



THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 223

Record No. 2016/255

**Peart J.
Irvine J.
Hogan J.**

BETWEEN/

STEPHEN MINCH

**RESPONDENT /
APPELLANT**

- AND -

COMMISSIONER FOR ENVIRONMENTAL INFORMATION

**APPELLANT /
RESPONDENT**

- AND -

**MINISTER FOR COMMUNICATIONS, ENERGY
AND NATURAL RESOURCES**

**APPELLANT /
NOTICE PARTY**

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 28th day of July 2017

1. This is an appeal taken by the Commissioner of Environmental Information ("the Commissioner") against the judgment of the High Court (Baker J.) delivered on 16th February 2016. In that judgment Baker J. set aside a decision of the Commissioner insofar as he had refused to direct the disclosure of a report prepared by the Minister for Communications, Energy and Natural Resources entitled "Analysis of Options for Potential State Intervention in the Roll out of Next-Generation Broadband" ("the Broadband Report"): see *Minch v. Commissioner of Environmental Information* [2016] IEHC 91.
2. The fundamental question presented in both the High Court and on appeal to this Court was whether the Broadband Report amounted to "environmental information" within the meaning of Article 3 of the European Communities (Access to Information on the Environment) Regulations 2007 (S.I. No. 133 of 2007) ("the 2007 Regulations"). The Commissioner concluded that it was not and, accordingly, the request was rejected *in limine* without the necessity for any further discussion as to whether even if it did, access to the document might be denied on other grounds contained in the 2007 Regulations. The fundamental question which came before the High Court and this Court was whether the report does come within the definition of environmental information within the meaning of the 2007 Regulations. If the answer to that question is in the affirmative, then the matter will have to be remitted to the Commissioner who will then have to proceed to consider whether, in the light of that decision, he should order release of the Report under the 2007 Regulations. If, conversely, the answer were to be in the negative, then it would follow that the Commissioner's decision rejecting the application essentially for want of jurisdiction would have to be upheld.
3. It will, of course, be necessary for this Court to examine in the course of this judgment both the terms of the 2007 Regulations and the Broadband Report in some greater detail. It is, however, first necessary to explain how this present appeal came about in the first place.
4. The appellant first applied to the Minister on the 18th May 2013 pursuant to the 2007 Regulations for access to the Broadband Report. The request for access to the Report was rejected by the Minister on the 17th July 2013 on the grounds that the information sought was not "environmental information" within the meaning of the 2007 Regulations. The appellant appealed to the Commissioner by letter dated the 24th July 2013 and by decision dated the 15th December 2014 the Commissioner subsequently rejected the appeal on the same preliminary ground. Mr. Minch then appealed to the High Court on a point of law pursuant to Article 13(1) of the 2007 Regulations.

The Broadband Report

5. The Broadband Report was prepared by consultants, Analysis Mason, and it is described as an economic analysis of the various options available to Government to achieve generalised rollout of high speed broadband services within the State. The affidavit of David Hanley, sworn on behalf of the Minister for Communications, Energy and Natural Resources on the 6th March 2015, described the Report as follows:

"...a financial and technical analysis was options for potential State intervention in the roll out of next generation broadband. The purpose of the report was to develop a financial model to calculate the likely capital expenditure associated with deploying next generation broadband under a number of different scenarios. The report contains no environmental information."

6. It seems that the Report considered two particular options which were available to achieve the objectives of the National Broadband Plan ("N.B.P.") namely, whether broadband would be made available by a wireless or wired mode. It should be noted that the N.B.P. is itself freely available.

The relevant legislative background

7. The 2007 Regulations transpose the provisions of Directive 2003/4/EC ("the 2003 Directive") on public access to environmental information. The 2003 Directive was itself promulgated by the Union legislator following the signing by the European Community of the UN sponsored Convention on Access to Information, Public Participation and Decision-Making and Access to Justice in Environmental Matters (1998) ("the Aarhus Convention"). Both the 2003 Directive – and, by extension, the 2007 Regulations – seek to give effect in law to one of the underlying objectives of the Aarhus Convention, namely, ensuring that the members of the public can have access to all relevant information concerning the environment in a timely fashion.

8. Given that effect has been given to this aspect of the Aarhus Convention by the Union legislator via the 2003 Directive, the 2007 Regulations constitute an EU legal obligation which this Court must uphold. Of course, very different considerations apply in respect of those features of the Aarhus Convention which have not been incorporated into EU law and the extent to which those obligations have been made part of domestic law independently of EU law is governed principally by reference to Article 29.6 of the Constitution and the legislation (if any) enacted by the Oireachtas for this purpose: see, e.g., *McCoy v. Shillelagh Quarries Ltd.* [2015] IECA 28 and *Conway v. Ireland* [2017] IESC 13.

