Neutral Citation Number: [2017] EWCA Civ 844

Case No: C3/2016/0880

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER) UPPER TRIBUNAL JUDGE WIKELEY
[2015] UKUT 671 (AAC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/06/2017

Before :

LORD JUSTICE BEATSON
LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE IRWIN

- -

Between:

The Department for Business, Energy and Industrial Strategy	**Appellant**
- and -	
The Information Commissioner & Alex Henney	**Respondents**

- -

Akhlaq Choudhury QC, Tom Cross (instructed by **Government Legal Department**) for the **Appellant**
Robin Hopkins (instructed by **Information Commissioners Office**) for the **1st Respondent**
Gerry Facenna QC, Julianne Morrison (instructed by **Harrison Grant Solicitors**) for the **2nd Respondent**

Hearing dates: 17 & 18 May 2017

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Approved Judgment

Lord Justice Beatson :

I Overview:

1. This is an appeal against the decision promulgated on 7 December 2015 by Upper Tribunal Judge Wikeley sitting in the Administrative Appeals Chamber of the Upper Tribunal. Judge Wikeley held that information requested by Mr Alex Henney on 9 November 2012 from the Department for Energy and Climate Change ("the Department") in a Project Assessment Review about the communications and data component of the United Kingdom government's Smart Meter Programme is "environmental information" under regulation 2(1)(c) of the Environmental Information Regulations 2004 SI 2004 No.3391 ("the EIR"). The Department, now called the Department for Business, Energy and Industrial Strategy, is the appellant. The first respondent is the Information Commissioner and the second respondent is Mr Henney, who has a longstanding professional interest and expertise in energy usage and policy.

2. The Smart Meter Programme was introduced pursuant to Directive 2009/72/EC ("the Electricity Directive") concerning common rules for the internal market in electricity. The programme seeks to provide sophisticated information about energy usage to consumers, suppliers, and network operators in near real time. Its benefits are said to include enabling consumers to make more accurate price comparisons between suppliers and to enhance their ability to control their energy usage, and enabling suppliers and the national grid better to match supply with demand and thus improve grid efficiency. The communications and data component provides the method of communicating information from smart meters to suppliers and network operators.

3. The Electricity Directive requires EU Member States to undertake a cost benefit assessment of large scale distribution of smart meters and, where that assessment is positive, to provide at least 80% of consumers with smart meters by 2020. The UK Government has made a positive assessment of the benefits of these meters and has pledged to take reasonable steps to equip domestic and smaller non-domestic premises with smart metering by the end of 2020.

4. The EIR gave effect in domestic United Kingdom law to Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information. [1] That Directive in turn gave effect to international obligations under the 1998 UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, the "Aarhus Convention". The obligations of public authorities to disclose environmental information under the EIR, the Directive and the Aarhus Convention are different and generally broader than the obligations under the Freedom of Information Act 2000 ("FOIA") to disclose information that does not qualify as "environmental information". For example, apart from an exception concerning personal data, all of the exceptions under the EIR are subject to a public interest balancing test whereas a number of the exemptions under the FOIA

[1] It replaced Directive 90/313/EEC of 30 June 1990.

are absolute. Moreover, the EIR contains a presumption in favour of disclosure but the FOIA does not.

5. I set out the definition of "environmental information" in regulation 2(1) of the EIR at [11] below. At this stage it suffices to state (emphasis added) that regulation 2(1)(c) provides that "environmental information" means any information "on" "measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect …" the state of the elements of the environment referred to in regulation 2(1)(a)[2] and factors, such as energy, emissions, discharges and other releases into the environment affecting or likely to affect the elements of the environment referred to in (a).

6. In very general terms, the issue between the parties is when and whether information on a measure which does not in itself affect the state of the elements of the environment or the factors referred to in regulation 2(1)(a) and (b) of the EIR, can be information "on" another measure which does. In this case, the measures are respectively the document containing the information, the Project Assessment Review about the communications and data component, and the Smart Meter Programme as a whole. It is common ground that the programme as a whole was likely to affect the relevant elements and factors. In the Upper Tribunal, the Judge (at [93]) identified the Smart Meter Programme as the relevant measure, without considering whether the communications and data component itself was a measure, and so did not express a view as to whether the communications and data component was itself likely to affect the relevant elements and factors.

