties to the main proceedings that control over the court file during the proceedings involves the exercise of 'judicial capacity'. So long as the court file remains 'open', the courts would be exempt from the scope of Directive 2003/4.

30. The issue in dispute is whether the court records are held by the Courts Service in a 'judicial capacity' after final decisions have been taken and all appeal proceedings have been exhausted. If that were the case, those records would remain outside the scope of Directive 2003/4.

31. Relying on the judgment of the Court in *Flachglas*,[6] the applicant argues that the concept of 'public authority' in Article 2(2) of Directive 2003/4 should be viewed as covering, in principle, all bodies or institutions of the State, subject to the function being carried out at the time the request for access is filed. In other words, according to that interpretation, the first sentence of the second subparagraph takes precedence over any structural determination under the first subparagraph. In the applicant's

6 Judgment of 14 February 2012, *Flachglas Torgau* (C-204/09, EU:2012:71).

view, any activity in a 'judicial capacity' is subject to a temporal limitation, in the sense that bodies or institutions may be deemed to be excluded from the scope of Directive 2003/4 only so long as they can actually be seen to be acting in such a capacity. The Commission broadly shares that position but recommends a 'case-by-case assessment' of the individual request for access.

32. The defendant, the Courts Service, Ireland and the Polish Government favour an interpretation that would essentially amount to a rather 'institutional' approach to the definition of the body concerned. The first subparagraph and the first sentence of the second subparagraph would have to be read in conjunction with the institutional definition in the first subparagraph. Therefore, under that definition, the courts, as institutions, would always be excluded from the first subparagraph, and thus from the scope of Directive 2003/4, since they always act in a 'judicial capacity'.

33. Although not expressly raised by either party to the proceedings, there is also a third possibility, which slightly nuances the institutional approach. It is an interpretation, which allows for an immediate qualification, on the basis of the first sentence of the second subparagraph, of any findings reached on the institutional designation of the first subparagraph with regard to the particular activities of the body concerned at the given time. This interpretation could thus be defined as primarily institutional, with a functional adjustment or corrective.

34. Thus it would appear that there are three possible interpretations of the concept of 'judicial capacity', contained in the first sentence of the second subparagraph of Article 2(2) of Directive 2003/4, which would therefore also apply to all definitions contained in Article 2(2) of that directive as a whole: (i) 'purely functional', (ii) 'primarily institutional', and (iii) 'institutional with a functional corrective'.

35. In order to suggest which of the three approaches should be favoured, a number of logically preceding points need to be addressed. First, what exactly is the relationship between the first and second subparagraphs of Article 2(2) of Directive 2003/4 (1)? That requires an assessment of the logic and structure of the first subparagraph, before recourse can be had to the derogation for activities in a 'judicial capacity' under the second subparagraph (2). After that, it is necessary to examine in detail the judgment in *Flachglas*,[7] relied on by all the parties to support their (diverging) interpretations of the concept of 'judicial capacity' (3). Only then will I be able to turn to a discussion on the three possible interpretations of the concept of 'judicial capacity' in Directive 2003/4 (4).

1. The relationship between the first and second subparagraphs

36. In their submissions, all the parties to the present proceedings focus in detail on the interpretation of the concept of 'judicial capacity'. That is certainly understandable, since that concept is indeed singled out in the question posed by the referring court. However, the concept of 'judicial capacity' is only part of the broader definition of 'public authority' set out in Article 2(2) of Directive 2003/4. It serves as a qualification, clarification, or even perhaps a derogation in the second subparagraph of that provision. It is necessary to start by discussing the less obvious link between the first and second subparagraphs of Article 2(2) of that directive.

37. As a starting point, it is necessary to clarify the relationship between the first sentence of the second subparagraph of Article 2(2) of Directive 2003/4, and the second sentence of that subparagraph. The first sentence of the second subparagraph comes at the end of a clause containing the definition of public authority and refers specifically to the first subparagraph in order to explain its scope. The second sentence of the same subparagraph, in turn, refers to the first sentence thereof to delimit the scope of exclusion from the review procedure under Article 6 of the directive. What is not

7 Judgment of 14 February 2012, *Flachglas Torgau* (C-204/09, EU:C:2012:71).

clear from the provision in question is how those two sentences are to be read: is there a need for an isolated reading in relation to the scope of the first subparagraph? Or, as the applicant argued at the hearing, should both sentences be read together to establish a comprehensive (and dominant) meaning of the second subparagraph?

38. It would appear to me that those two sentences of the second subparagraph of Article 2(2) of Directive 2003/4 should be read independently of one another.

39. Besides the fact that the two sentences of the second subparagraph refer to the same bodies or institutions, there is no conjunction or link to bind the two sentences together. They concern, and are applicable to, distinct situations. Furthermore, the Court has already clarified that neither the aim nor the effect of the second sentence is such as to limit the option given to the Member States, in the first sentence, to exclude bodies and institutions 'acting in a judicial or legislative capacity' from the scope of Directive 2003/4.[8] Rather, that second sentence was intended to address the specific situation of certain national authorities whose decisions, at the date of the adoption of Directive 2003/4, could not be reviewed, according to the national law in force, in accordance with the requirements of the directive. As Ireland confirmed at the hearing, but which remains for the referring court to verify, such a situation does not arise for that Member State.

40. Having clarified the internal construction of the second subparagraph, it is now necessary to examine the relationship between the first sentence of the second subparagraph (the 'judicial capacity' qualification) and the first subparagraph of Article 2(2) of Directive 2003/4. Given the systemic position of the first sentence of the second subparagraph, it is obvious that its effects depend on the applicability of the first subparagraph. That is to say that the requirement for qualifying as a 'public authority' as defined in the first subparagraph arises logically *prior* to the question of whether that 'public authority' benefits from the exclusion referred to in the first sentence of the second subparagraph.