9. Article 6 of the 2007 Regulations envisages that a request for environmental information will be made in the first place to the relevant public authority. Provision is further made under Article 12 for an appeal to the Commissioner for Environmental Information. Article 13(1) then provides an appeal to the High Court on a point of law of any decision of the Commissioner:

"A party to an appeal under article 12 or any other person affected by the decision of the Commissioner may appeal to the High Court on a point of law from the decision."

10. So much for the right of appeal. What is critical, however, is the definition of environmental information which is found in Article 3 of the 2007 Regulations. Article 3(1) provides as follows:

"In these Regulations environmental information" means any information in written, visual, aural, electronic or any other material form on:-

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms and the interaction among these elements,
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment,
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements,
- (d) reports on the implementation of environmental legislation,
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c), and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are, or may be, affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c)."

11. Even taking Mr. Minch's case at its height, the present appeal really concerns only sub-paragraphs (c) and (e). Before considering these questions, it may be observed that it is probably not necessary for this Court to embark on an excursus as to the precise parameters of this statutory right of appeal. The real questions which arose in the High Court and, on appeal, in this Court, was whether the Commissioner correctly interpreted the relevant legal provisions and, if so, whether the inferences drawn by him were ones which might reasonably have been drawn. It seems implicit in the judgment of the Supreme Court in *NAMA v. Commissioner for Environmental Information* [2015] IESC 51 that questions of statutory interpretation of the 2007 Regulations are ultimately purely questions of law to be judicially determined by reference to the underlying objectives of the 2004 Directive.

12. In that respect I broadly agree with the approach taken by Baker J. in the High Court when she said:

"In my view the approach that I take in the appeal is that identified by O'Neill J. [in *An Taoiseach v. Commissioner for Environmental Information* [2013] 2 I.R. 510], namely, I may consider whether the conclusion reached by the Commissioner was based on a correct or erroneous view of the law, as noted by McEochaidh J. in [the High Court in] *NAMA v. Commissioner for Environmental Information*. I may engage "all legal issues arising", and I may consider the issues of the interpretation of the underlying Directive and of the Regulation. The appeal does engage the full jurisdiction of the court, but not as argued by the appellant, in that I cannot substitute findings of fact, and I cannot reverse the inferences drawn by the Commissioner with regard to the nature of the Report."

13. I would, for my part, slightly qualify that statement by saying that the High Court could review findings of fact or inferences drawn from those facts where these were findings of fact which could not reasonably have been found or inferences which could not reasonably have been drawn: see generally the analysis of this issue found in the judgment of McKechnie J. in *Deely v. Information Commissioner* [2001] IEHC 91, [2001] 3 I.R. 439.

The characterisation of the Report by the Commissioner

14. In his elaborate decision on the point, the Commissioner accepted that Minister's summary of the Report which might conveniently be reproduced here:

"This Report is a financial and technical analysis of options for potential State intervention in the roll out of next generation broadband and was commissioned by the Department in the context of the National Broadband Plan for Ireland.

The purpose of the Report was to develop a financial model to calculate the likely capital expenditure associated with deploying next generation broadband under a number of different scenarios."

15. The Minister had further stated that the Report fell outside the scope of the 2007 Regulations as it had no environmental content.

16. The Commissioner went on to characterise the purpose and contents of the Report:

"I agree that its purpose was to examine the cost of deploying 'next generation' broadband (NGB) infrastructure to areas that the private sector is not expected to serve based on a range of options or scenarios of a technical nature, i.e., to develop a financial model to calculate the likely capital expenditure associated with deploying NGB infrastructure for each of the scenarios identified by the Department in order to provide the Department with an understanding of the scale of investment required for each case. In other words, put simply, the report is about the cost implications for the State of deploying various types of NGB infrastructure to areas underserved by the private sector."

17. It is important to stress that the Broadband Report did not address issues such as the roll-out of traditional broadband infrastructure or whether the construction of masts or the laying of cables might be necessary. Nor did the Report contain any discussion of what different technologies might have to be deployed or whether different choices might have an impact on the environment. It seems fair to observe, accordingly, that the Report dealt with the performance, characteristics and relative cost implications of the various options which had been identified in the National Broadband Plan.