7. The question before us concerns the extent to which it is permissible to look beyond the document containing the information and to have regard to what the Upper Tribunal described as the "bigger picture" to identify the "measure" that the information in it is "on". The Department's grounds of appeal are summarised at [34] below. In a nutshell, its case is that the Upper Tribunal erred because it reached the conclusion that the information in the Project Assessment Review is "on" the Smart Meter Programme by improperly using the "bigger picture" approach. On its behalf, Mr Choudhury QC submitted that the Tribunal impermissibly allowed the context of the information to become its subject. There is, he maintained, nothing in the Project Assessment Review to suggest that it is a review of anything more than the communications and data network which was its focus. That network does not and is not likely to have any effect on the state of the elements of the environment or the factors referred to in regulation 2(1)(a) and (b). He submitted that the consequence was that the Upper Tribunal erred in concluding that the regime under the EIR applied rather than that under the FOIA.

8. Mr Hopkins, on behalf of the Information Commissioner, and Mr Facenna QC, on behalf of Mr Henney, seek to uphold the decision of the Upper Tribunal. They submitted that a Project Assessment Review whose immediate focus is the communications and data component of the project can also contain information

[2] The list of elements includes air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, and the interaction among these elements.

"on" or "about" the Smart Meter Programme as a whole. They argued that whether it does so is a question of fact for the fact-finding body, here the Upper Tribunal. In this case, the tribunal's finding that the communications and data component was "on" the programme as a whole, because it is integral to the success of the programme as a whole, is a finding of fact, which, absent perversity, the Upper Tribunal was entitled to make.

9. In section II of this judgment, after setting out the definition of "environmental information" in the EIR, I summarise the guidance in the jurisprudence as to the approach to be used. Section III contains a summary of the factual and procedural background. Section IV summarises the decision of the Upper Tribunal, and section V analyses the submissions of the parties. It also gives the reasons for my overall conclusion that, although I consider that the use of the phrase the "bigger picture" is not helpful because it can deflect attention away from the definition in regulation 2(1) of the EIR, in this case the tribunal did not fall into legal error, despite using the phrase. Accordingly, its finding that the communications and data component was "on" the Smart Meter Programme as a whole because it is integral to the success of the programme as a whole was one that it was entitled to make. If my Lords agree, I would therefore dismiss the appeal.

10. The General Regulatory Chamber of the First-tier Tribunal ("the FtT") dealt with the question of the applicable regime as a preliminary issue rather than deciding what the outcome would have been under both regimes (see [21] below). The matter will therefore have to be remitted to the FtT for it to consider the substantive issues that arise under the EIR regime which applies to Mr Henney's request. Mr Henney's request for information was made four and a half years ago. I am aware of the pressures on the General Regulatory Chamber, and know that it is not for this court to interfere in its management of its heavy caseload. But, given when Mr Henney's request was made, the timetable for the introduction of the Smart Meter Programme, and the purpose of the EIR to facilitate more effective participation by the public in environmental decision-making, there may be a case for this matter to be given some expedition.

II. Legislative framework:

11. Regulation 2(1) of the EIR defines "environmental" information as follows:

> '"environmental information" has the same meaning as in Article 2(1) of the Directive, namely 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 referred to in (a);

(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 (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 (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 (a) or, through those elements, by any of the matters referred to in (b) and (c) …."

I have underlined the parts of the definition that are particularly in issue in the present appeal.

12. It is not necessary to set out article 2(1) of the Directive because the EIR's definition and the six categories in sub-paragraphs (a) – (f) of regulation 2(1) are in identical terms to it. The definition of "environmental information" in the Aarhus Convention which has three categories is set out in an Appendix to this judgment.