41. As such, it becomes necessary to clarify the logic and structure of the first subparagraph of Article 2(2) of Directive 2003/4. After all, if the courts were not included within the scope of the definition of 'public authority', within the meaning of the first subparagraph of that provision, any possible qualifying or overriding effects of the second subparagraph on that definition would become moot.

2. Are courts 'public authorities' under Article 2(2) of Directive 2003/4?

42. The applicant and the Commission take the position that the courts (of a Member State) fall under the definition of 'public authority' within the meaning of the first subparagraph of Article 2(2) of Directive 2003/4.

43. At the outset, it ought to be recalled that while Directive 2003/4 could perhaps not be regarded as a full transposition of the Aarhus Convention at the time of its adoption, since it pre-dated the approval of the Aarhus Convention by the European Union in 2005, that convention now forms an integral part of the EU legal order.[9] The Court has thus recognised that the co-legislators intended to ensure 'compatibility' between Directive 2003/4 and the Aarhus Convention.[10] Accordingly, for the purposes of interpreting Directive 2003/4, account is to be taken of the wording and the aim of the Aarhus Convention.[11]

8 Judgment of 14 February 2012, *Flachglas Torgau* (C-204/09, EU:C:2012:71, paragraph 48).

9 Judgment of 8 March 2011, *Lesoochranárske zoskupenie* (C-240/09, EU:C:2011:125, paragraph 30).

10 Judgment of 14 February 2012, *Flachglas Torgau* (C-204/09, EU:C:2012:71, paragraph 31 and the case-law cited). See also recital 5 of Directive 2003/4 and the declaration annexed to the Aarhus Decision.

11 Judgment of 19 December 2013, *Fish Legal and Shirley* (C-279/12, EU:C:2013:853, paragraph 37 and the case-law cited).

44. In the present case, that means that Article 2(2) of Directive 2003/4 should be interpreted in the light of Article 2(2) of the Aarhus Convention. Both provisions contain the definition of 'public authority'. They thereby delimit their scope in a similar way. However, a closer inspection reveals that, in part, they do so to a different degree.

45. Point (a) of Article 2(2) of Directive 2003/4 refers to 'government or other public administration, including public advisory bodies, at national, regional or local level'. Conversely, point (a) of Article 2(2) of the Aarhus Convention refers to 'government at national, regional and other level'. The reason for that difference in wording is not apparent from the text or the preparatory documents of those instruments.

46. By contrast, in the English language version, point (b) of the first subparagraph of Article 2(2) of Directive 2003/4 and of the Aarhus Convention are near carbon copies of one another. They both refer to natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment. The same applies to a comparison of point (c) of both instruments. There, too, the wording is broadly equivalent. It refers to 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). In other words, that provision contains a 'no-outsourcing provision'.

47. For the sake of completeness, in the English language version, two other differences in scope arise. First, the second subparagraph of Article 2(2) of the Aarhus Convention notes that the positive definition of Article 2(2) found in that article 'does not include' bodies or institutions acting in a 'judicial or legislative capacity'. *Imperative* wording, in other words. The first sentence of the second subparagraph of Article 2(2) of Directive 2003/4, however, employs the *facultative* tense ('may provide'). It thus gives Member States the option to provide for a limitation of scope within their national law. Secondly, the second sentence of the second subparagraph of Article 2(2) of the directive, while not decisive for the present case,[12] finds no equivalent in the Aarhus Convention.

48. How does all that affect the issue of whether courts as institutions fall under any of the three points of the first subparagraph of Article 2(2) of Directive 2003/4?

49. Neither party quite took a position on that question. At the hearing, the applicant and the Commission merely placed the courts within point (a) as part of the scope of 'government'. The Courts Service, on the other hand, explained that courts do not normally exercise 'governmental functions' within the traditional meaning of that term, nor do they perform 'administrative functions … in relation to the environment' within the meaning of point (b) of the first subparagraph of Article 2(2) of the directive. Moreover, given that point (c) of the same provision covers any person 'under the control' of /an authority referred to in points (a) or (b), the courts could hardly fall thereunder.

50. I have some difficulty including 'courts' within the scope of point (a) of the first subparagraph of Article 2(2) of Directive 2003/4. Admittedly, courts could in some, rather limited instances, indeed be 'legal persons performing public administrative functions under national law' under point (b) of that provision.

51. On the one hand, when considered in isolation, the concept of 'government' in point (a) of the first subparagraph of Article 2(2) of the Aarhus Convention could be understood in a narrow sense as encompassing only the executive, writ large, to the exclusion of the judiciary and the legislature. If, however, a more subtle emphasis were to be placed on the concept of 'governance', inherent in a 'government', and that were to be read in the light of the preamble of the convention for the purposes

12 As explained in detail in point 39 of this Opinion.

of the need for transparency in 'all branches of government', it could be suggested that the concept of 'government' should encompass all systems of principles and rules that determine how a State is regulated.[13] If that interpretation were embraced, then the Aarhus Convention could perhaps be read, at least as regards its text, as applying to any public authority in a State, including courts.