18. The Commissioner then went on to examine the request in the context of the definition of "environmental information" in the Regulations. He concluded as follows:-

"In the circumstances, I do not accept that the report provides information on factors such as energy, radiation, or emissions affecting or likely to affect the elements of the environment. Thus, I find that the report does not qualify as environmental information under Article 3(1)(b) of the definition. I also do not accept that the report provides information on a measure or activity affecting or likely to affect the elements and factors referred to in paras. (a) and (b) of the environmental information definition. It follows that I find no basis for concluding that the report, in and of itself, qualifies as environmental information within the meaning of Article 3 (1) (c) of the Regulations."

19. So far as Article 3(1)(e) of the Regulations were concerned, namely, whether the Report might be a cost benefit analysis within the framework of a measure to which sub . (c) relates, the Commission first examined whether the N.B.P. itself might be "a measure affecting or likely to affect the environmental elements" and was thus within Article 3(1)(c). He concluded that as it contained a number of different policy objectives to achieve the targets for high speed broadband availability throughout the State along with a review of the national spectrum policy, publication of a national digital strategy, infrastructure barrier removal, and a proposed state intervention, it followed that the N.B.P. was:

"merely a high level strategy, and the many variables which might effect the environment or the level of discharge emissions or other releases into the environment, are not apparent from a policy document".

20. The Commissioner accordingly concluded that the N.B.P. itself did not constitute environmental information within the meaning of the Regulations as "[t]he link between the plan and any effect on the environment is simply too remote, unlike the measures and activities that may be adopted to implement the plan". It followed in turn that the Broadband Report did not qualify as environmental information by virtue of Article 3(1)(e), as the characterisation of the Broadband Report under this heading depended on whether it was an economic analysis or cost benefit analysis regarding a policy or plan or measure which itself is environmental information within the meaning of Article 3(1)(c).

21. It will be seen that of the Commissioner considered that the link between the N.B.P. and environmental emissions was "too remote" to have any effect on the environment, as it was a high level strategy document and, at that level of generality, it could not have an effect on environmental emissions. He then concluded that if the N.B.P. was not a measure affecting or likely to affect emissions, any cost benefit or other economic analysis and assumptions that might either underlie or be used within the "framework" of the measures – such as the Broadband Report – could also not be environmental information.

The judgment of the High Court

22. In her judgment Baker J. first observed that:

"The Commissioner's conclusion was one based primarily on a view that as the N.B.P. was not a measure or policy to which the Regulation applied, that a cost benefit analysis that might inform the implementation of that plan is equally not environmental information. The characterisation of the N.B.P. was clearly and concisely dealt with by him. I conclude that I must approach the decision of the Commissioner by first considering his characterisation of the N.B.P., and whether the Commissioner was correct in applying a test of remoteness."

23. Baker J. went on to reject the Commissioner's submission that the first matter for determination was whether the N.B.P. contains environmental information:

"Article 3(1)(e) identifies as environmental information a cost benefit analysis of a measure or policy to which Article 3(1) (c) applied. That is a starting point for Article 3(1)(e) and the Commissioner was correct that any analysis of the applicability of Article 3(1)(e) had to involve first a consideration of the status of the N.B.P. Article 3(1)(e) does not relate to stand alone information, but rather cost-benefit or economic analyses in framework of other documentation and information."

24. Baker J. continued by saying that she considered that a purposive interpretation of the provisions of Article 3(1)(e) suggests that what was intended]:

"..... to be captured thereby were economic analysis or models which informed or were capable of informing either a programme or plan or administrative measure, not merely information which did as a matter of fact actually inform the decision maker. To consider otherwise would fail to have regard to the fact that the Minister is not bound by any of the policies or strategies proposed in the N.B.P, and the Regulation intends to capture any documentation or reports or information even that which was rejected by the policy maker in coming to its decision, and of all of the matters be considered by him or her."

25. She added that the word "use" in Article 3(1)(e) did not import a narrow approach such that only those documents which were available at the time a particular report was written are covered by the Regulation, and as the terminology of Article 3(1)(c) included plans and programmes "likely to affect" the environmental elements, reports, information, models or other data which are capable of informing the thinking in a plan, programme or policy are capable of being environmental information.