13. Guidance as to the legal principles to be followed in construing and applying the definition of "environmental information" in article 2(1) of the Directive and regulation 2(1) of the EIR has been given by decisions of the CJEU and United Kingdom courts. At this stage, it suffices to refer to those which are not in dispute.[3] The differences between the parties, which are mainly as to the application of the principles, will be seen from the analysis in Part VI of this judgment.

14. The starting point is that the EIR must be interpreted, as far as possible, in the light of the wording and the purpose of the Directive, which itself gives effect to international obligations arising under the Aarhus Convention. In Case C-297/12 *Fish Legal v Information Commissioner* [2014] QB 521, [2014] 2 CMLR 36 the CJEU stated:

"35 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

[3] The principles which were not in dispute were summarised by the Upper Tribunal at §§32-37 of its decision.

> environmental information held by or for public authorities: see Ville de Lyon v Caisse des dépôts et consignations (Case C-524/09) [2010] ECR I-14115 , para 36 and *Flachglas Torgau GmbH v Federal Republic of Germany (Case C-204/09)* [2013] QB 212, para 30.
>
> 36 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: see the *Flachglas Torgau* case, para 31.
>
> 37 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: see the *Flachglas Torgau* case, para 40."

15. The importance of the obligation to provide access to environmental information is seen from the recitals to the Directive and the Aarhus Convention. The first recital to the 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."

The recitals to the Aarhus Convention include:

> "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".

16. It is well established that the term "environmental information" in the Directive is to be given a broad meaning and that the intention of the Community's legislature was to avoid giving that concept a definition which could have had the effect of excluding from the scope of that directive any of the activities engaged in by the public authorities: see Case C-316/01 *Glawischnig v Bundesminister für Sicherieit und Generationen*, (13 June 2003) at [24]. That decision concerned Directive 90/313/EEC but it was common ground that the same approach applies

to Directive 2003/4/EC, which replaced it, and with which this case is concerned. That a broad meaning is to be given to the term is also seen from the decisions of this court in *Secretary of State for Communities and Local Government v Venn* [2014] EWCA Civ 1539 at [10]- [12] *per* Sullivan LJ (referring to the decision of the CJEU in Case C-240/09 *Lesoochranarskezoskupenie VLK v Ministerstvo ivotneho prosterdia Slovenskej Republiky* [2012] QB 606) and in *Austin v Miller Argent* [2014] EWCA Civ 1012 at [17] and [30] *per* Elias and Pitchford LJJ.

17. *Glawischnig* and *Fish Legal*, however, also show the limits of the broad approach. In *Glawischnig's* case it was stated (at [25]) 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".

In *Fish Legal* it was stated (at [39]):

> "… [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 (*Flachglas Torgau*, paragraph 32)."

III. Factual and procedural background:

18. I referred to the benefits that it is said smart meters can provide, the cost-benefit analysis of smart meters required by the Electricity Directive, and to the United Kingdom government's positive assessment of those benefits at [2] and [3] above. Mr Henney, who had co-authored a paper "Smart Metering – Miliband's poisoned chalice", was more sceptical. His request for information was made in an email sent to "FOI-EIR queries – DECC", under the subject heading "Freedom of Information request". In his email he stated that he had been told there was an "'independent review' of the roll-out of" the Smart Meter Programme which endorsed the Department's opinion of "the viability of the roll-out" and requested the key papers and the "independent review".

19. The Department responded in a letter dated 6 February 2013. It identified the independent review referred to by Mr Henney as a Project Assessment Review of the Smart Meter Project. It stated that the review was carried out by the Major Projects Authority in the Cabinet Office as part of the Government's standard procedures for providing assurance of major projects and programmes and it culminated in a report. The Department provided Mr Henney with a heavily

redacted copy of the report.[4] The redacted material was withheld under various provisions of the FOIA including that the information related to the development of government policy on smart meters which was "still ongoing",[5] and that, if disclosed, it would inhibit the free and frank exchange of views or would otherwise prejudice or be likely to prejudice the effective conduct of public affairs.[6]

20. The Department provided Mr Henney with some further information following an internal review of his request, but on 26 April 2013 he complained to the Information Commissioner. One of the matters about which he complained was that the request for information should have been considered under the EIR and not the FOIA. In a decision issued on 31 March 2014, the Information Commissioner accepted the Department's submission that the FOIA and not the EIR applied to Mr Henney's request, but ruled that the public interest favoured disclosure which she ordered.