52. On the other hand, it would be difficult to read point (a) of the first subparagraph of Article 2(2) of Directive 2003/4 in line with those broader implications of 'governance', given that its definition specifically links 'government' to 'other public administration, including public advisory bodies, at national, regional or local level'. What sense would there be to add 'government *or* other public administration', if 'government' were to be understood as already including all the powers in a State? The other category 'other public administration, including public advisory bodies, at national, regional or local level' would be completely redundant. Similarly, the Aarhus Convention Implementation Guide links the concept of 'government' to 'political power'.[14]

53. Moreover, if a greater weight is placed on the convention's focus on 'transparency in decision-making' and the Court's interpretation of that term as covering only 'administrative authorities',[15] it is difficult to conceive of an interpretation of point (a) of the first subparagraph of Article 2(2) as it appears in Directive 2003/4, if pegged against the objectives of the Aarhus Convention, as going beyond decision-making at a political (and administrative) level. Consequently, while it may be accepted that point (a) of the first subparagraph of Article 2(2) applies to the administrative activities of the courts, it is much more difficult to interpret that point as also applying to the courts themselves.

54. Conversely, I believe that point (b) of the first subparagraph of Article 2(2) of Directive 2003/4 allows for a more flexible interpretation. That point was intended to cover 'any natural or legal person performing public administrative functions …, including specific duties, activities or services in relation to the environment'. The use of the word 'including' indicates that the person carrying out such functions does not necessarily have to operate in the field of the environment.[16] They may do so, but there is no obligation to that effect. Granted, 'public administrative functions' tend to be associated with the routine exercise of governmental authority rather than the resolution of disputes by the judiciary of a State. However, depending on the judicial structure of a Member State, there may be situations where courts carry out such activities in connection with which a body or institution, although institutionally referred to as a court, is not in fact exercising any judicial function with regard to a certain specific activity.[17]

55. On the whole, I assume that the overall purpose and spirit of the Aarhus Convention should limit any interpretative creativity which could be attached to the definition of 'public authority'. If the overall aim of the instrument is to increase public participation and accountability in decision-making *in the field of the environment* (as the preamble to the Aarhus Convention notes), then the instrument should logically cover the type of bodies or institutions before which such decision-making effectively takes place. 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 are developed), nor downstream in cases of judicial review (where the legality of a 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).

13 See also recital 7 of Regulation (EC) No 1367/2006, which applies the Aarhus Convention to the institutions and bodies of the European Union, and notes that the 'Aarhus Convention defines public authorities in a broad way' – Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ 2006 L 264, p. 13).

14 See Aarhus Convention: An Implementation Guide, p. 47. On the status of the Guide, see judgment of 19 December 2013, *Fish Legal and Shirley* (C-279/12, EU:C:2013:853, paragraph 38).

15 See judgment of 14 February 2012, *Flachglas Torgau* (C-204/09, EU:C:2012:71, paragraph 40).

16 See also Aarhus Convention: An Implementation Guide, p. 46.

17 See, for example, judgment of 27 April 2006, *Standesamt Stadt Niebüll* (C-96/04, EU:C:2006:254, paragraph 17).

56. However, if a categorisation had to be made, I think that point (b) of the first subparagraph of Article 2(2) of Directive 2003/4 best 'fits the bill'. That is especially so if viewed against the much more restrictive wording of point (a) of the same provision. I am not convinced that either the applicant or the Commission have made a strong enough case to satisfy the question of whether the first subparagraph of Article 2(2) of Directive 2003/4 was actually meant to include the courts of the Member States as 'public authorities'. However, I am ready to acknowledge that institutions which have the word 'court' written above their entrances may indeed be entrusted with 'performing public administrative functions under national law' in respect of some of their activities.

57. What does the second subparagraph of Article 2(2) of Directive 2003/4, interpreted so far solely on the basis of the first subparagraph of that provision, add to this picture? Before turning to that issue, since all parties cite the judgment of *Flachglas* in order to establish the meaning of the second subparagraph, and in particular the concept of 'judicial capacity', it is necessary first to analyse that judgment in some detail.

3. The judgment in Flachglas

58. The facts underlying the Court's judgment in *Flachglas* are as follows. The German legislature had invoked the first sentence of the second subparagraph of Article 2(2) of Directive 2003/4 to provide, in its national law, that federal *ministries*, when acting in the context of a legislative process, are not required to disclose environmental information about that process. The Court was asked to verify that implementation under German law and to specify the point at which such a ministry could be excluded from the scope of the right of access to environmental information granted by Directive 2003/4.

59. The Court held that the context, purpose, and aims of both the Aarhus Convention and Directive 2003/4 prove that those instruments were intended to refer to 'public authorities' only to the extent that they act as administrative authorities holding environmental information in the exercise of their functions.[18] That would arise from the second subparagraph of Article 2(2) of Directive 2003/4, since the purpose of the first sentence of that provision, read in conjunction with the Aarhus Convention, was to authorise Member States to exclude from the scope of 'public authorities' bodies or institutions acting in a 'judicial or legislative capacity'.[19] In order to account for the plurality of processes underlying the specific nature of the legislative and judicial organs of the Member States,[20] that derogation from the general rules on access must be interpreted in a 'functional' manner.[21]

60. In the event of a derogation under German law for a ministry participating in the legislative process, that functionality would cease 'by the end of that process'. At that point in time, the derogation from the principle of the right of access to 'environmental information', contained in Article 1 of the directive, would no longer be justified.[22]

61. The applicant and the Commission suggest a 'cross-reading' of the latter temporal element to derogation for the exercise of 'judicial capacity'. Put simply, they argue that 'legislatures are legislatures only as long as the legislative process is ongoing', so 'courts should be courts only so long as a case is pending'.