26. This all led to the conclusion that the Environmental Commissioner took an "overly narrow approach" in a number of respects:

"His approach to the N.B.P. itself, that it was a high level or a policy document, is overly narrow. I do not consider that the question of remoteness was a correct approach in that he failed to take into account the fact that Article 3(1)(c) included in the definition of environmental information not merely measures, programmes, policies etc., which affected the elements of the environment, but those which were likely to effect those elements. Therefore, I consider that the test of remoteness as identified by the Commissioner does not correctly identify the range of information that might affect the elements of the environment, i.e., where the consequential effect is not direct or not yet apparent.

Therefore, I conclude that the test applied by the Commissioner in assessing the N.B.P. was overly narrow, and in his view that only documentation which would show how the policy was to be worked out or implemented could come within the Regulation, the Commissioner fell into error. As a result, I consider the approach of the Commissioner to be incorrect with regard to the Report the subject matter of the data application before him. He directly, and in my view incorrectly, linked the production of the Report to his characterisation of the N.B.P. itself. The Report, as an economic model, could inform the choice that policy makers will make. It is, to use the language of Aarhus, part of the "thinking" that might go into such policy choices, and could impact on them.

The cost benefit analysis is part of the framework of information that Government will have before it when considering the various options described in the N.B.P., and because the matter will include the element of cost, the full framework of the information available to the Government is likely to have an impact on emissions into the environment. In conclusion, I consider that any information that might have informed or be capable of informing the thinking of the Government in making decisions with regard to the N.B.P., including economic models or cost-benefit analyses, is capable of being environmental information, and is so capable, notwithstanding that such models do not contain information on emissions or impact on the environment as such.

I consider in the circumstances that the Commissioner's approach was too narrow, he failed to adopt the teleological approach that is required to the interpretation and implementation of the Regulations, and imposed an overly narrow test of remoteness in seeking to characterise both the N.B.P. and any report or information within the framework that might inform the Government on the implementation of that plan."

27. These passages have formed the background to the appeal brought by both the Commissioner and the Minister. Both parties have focussed on the trial's judge analysis of the relationship between the Report and the N.B.P. and her analysis of the remoteness issue.

The proper interpretation of the 2007 Regulations

28. The proper approach to the interpretation of the 2007 Regulations is by now scarcely in doubt. As O'Donnell J. made clear when delivering the judgment of the Supreme Court in *NAMA v. Commissioners for Environmental Information* [2015] IESC 51 that the State's obligations as a Member State of the E.U., "requires that the courts approach the interpretation of legislation in implementing a Directive, so far as possible, teleologically, in order to achieve the purpose of the Directive".

29. This point was also made by the Court of Justice in its judgment in Case C-297/12 **Fish Legal v. Information Commissioner** EU:C: 2013: 853:

"First of all, it should be recalled that, by becoming a party to the Aarhus Convention, the European Union undertook to ensure, within the scope of EU law, a general principle of access to environmental information held by or for public authorities.....As recital (5) in the Preamble to Directive 2003/4 confirms, in adopting that Directive the EU legislature intended to ensure the consistency of EU law with the Aarhus Convention with a view to its conclusion by the Community, by providing for a general scheme to ensure that any natural or legal person in a member state has a right of access to environmental information held by or on behalf of public authorities, without that person having to state an interest: ...It follows that, for the purposes of interpreting Directive 2003/4, account is to be taken of the wording and aim of the Aarhus Convention, which that Directive is designed to implement in EU law..."

30. The recitals to both the 2004 Directive and the Aarhus Convention all stress the importance of the obligation to provide access to environmental information. The first recital to the 2004 Directive states that: "increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment".

31. The recitals to the Aarhus Convention are in broadly similar terms and include the following:

"Whereas....citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters" and, "improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns."

32. While the CJEU's subsequent case-law has stressed these objectives are to be interpreted broadly, that Court has also acknowledged that there are limits to the extent of a Member State's obligations.

33. In Case C-316/01 *Glawischnig v Bundesminister für Sicherheit und Generationen* [2003] E.C.R. I-6009 the Court said of a precursor Directive to the 2004 Directive that the fact that the Directive is to be given a broad meaning does not mean that it intended:

"to give a general and unlimited right of access to all information held by public authorities which has a connection, however minimal, with one of the environmental factors mentioned To be covered by the right of access it establishes, such information must fall within one or more of the ... categories set out in that provision."

34. The decision in *Glawischnig* concerned a request for information regarding measures applied to monitor food products containing genetically modified food stuffs and ensure compliance with labelling requirements. The Court of Justice held, however, that the name of the manufacturer and the product description and the administrative penalties imposed for controlling compliance with the labelling

requirements "do not constitute information relating to the environment".