21. The Department appealed to the FtT and Mr Henney cross-appealed. The cross-appeal concerned whether his request should have been dealt with under the EIR regime rather than the FOIA regime. In the event, the FtT dealt only with what it described as the "preliminary point"; whether the appropriate access regime was that under FOIA or that under the EIR. The Department and the Information Commissioner argued that the FOIA regime applied, although the Information Commissioner considered that the issue was finely balanced.

22. It appears from the decision of the Upper Tribunal (UT at §6) and from what Mr Choudhury stated at the hearing before us, that it was in its evidence to the FtT that the Department first stated that the Project Assessment Review in this case was commissioned for one particular aspect of the Smart Meter Programme; the communications and data component. At the hearing, Mr Choudhury stated that the Department's evidence to the FtT was that the review considered two different models. The first was a centralised model in which a single organisation provides the communications and data services to all energy companies and authorises third parties for the purposes of smart metering. The second was a "competitive" model where individual energy companies procure the communication and data services to support their smart meters.

23. In its decision promulgated on 30 December 2014, the FtT found that the disputed information was environmental and should have been considered under the EIR. The Department was granted permission to appeal against that decision. By the time the case came before the Upper Tribunal, the Information Commissioner had revised her position and no longer opposed the FtT's conclusion that the information was environmental information.

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4 An unredacted copy of the Project Assessment Review was provided to this court with the appeal bundles, but before the hearing the parties informed the court that it should not have been and the court did not read or consider it.

5 FOIA section 35(1)(a).

6 FOIA section 36(2)(b) and (c).

IV The decision of the Upper Tribunal:

24. The Upper Tribunal held that the FtT erred in law in the way in which it approached the interpretation and application of regulation 2(1)(c) and (e) of the EIR, set aside its decision, and re-made it: see §§55-74. The Upper Tribunal reached the same conclusion as the FtT, but did so by a different route.

25. In determining whether the disputed information falls within regulation 2(1)(c), Upper Tribunal Judge Wikeley ("the Judge") relied on the relevant legal principles which I have summarised at [13] – [16] above. In his decision, the Project Assessment Review is referred to as the PAR and the Smart Meter Programme as the SMP.

26. The Judge's starting point in re-making the decision was to consider the proper approach to identifying the relevant "measure". He stated (at §83):

> "As a matter of law, when identifying the relevant "measure" for the purposes of regulation 2(1)(c), I also find it is permissible to look beyond the precise issue with which the disputed information is concerned and to have regard to the "bigger picture". This approach is consistent with a broad interpretation of the EIR as mandated by the Aarhus Convention and the Directive. In this context I also bear in mind that on a proper reading only the *Mersey Tunnel Users Association* case is a worked example of the pure "bigger picture" approach in the context of regulation 2(1)(c), given that *Lend Lease* was actually a regulation 2(1)(e) case."[7]

The phrase the "bigger picture" appears to have been derived from the submissions of Mr Hopkins, who appeared on behalf of the Information Commissioner before the Upper Tribunal and before us. His skeleton argument for the Upper Tribunal stated:

> "When identifying the relevant "measure" for the purposes of regulation 2(1)(c) EIR, it is permissible to look beyond the precise issue with which the disputed information is concerned and to take account of the 'bigger picture'. He accepts, however, that there must be a sufficient connection between the 'big picture' and the particular information in dispute, such that the latter satisfies the definition under regulation 2(1) EIR." [skeleton, §19, quoted UT §39]

and:

> "There must be a sufficient connection between the 'big picture' and the particular information in dispute, such that the latter satisfies the definition under regulation 2(1) EIR. The component to which the disputed information relates must play a sufficiently important role in the large project and in the environmental aspects of that project." [skeleton, §20, quoted UT §84]