18 Judgment of 14 February 2012, *Flachglas Torgau* (C-204/09, EU:C:2012:71, paragraphs 40 and 48).

19 Ibid., paragraphs 40 to 42.

20 Ibid., paragraphs 44 and 49 to 50.

21 Ibid., paragraph 49.

22 Ibid., paragraphs 55 to 56.

62. That reasoning, however, overlooks a rather important factual element of *Flachglas*. The federal ministry at issue was clearly a 'public authority' within the meaning of the definition given in the first subparagraph of Article 2(2) of Directive 2003/4 when the request for information was filed. The *institutional* aspect of the definition was clearly present. It was only through the 'legislative capacity' derogation that it could temporarily 'escape' that scope. Thus, a body clearly 'inside the scope' was allowed to be 'outside the scope', and the question arose as to 'how long' it was allowed to remain so. It is in that context that the Court pointed to the 'functional interpretation' of the first sentence of the second subparagraph of Article 2(2) of the directive since, at the moment it was acting in a 'legislative capacity', the ministry was not acting as an 'administrative authority'. [23]

63. It is that 'dual identity' or 'split status' of the ministry which the Court sought to recognise. That is to say that a body could *structurally* be deemed a branch of the executive, and therefore subject to Directive 2003/4, while *functionally* engaged in activities that are part of the protected 'legislative process' and which fall outside its scope. Put simply, *Flachglas* essentially stated that what was 'institutionally included' could be temporally 'functionally excluded'.

64. However, as the applicant and the Commission argue, it is a completely different matter to interpret the concept of 'public authority' under Article 2(2) of Directive 2003/4 (and, indeed, also under the Aarhus Convention) as inherently requiring a 'functional interpretation', irrespective of the 'structural' nature of the body concerned. To follow that interpretation would be akin to disregarding the list of positive definitions contained in the first subparagraph of Article 2(2) of Directive 2003/4. It would limit any assessment under that provision to the application of a single criterion of 'functionality', elevating the exception to the sole condition for arriving at the ultimate conclusion regarding the status of the institution or body concerned. In other words, the first sentence of the second subparagraph would be applied in exactly the opposite way to the way it was applied in *Flachglas*: not to grant a temporal, function-related exclusion, but instead bring about a radical institutional extension of the scope of Directive 2003/4.

65. In summary, in *Flachglas*, the Court did not state, in my view, that the entire definition of Article 2(2) of Directive 2003/4 is purely 'functional', without any regard being taken of the institutional dimension of the first subparagraph of that provision. That dimension of the definition was simply not relevant for that case since a ministry is clearly a 'public authority' within the meaning of Article 2(2) of Directive 2003/4. 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 would be covered by the definition in the first place.

4. The options

66. Thus, read in its proper context, neither *Flachglas*, nor in fact the text of Article 2(2) of Directive 2003/4, provides any basis for the 'purely functional' approach advocated by the applicant and the Commission as set out in point 31 of this Opinion. The first sentence of the second subparagraph of Article 2(2) of Directive 2003/4 cannot be interpreted as overriding the 'structural' definition of the first subparagraph.

67. Two options remain, as set out in points 32 to 33 of this Opinion: 'institutional' or 'institutional with a functional corrective'. Could courts be included in the first part of the definition, that is to say as 'public authorities' under any of the points of the first subparagraph of Article 2(2) of Directive 2003/4? The difference is not merely cosmetic: if the courts were not 'structurally' included in the first place under any of the points of the first subparagraph, there would then be no need to exclude them 'functionally' through the operation of the second subparagraph.

23 Ibid., paragraphs 40 and 49.

68. The practical difference between the two approaches is that under an 'institutional' approach, the courts would always be excluded as institutions from the scope of Directive 2003/4. Under the 'institutional with a functional corrective' approach, the function exercised by a court would already be relevant for its definition under the first subparagraph of Article 2(2) of Directive 2003/4.

69. Therefore, in accordance with the latter approach, if the concept of 'public administrative functions', in point (b) of the first subparagraph of Article 2(2) of Directive 2003/4 (and the Aarhus Convention) were to be interpreted broadly so as to also cover courts, those institutions would only be covered by the scope of Directive 2003/4 if they *do not* exercise their ordinary role as the judiciary. In other words, they would come within the scope of the directive only if they perform 'public administrative functions'. However, those bodies would then also be recognised as having a 'split status', in the sense that they might at times fall within the scope of that directive when performing any public administrative functions under national law.

70. In general, the latter approach appears preferable.

71. First, the 'institutional approach with a functional corrective' provides for a flexible perspective to the institutional diversity of the Member States. It recognises the multiplicity of functions that courts carry out under certain national systems, and so allows for the courts of the Member States to be included in the scope of the directive for all 'administrative acts' carried out by those bodies. In turn, it protects the judicial process by keeping all activities, in their capacity as adjudicating bodies, outside that scope [24] since such function is simply not the same as the performance of 'public administrative functions'.

72. Second, unlike the approach suggested by the defendant, the Courts Service, Ireland and the Polish Government, such an approach is not bound by the formal structural determinations under the national law of the Member States, which may not fully catch the activities of the body concerned. It recognises the practical reality that certain institutions which are structurally referred to as courts can sometimes, with regard to a portion of their activity, effectively carry out 'public administrative functions', including those relating to the environment, within the meaning of point (b) of the first subparagraph of Article 2(2) of Directive 2003/4.

73. To illustrate that situation, imagine that a court decides to build a new building for itself. A tower block, for example. A construction of such scale is likely to require compliance with a number of environmental requirements. Such an activity does not come within the sphere of 'judicial capacity', but rather an administrative one, and as such is likely to entail a 'public administrative function … in relation to the environment'. This may also include the obligation to satisfy any requests for access to documents under Directive 2003/4, as well as any further obligations flowing from that directive.

74. Certainly, all of that would depend on the exact institutional arrangement in a Member State. It may be that it is not, technically speaking, the court that is building the new facilities, but rather a ministry or another public authority acting on its behalf. However, on the assumption that the new premises will be built by the court as a legal entity, for that *specific activity*, that court may indeed be required to disclose 'environmental information' relating to that construction, since it is acting in an administrative capacity.