35. The Court adopted a broadly similar view in *Fish Legal* where it stated that

"... [It] should also be noted that the right of access guaranteed by Directive 2003/4 applies only to the extent that the information requested satisfies the requirements for public access laid down by that directive, which means, *inter alia*, that the information must be 'environmental information' within the meaning of Article 2(1) of the directive, a matter which is for the referring tribunal to determine in the main proceedings....."

Application of these principles to the present case

36. As Baker J. pointed out in her judgment, if the Broadband Report comes within the definition of "environmental information" within the meaning of Article 3 of the 2007 Regulations it can only do so because it *either* constitutes a "measure" within the meaning of Article 3(1)(c) "affecting or likely to affect" the elements of the environment or, alternatively, information for the purposes of Article 3(1)(e) "on...cost-benefit and other economic analyses" within the "framework of the measures and activities" referred to in Article 3(1)(c). These two possible grounds can now conveniently be examined in turn.

Article 3(1)(c) of the 2007 Regulations

37. In his decision the Commissioner found that the Report had endeavoured to develop a financial model to calculate the likely capital expenditure associated with deploying next generation broadband infrastructure in order to provide the Minister with an understanding of the scale of investment required. In other words, as the report was prepared in order to assess the likely cost of the roll-out of the infrastructure, it was not a measure affecting or likely to affect the environment. In this regard, it is significant that the Commissioner found that the Report did not discuss any of the technologies in question in terms of their environmental impact, but rather in terms of "their performance characteristics and associated cost implications."

38. In many ways, this case is another instance of how real life throws up examples which are more complex than the drafters of legislation and statutory instruments may originally have envisaged or provided for in the legislative text. The Broadband Report appears to have been that which might be described as a thought experiment as to the costs associated with the roll-out of various broadband infrastructure. *In itself* – and I stress these words – the Report could obviously have no implications for the environment since it was concerned with financial modelling. If, however, the Minister selected one of these technologies one could see, of course, how the build-out of the infrastructure could have environmental impacts.

39. It is, however, perhaps significant that Article 3(1)(c) of the 2007 Regulations refers to "plans" or "policies" "affecting or likely to affect the environment..." The wording here suggests that the document in question must have graduated from simply being an academic thought experiment into something more definite such as a plan, policy or programme – however tentative, aspirational or conditional such a plan or policy might be – which, either intermediately or mediately, is likely to affect the environment.

40. This does not mean, however, that the Commissioner is required to make a judgment as to whether the plan or policy is ever likely to be put into effect and in that sense is or is not likely to affect the environment. If, for example, the Minister had prepared a plan to build four new motorways, it would matter not that by the time the matter came to the Commissioner the economy had weakened and the funding for this project was no longer to hand. The Commissioner would not be entitled in those circumstances to conclude, for example, that these plans were not likely to affect the environment because the roads in question were now unlikely to be constructed. In that sense, as the French text of Article 3(1)(c) of the 2003 Directive makes clear, the reference to "likely to affect" the environment should really be understood in the sense of being "capable" of affecting the environment ("...les mesures ...et les activités ayant ou susceptibles d'avoir des incidences sur les éléments et les facteurs visés aux points a) et b), ainsi que les mesures ou activités destinées à protéger ces éléments...").

41. There must, however, be a plan or something in the nature of a plan. This requirement that the document constitute a plan or a policy thus curtails a potentially open-ended or indefinite right of access to documents and in this respect reflects the thinking of the Court of Justice in *Glawischnig*, as otherwise virtually any document generated by a public body which referred either directly or indirectly to environmental matters could come within the scope of Article 3(1)(c).

42. Viewed thus, I cannot say that the Commissioner asked himself the wrong question with regard to Article 3(1)(c) or that his factual findings with regard to the Broadband Report can be disturbed. More particularly, as the Report had simply examined various financial models for broadband roll-out, it cannot be said that it had developed to the point where its contents represent a "plan" or "policy" or "programme" such as would constitute a "measure" for the purposes of Article 3(1)(c) of the 2007 Regulations.

Article 3(1)(e) of the 2007 Regulations: costs benefit analysis

43. There seems little doubt but that the Broadband Report involved a cost benefit analysis or other economic analysis for the purposes of Article 3(1)(e) of the 2007 Regulations. That in itself, however, is not enough in that Article 3(1)(e) further requires that this economic analysis must have been used "within the framework of the measures and activities referred to" in Article 3(1)(c). One may candidly say that the use of the term "within the framework" is not, perhaps, always the easiest legislative description to follow. It seems to suggest, however, that the economic analysis must have been used in the formation of a plan or policy or programme.