75. Third, such an approach takes into account the broad wording of the definition of 'public authority', but interprets that wording in a reasonable manner, remaining tied to the logic and spirit of the Aarhus Convention. As such, it encourages and ensures participation by the public in those situations where decision-making on environmental matters is *actually* taking place.

24 See, as regards a similar discussion on Article 15(3) TFEU, my Opinion in *Commission* v *Breyer* (C-213/15 P, EU:C:2016:994, points 52 to 64).

5. Interim conclusion

76. In summary, the definition of Article 2(2) of Directive 2003/4 should not be interpreted as entailing a purely 'functional' or a purely 'institutional' interpretation. Instead, an *institutional definition with a functional corrective* is suggested.

77. That means, in essence, that courts, or the judiciary of a Member State, *are excluded* from the scope of the definition of Article 2(2) of Directive 2003/4, *unless* a judicial body actually performs public administrative functions, most likely under point (b) of that provision.

78. That assessment is nonetheless already inherent in the division between 'administrative functions' (and, *a contrario*, 'judicial functions)' in point (b) of the first subparagraph of Article 2(2). In that regard, the qualification of 'judicial … capacity' in the second subparagraph of the same provision would, at best confirm, the outcome already reached, but would not constitute another exclusion, in contrast to the situation in *Flachglas*. Put simply, what is already (permanently) excluded, does not have to be (temporarily) excluded again.

B. Judicial files and judicial function

79. That conclusion gives rise to another set of issues. The first issue relates to the distinction drawn between activities of a 'judicial' nature and activities carried out in an 'administrative capacity'. In particular, are court records always held or administered in the exercise of a judicial capacity? The second issue relates to the way in which that line should be interpreted in general, in particular the clarification of the default function of the courts, that is to say what is the rule and what is the exception. The third issue concerns the passage of time and its consequences as regards access.

80. First, when is a function *judicial*? Neither 'public administrative functions', nor, for that matter, 'judicial capacity', is defined in Directive 2003/4 or the Aarhus Convention. Nor do those instruments offer any explanation as to the legislative intent behind the distinction between functions exercised in an 'administrative capacity'[25] and functions exercised in a 'judicial capacity'.[26]

81. Certainly, some inspiration concerning this distinction might be drawn from other areas of (EU) law, such as from the area of access to documents. Under Regulation (EC) 1049/2001,[27] the exclusion of 'documents drawn up' by the Commission 'solely for the purposes of … court proceedings' has been interpreted to cover only documents having 'a relevant link' with a pending dispute before national courts or the Courts of the European Union,[28] unless those documents were drawn up for a 'purely administrative matter'.[29] In turn, the latter concept of 'purely administrative matters' has been held to cover exchanges of documents outside of judicial proceedings[30] as well as working documents.[31]

25 As interpreted by the Court in judgment of 14 February 2012, *Flachglas Torgau* (C-204/09, EU:C:2012:71, paragraph 46).

26 Although the Guide delphically notes, without explaining, that the derogation is required 'due to the different character of such decision-making from many other kinds of decision-making'. Aarhus Convention: An Implementation Guide, p. 49.

27 Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43)

28 Judgment of 6 February 2020, *Compañía de Tranvías de la Coruña* v *Commission* (T-485/18, EU:T:2020:35, paragraph 42 and the case-law cited).

29 Judgment of 6 July 2006, *Franchet and Byk* v *Commission* (T-391/03 and T-70/04, EU:T:2006:190, paragraph 91).

30 Judgment of 8 February 2018, *POA* v *Commission* (T-74/16, not published, EU:T:2018:75, paragraph 107).

31 Judgment of 20 September 2019, *Dehousse* v *Court of Justice of the European Union* (T-433/17, EU:T:2019:632, paragraph 97).

82. Similar concepts are to be found in Regulation (EU) 2016/679.[32] That regulation contains a number of exclusions from its scope or states that data processing is lawful with regard to 'courts acting in a judicial capacity'. Thus, the processing of certain categories of personal data, including sensitive data, is permissible where 'processing is necessary … whenever courts are acting in their judicial capacity' (Article 9(2)(f) thereof). Similarly, a data protection officer must be designated in all cases where processing is carried out by a public authority or body, 'except for courts acting in their judicial capacity' (Article 37(1)(a) thereof). In the same way, supervisory authorities entrusted with monitoring the application of Regulation 2016/679 are not competent to supervise processing operations of 'courts acting in their judicial capacity' (Article 55(3) of that regulation). These examples clearly suggest that the same activities would fall within the scope of that regulation if carried out in an 'administrative capacity'.

83. The Polish Government suggested that further guidance could be derived from the case-law on the '*Dorsch criteria*' and the definition of what constitutes a 'court or tribunal' within the meaning of Article 267 TFEU.[33] It is true that the case-law of the Court in this field provides an extensive and useful resource of examples of an administrative nature, in so far as it concerns the institutional criteria for meeting the requirements of Article 267 TFEU. However, those judgments can provide only rather remote inspiration, since the logic underlying the Aarhus Convention and Directive 2003/4 is based on a general principle of access to environmental information,[34] irrespective of institutional designation within the national system of the Member States, which has regard to the *activity* involving the handling of 'environmental information'.[35] That inevitable link to the *ratione materiae* rather than the *ratione institutionis* may therefore lead to more widespread exclusion of certain activities than is intended under a criterion which plainly focuses on the activity concerned.