44. It seems at least implicit in the Commissioner's conclusions that the economic analyses contained in the Broadband Report were used in the formation of the N.B.P. , although I would note that there is no express finding to this effect. I will return to this point presently. Unlike the Broadband Report, the N.B.P. can, however, properly be regarded as a "plan" for the purposes of Article 3(1)(e) since it clearly sets out a list of actions which it was proposed that various State and public bodies would take to facilitate the broadband roll-out.

45. If, therefore, the N.B.P. was itself a plan "affecting or likely to affect" the environment within the meaning of Article 3(1)(c), then the Broadband Report would also come within the definition of environmental information for the purposes of Article 3(1)(e), as in those circumstances it would amount to an economic analysis used in the preparation of a plan (*i.e.*, the N.B.P.) which itself affected or was likely to affect the environment.

46. Thus, the issue to this question turns on the antecedent question of whether the N.B.P. was likely to affect the environment. The Commissioner concluded that the N.B.P. was merely a high level strategy document with many variables and that the link between the plan and the environment was simply too remote. I fear that I cannot agree.

47. The N.B.P. is certainly a plan for the roll-out of high-speed broadband. But, viewed objectively, it would be hard to deny that that the actions proposed in this plan are likely to affect the environment. One example must suffice for this purpose. Under the heading

"Infrastructure Barrier Removal" (at page 16 of the Plan) the authors say:

"Where fibre is required to the premises, to the cabinet or for backhaul, road opening permits will be necessary. Where wireless installations are required there will be a need to secure the necessary planning permissions for installations and civil works to support these structures. Industry has confirmed that at least 2,000 new installations may be required to facilitate the delivery of wireless technology."

48. The authors then discuss ways in which the infrastructure roll-out can be delivered more quickly. The specific measures included the issuing of a circular letter by the Minister for the Environment to planning authorities "in relation to the planning aspects of the development of telecommunications infrastructure". It was proposed that the guidance letter would address matters such as "the current system of granting temporary permissions and the associated bond/deposit regime for telecommunications infrastructure", "coverage restrictions and exclusions in county development plans", together with "appropriate regard being given by planning authorities to the planning decisions of An Bord Pleanála".

49. On any view, therefore, the plan discussed a variety of options each of which would have significant environmental impacts, whether it be the road openings for fibre or the installation of 2,000 new installations to facilitate the delivery of wireless technology. The plan further envisaged specific measures with regard to the planning process and the development of telecommunications infrastructure. None of these proposed actions can, with respect, be dismissed as remote or incidental.

50. It follows, therefore, that it is clear that the N.B.P. constituted a plan (and, hence, a measure) for the purposes of Article 3(1)(c) of the 2007 Regulations which was likely to affect the environment in the sense I have already explained. On the assumption that the Broadband Report provided an economic analysis used in the preparation of the N.B.P., it follows, therefore, that the latter Report constitutes "environmental information" for the purposes of Article 3(1)(e) of the 2007 Regulations. I find myself obliged to conclude that the Commissioner's conclusions to the contrary are in error, since the inferences he drew from the contents of the plan as to whether the N.B.P. was likely to affect the environment are simply not legally sustainable for the reasons I have just mentioned.

51. To all of this I would enter but one caveat: as I have already noted, the Commissioner does not appear to have made an express finding that the economic analyses contained in the Broadband Plan were used in the N.B.P. If this is a matter which is in dispute, then I would favour remitting this matter to the Commissioner to make appropriate findings of fact, coupled with a direction that in the event he should determine that the Plan was so used in the N.B.P. that the former would then constitute environmental information for the purposes of Article 3(1)(e) of the 2007 Regulations.

Conclusions

52. In summary, therefore, subject to the important caveat contained in the preceding paragraph, I would dismiss the appeals of the Commissioner and the Minister. While I agree that the Broadband Report does not come within Article 3(1)(c) of the 2007 Regulations, I would nonetheless affirm the decision of the High Court to the effect that the Broadband Report amounted to information "on" an economic analysis or analyses used in the framework of a measure which itself affected or was likely to affect the environment, namely, in this instance, the N.B.P. It follows, therefore, that the Broadband Report constitutes "environmental information" within the meaning of Article 3(1)(e) of the 2007 Regulations.

53. I would propose discussing with counsel the precise form of order now required in the light of the delivery of this judgment.