84. The judgment in *Cartesio* might illustrate that point. In that case, the Court held that a court cannot be regarded as carrying out a judicial function when it is responsible for maintaining a commercial register and makes administrative decisions in relation thereto.[36] In other words, that body would not be a 'court or tribunal' (within the meaning of Article 267 TFEU). However, if the register in question documented environmental cases currently pending before that court, a request for access to information on those names of those cases under Directive 2003/4 would be rejected on the ground that that body acted in a 'judicial capacity', even though that same body would still fail to satisfy the '*Dorsch*' criteria.

85. Ultimately, what is 'judicial' is indeed likely to remain a rather intuitive[37] assessment: anything pertaining to the impartial settling of disputes is judicial in nature and thus not covered by Article 2(2) of Directive 2003/4.

86. Court records in a judicial file, their assembly, administration, use and storage are, to my mind, a clear part of the judicial process, of judicial activity. Naturally, a certain amount of administrative work will go into the preparation of court records. However, those tasks are not administrative in nature. They are inherently linked to a particular dispute and its solution.

32 Regulation of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ 2016 L 119, p. 1).

33 See judgment of 17 September 1997, *Dorsch Consult* (C-54/96, EU:C:1997:413, paragraphs 23 to 34).

34 As first laid down by the Court in the judgment of 22 December 2010, *Ville de Lyon* (C-524/09, EU:C:2010:822, paragraph 35).

35 As applied by the Court in *Flachglas* to the activities of the ministry in question. See point 59 of this Opinion.

36 Judgment of 16 December 2008, *Cartesio* (C-210/06, EU:C:2008:723, paragraph 57 and the case-law cited).

37 With perhaps a different type of intuition involved than that one suggested by the United States Supreme Court Justice Stewart's threshold test on how to spot obscene material: 'I know it when I see it'. See *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

87. Second, returning to the issue of overall definition, two elements are worth noting: on the one hand, with regard to courts, the 'judicial' nature of their activities is the rule, while the 'administrative' activities are the exception. On the other hand, the definition of the concepts in the first subparagraph of Article 2(2) of Directive 2003/4 relates to the definition of the scope of an instrument, and not to an exception that would have to be interpreted narrowly.

88. Those elements mean first, that where the institution in question is a court, then the default rule is that it is likely to act in a judicial capacity, unless it is established that the specific activity at issue is in fact administrative in nature. Second, both concepts are to be interpreted reasonably: or, rather, if anything were to be interpreted narrowly, then it would be the administrative capacity of the courts, because that is in fact the exception. However, all of this relates to the definition of what constitutes 'public administrative functions under national law' for the purposes of Article 2(2)(b) of Directive 2003/4.

89. In seeking to determine which activities of a court fall into one or the other concept, it is possible that usually, but not always, the rule of thumb could be to look at the person rendering the decision on behalf of the institution. For example, a judge rendering judgment could be said to be acting in a 'judicial capacity'. By contrast, the court facility manager or another person in charge of signing a contract for the installation of solar panels on the roof of the court buildings is likely to be performing 'public administrative functions … in relation to the environment'.

90. Third, and for similar reasons, the 'temporal' logic of *Flachglas*, put forward by the applicant and the Commission, is simply not transposable in this instance. Indeed, as I have explained in point 62 of this Opinion, that line of reasoning was developed against the background of an institution falling clearly within the scope of Directive 2003/4, whereas courts acting in a judicial capacity do not fall within the same scope. In *Flachglas*, the temporal logic was entirely justified with regard to the duration of an exception; in the present case, it is an issue of definition. Moreover, in *Flachglas*, the limitation was necessary to ensure that the principle of participatory democracy, common to the traditions of the Member States and enshrined in the first sentence of Article 10(3) TEU,[38] will be reconciled with the possibility *actually* to hinder the smooth functioning of the legislative process.[39]

91. Contrary to the case-law on Article 4 of Regulation No 1049/2001, that assessment does not change once proceedings are closed.[40] The exception in that regulation is linked to the duration of a *dispute* ('court proceedings'), whereas the derogation in Directive 2003/4 is linked to the duration of an *activity* ('public administrative functions', on the one hand, or acting in a 'judicial capacity', on the other). A body or institution which otherwise acts in a judicial capacity does not in principle cease to do so simply because of the passage of time. The thickness of the layer of dust on a court file, so to speak, does not render that file any less 'judicial'. The judiciary does not switch roles or cease to act as the judiciary at certain points in time. In the words of Advocate General Sharpston, its activity in that capacity 'has no beginning or end time'.[41]

92. In any event, in addition to the normative arguments as to why the 'temporal' argument cannot be applied to the work of the judiciary, that conclusion is also emphasised by arguments of a more operational nature. It is true, as the referring court notes, that it appears to be common ground that the 'active stage of proceedings' could be covered by the 'judicial capacity' derogation. However, should the line be drawn before, in between, and after? The referring court explains that, under Irish law, the issuing of final orders and the expiry of the period for bringing an appeal, or the issuing of final orders in any appeal, do not necessarily represent the definitive conclusion of the relevant

38 See, to that effect, judgment of 4 September 2018, *ClientEarth* v *Commission* (C-57/16 P, EU:C:2018:660, paragraph 84 and the case-law cited).

39 See, to that effect, judgment of 14 February 2012, *Flachglas Torgau* (C-204/09, EU:C:2012:71, paragraph 43).

40 See judgment of 21 September 2010, *Sweden and Others* v *API and Commission* (C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraphs 130 and 131).

41 Opinion of Advocate General Sharpston in *Flachglas Torgau* (C-204/09, EU:C:2011:413, point 73).

proceedings before the Irish courts. What rules should then apply to the process of receiving the case, checking the file for completeness, and other administrative tasks that do not yet indicate the 'active' nature of proceedings? Is that stage any less an activity of 'judicial capacity'? What about a suspension of proceedings during the course of examination of the case? Similarly, once a judgment is finalised, there is naturally a certain period of time within which its publication is prepared. There is no reason why the provisions on access to documents under the Aarhus Convention or in Directive 2003/4 should be applicable. So, at what stage then does the 'judicial capacity' of the body tasked with deciding on the case cease to exist?

93. All these considerations yet again emphasise the problems of seeking to replace the initial definition of the scope of an instrument, which is supposed to be stable and to a certain degree permanent on the institutional plane, such in the case of the definition in the first subparagraph of Article 2(2) of Directive 2003/4, with the logic of a temporal derogation placed as a clarification or an exception in the second subparagraph of that provision.

94. Two final general considerations might be added at this stage.

95. First, in terms of the objectives, I do not see how the aim of increasing democratic participation in environmental matters, repeatedly invoked by the applicant, would apply to the same extent to the judiciary. As Ireland points out, the judiciary typically presents different legitimising credentials from those of other branches of State powers. In an *inter partes* procedure, the parameters for increasing legitimacy are not linked to granting the widest possible access to the court file. Rather, they derive from a critical legal discourse witnessed, as the case may be, during a public hearing and set out in the judgment. Directive 2003/4 was hardly intended to alter the *inter partes* discourse which is at the heart of judicial proceedings.

96. Second, I also do not believe that Directive 2003/4, or the Aarhus Convention for that matter, was meant to make the mere potential possession of documents relating to the environment subject to the unfettered duty to disclose. If that were the case, any IT department of a public authority, or any third party, including perhaps even national security bodies, would be under a duty to disclose the 'environmental information' in their possession upon request, subject only to the exceptions contained in Article 4 of the Aarhus Convention and Directive 2003/4, without, however, playing any role in the underlying decision-making process to which that information pertains. It would also render meaningless the very objective of increased public participation in *environmental* decision-making.[42] Indeed, given that it is the administrative authority which adopts the decision, it is unclear how access to environmental information possibly contained in court records could advance that process.[43] That is particularly so considering that the limited provision of access would lead to a certain information imbalance *within* the 'public'.[44] Consequently, the 'environmental information', if it does exist, must either come from the public authority at the centre of the decision-making process, or be contained in the reasoning of a public judgment of the courts.

C. The present case

97. As established in the preceding sections of this Opinion, courts are by default acting in a judicial capacity unless, as regards a specific activity, they are performing public administrative functions within the meaning of point (b) of the first subparagraph of Article 2(2) of Directive 2003/4. Conversely, for all activities carried out in a judicial capacity, those bodies or institutions fall outside the scope of that directive.

42 See recital 1 of Directive 2003/4 and the preamble to the Aarhus Convention.

43 See judgment of 14 February 2012, *Flachglas Torgau* (C-204/09, EU:C:2012:71, paragraph 40).

44 See, to that effect, recital 7 of Directive 2003/4. Those considerations apply before any potential influence on proceedings of public authorities within the meaning of Article 4(a) of the Aarhus Convention and Article 4(2) of Directive 2003/4.

98. That is the general answer. The peculiarity of the present case however is that while the applicant's request for access may have been filed with the High Court, it was in fact the Courts Service, by reason of the institutional structure of the Irish judiciary, which was in possession of the documents concerned. [45]

99. It is thus appropriate to now return [46] to that specific structural design and ask whether the Courts Service, a body separate from the national courts, could be covered by the definition of 'public authority' when holding the records of closed cases.

100. The Courts Service, the defendant and Ireland explain that the Courts Service is an independent private entity established and tasked with the maintenance and storage of court records for the judiciary in Ireland.

101. While that is indeed a matter of national law, from the perspective of its institutional structure, the Courts Service, a *private entity* under Irish law, thus does not appear to form part of the 'government or other public administration', for the purposes of point (a) of the first subparagraph of Article 2(2) of Directive 2003/4. Since its functions are also not such as to amount to 'performing public administrative functions under national law', [47] within the meaning of the case-law, [48] it also appears to fall outside the definition of point (b) of the first subparagraph of Article 2(2) thereof. That is the case on an institutional level; as far as the specific function is concerned, that answer is then logically linked to the nature of management of court files.

102. That leaves only point (c) of the first subparagraph of Article 2(2) of Directive 2003/4, which covers 'any … legal persons 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)'.

103. At its core, that last provision seeks to cover the situation of natural or legal entities carrying out public tasks under the control of a public body or institution. Thus, entities otherwise covered by points (a) and (b) of that provision cannot 'avoid' the scope of Directive 2003/4 by delegating their public administrative tasks to another entity, even a private one.

104. To be clear, there is no indication, nor do I wish to imply, that that is what Ireland intended when establishing the Courts Service. The choice of where to house the court records of open or closed cases is entirely a matter for the national systems of the Member States. I merely wish to explain that the third option provided for by the legislature covers 'delegations' to third parties, private or public, in order to control the delegation of activities.

105. However, what is fundamental is the fact that in order to fall under point (c), the 'principal' and its 'activities' must themselves be covered by points (a) and (b) of the first subparagraph of Article 2(2) of Directive 2003/4. After all, the 'agent' must derive its source of authority from the principal in order for it to be covered by the former.

106. As I explained in the previous sections of this Opinion, courts do not fall within the scope of Directive 2003/4 unless they act in an administrative capacity. The keeping of judicial records and the management of the court files clearly does not relate to administrative capacity, but is of a judicial nature. So, in so far as that is established, the 'principal', in this instance the High Court, is not covered by the scope of that directive, nor will its agent be for that type of activity, provided that the nature of that activity is preserved.

45 See points 12 and 13 of this Opinion.

46 See above, points 22 to 25 of this Opinion.

47 At least under the interpretation of national law as provided by the defendant in Case CEI/15/0008 *An Taisce & The Courts Service*, p. 3.

48 Judgment of 19 December 2013, *Fish Legal and Shirley* (C-279/12, EU:C:2013:853, paragraph 49 and the case-law cited).

107. That seems to be the case here. As the referring court explains by reference to extensive case-law, legislation, rules, and practice guidelines, the Courts Service exercises no autonomous function in maintaining and holding the court file. It carries out its activity exclusively on behalf, and under the supervision, of the judiciary.[49] In doing so, it cannot exercise its activities in a way that interferes with the work of the courts.[50] Such supervision does not come to an end when proceedings are concluded.[51] From the information provided by the referring court, the Courts Service, although formally a separate body, functions much the same as an internal storage department or registry that forms part of the same institutional structure as a court. As such, its activities in storing, archiving, and managing the court records, in any event, fall outside the scope of the directive.

108. Thus, in conclusion, it is the nature of the activity performed, and not necessarily the exact institutional structure in a Member State that is relevant. Otherwise, the applicability of Directive 2003/4 would depend on the rather formal structural division of where the files are physically stored and administered. Needless to say, apart from the potential of inciting a certain strategic shaping of national institutional structures, such an approach would also hardly meet the need for uniformity of interpretation and application of Directive 2003/4 and the Aarhus Convention.[52]

D. A postscript

109. Finally, contrary to what the applicant and the Commission argue, the above conclusion does not render access to the environmental information impossible, provided that such information were in fact contained in the court file. It merely shows that the individual instrument relied on by the applicant is not the correct gateway to such access. That instrument does not regulate the type of access sought by the applicant. However, that naturally does not preclude that the normal avenues available for such access are no longer possible.

110. First, there are the national rules on access to judicial files and records. It is certainly not for me to comment on those rules, but it has been stated that the open administration of justice is a principle of Irish (constitutional) law.[53] Granted, as explained by the interveners in this case, Irish case-law may diverge on the issue of to what extent third parties may request access to documents under that procedure. However, that is a matter of national law exclusively for the Irish courts to resolve. From the perspective of EU law, that matter is hardly a factor to take into consideration when interpreting Directive 2003/4.

111. Second, the national administrative authority that adopted the contested decision(s) later reviewed before national courts naturally remains itself subject to the rules on access to 'environmental information' of Directive 2003/4, as transposed in the AIE Regulations. For the purposes of the decision underlying *Balz & Anor v An Bord Pleanála*, I understand that that would have been made by either Cork County Council (as the local planning authority) or An Bord Pleanála (as the reviewing authority). While that would naturally be for the national courts to assess, it is fair to assume that those institutions are likely to be covered by the definitions in points (a) and (b) of the first subparagraph of Article 2(2) of Directive 2003/4 respectively.

49 As explained by the defendant in its decision in Case CEI/15/0008 *An Taisce & The Courts Service*), pp. 5 to 6. See also Baker J in *BPSG Limited trading as Stubbs Gazette v The Courts Service & Others* [2017] 2 I.R. 243, paragraphs 68 and 71.

50 As appears to be laid down in section 9 of the Courts Service Act 1998.

51 See Case CEI/15/0008 *An Taisce & The Courts Service*, p. 6.

52 Judgment of 14 February 2012, *Flachglas Torgau* (C-204/09, EU:C:2012:71, paragraph 50).

53 See, in this regard for example, the judgment of Hogan, J. in *Allied Irish Bank plc v Tracey (No 2)* [2013] IEHC 242, paragraphs 21 to 23.

112. With regard to that latter point, I do not wish to suggest that the laws of the Member States should seek to replicate the unsatisfactory situation that exists in my view under EU law, whereby individuals are directed to an institutional party to the court proceedings to obtain access to parts of the court file.[54] However, in situations like the present case, a request for access relating to the environmental information concerning decision-making in environmental matters may actually be filed with the institutions effectively rendering the planning and review decisions. That is precisely, at least in my perhaps unduly narrow view of the process, exactly what Directive 2003/4 and the Aarhus Convention are intended to achieve: to enable individuals to obtain information and thus possibly be able to influence the decision-making *at the stage* where that decision-making is actually taking place.

113. I remain of the opinion that, in general, there is no reason to refuse access to a file to *any* interested individual in *closed cases*, unless there are clear and imperative reasons against such disclosure in an individual case.[55] Such openness of the judiciary strengthens the overall legitimacy of the courts and improves the quality of justice.[56]

114. Nevertheless, an equally important principle is that of attributed competence and the imperative to interpret a piece of legislation within the bounds of what it might reasonably mean. Interpreted in that way, in my view, Directive 2003/4 remains silent on access to court files. That is a matter for national law. Maybe, at some point, EU law may indeed provide for such access. However, until that happens, forcing a change in national law or practice on access to the records of closed cases through an unnatural extension of EU legislation, which is designed for a different purpose, is, perhaps, not the best way to proceed, certainly not for this Court.

V. Conclusions

115. I propose that the Court answer the question referred for a preliminary ruling by the High Court (Ireland) as follows:

Article 2(2) of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC must be interpreted as meaning that the control of access to court records, whether carried out by a court, that is to say a body formally part of the judiciary, or by a private entity established for the same purpose and acting on behalf and under the control of the judiciary, constitutes an activity falling outside the scope of that provision.

54 See judgment of 18 July 2017, *Commission* v *Breyer* (C-213/15 P, EU:C:2017:563, paragraphs 54 to 55).

55 In detail, see my Opinion in *Commission* v *Breyer* (C-213/15 P, EU:C:2016:994).

56 Ibid, points 93 to 104 and 118 to 142.