[7] The references are to *Mersey Tunnel Users Association* v *Information Commission and Holton* BC FLT(General Regulatory Chamber) 24 June 2009 and *R(Lord)* v *Secretary of State for the Home Department* [2003] EWHC 2073 (Admin)

27. The Judge then explained why he rejected the four reasons given by Mr Choudhury as to why the "bigger picture" approach was inappropriate in this case: see UT §§87-90. The first was Mr Choudhury's submission that the *Mersey Tunnel Users Association* case should be distinguished on the basis that it involved a major infrastructure construction project with obvious, immediate and significant environmental impacts. The Judge rejected this because (see §87) this was in effect to adopt a "bricks and skyline" approach which would be wholly inconsistent with the objectives and philosophy of the Aarhus Convention and the Directive.

28. Secondly, he stated that the fact that the Smart Meter Programme itself is "not inherently about the environment" did not (see §87) suffice to preclude the "bigger picture" approach. While reducing carbon emissions is *an* aim rather than *the* aim of both the Electricity Directive and the Smart Meter Programme, the test under regulation 2(1)(c) is not framed in terms of the primary intention or motivation behind the measure in question (see §88). The Judge stated (at §89) that because the "bigger picture" approach was, as a matter of law, properly open to the tribunal, the evaluation as to what the disputed information was "on" became factually and contextually sensitive. Finally, he stated (at §90) that the evidence may justify a finding, as part of the bigger picture, that the Project Assessment Review was information "on" the Smart Meter Programme , irrespective of the fact that the report was devoted to only the communications and data component.

29. The Judge went on to recognise (at §91) that some types of information that are relevant to a project (which itself has some environmental impact) will clearly not amount to environmental information within regulation 2(1). He suggested, by way of illustration, a report exclusively focussed on the public relations and advertising strategy to be adopted for the Smart Meter Programme, stating that he considered it unlikely to come within the scope of regulation 2(1).

30. The Judge then (at §92) asked whether the fact that the "bigger picture" approach is permissible leads to the conclusion that this Project Assessment Review was environmental information within regulation 2(1)(c) of the EIR. He concluded that it was for the reasons he gave in the following paragraphs. The first stage of his analysis was (see §93) that:

> "… regulation 2(1)(c) must be liberally construed whilst not losing sight of the statutory language. The SMP itself is on any reckoning a "measure", in that it is plainly a policy, plan or programme in the ordinary meaning of those terms."

31. The Judge next considered whether the Smart Meter Programme is a measure "affecting or likely to affect the elements and factors referred to in (a) and (b)" (including "air and atmosphere" and "energy"). He concluded (at §94) that it is "at the very least likely" to affect those elements and factors because the Electricity

Directive clearly has an impact on energy policy and on the environment. The Department's own impact assessment of the programme made several references to its role in reducing CO_2 emissions. He also stated (at §94) that "likely" denotes something more substantial than a remote possibility but did not impose the relatively high standard of a balance of probabilities.

32. The third stage of the Judge's analysis, and the stage that is most critical for this appeal, is in §95. He stated:

> "… I acknowledge that the argument so far has been focussed on the SMP, and not the PAR. The primary focus of the PAR is the communications and data components of the SMP. I shall assume for the present – although I recognise too that Mr Henney disputes this – that the PAR itself is not a measure "affecting or likely to affect the elements and factors referred to in (a) and (b) above". However, the definition of "environmental information" in regulation 2(1) must be read in its entirety. It includes "any information … on" any of the matters enumerated in sub-paragraphs (a) to (e) inclusive. Taking a broad view of the regulation, and bearing in mind the "bigger picture", it is accurate to say that the PAR is information on the SMP as a whole, which (as noted above), is plainly a relevant measure for the purpose of regulation 2(1)(c). In reaching this conclusion I find that the PAR does not contain information on some incidental aspect of the SMP that could be easily hived off. The communications and data system underpinning the SMP is integral to its success. As Mr Hopkins pointed out, the official consultation paper described the DCC, the government's chosen vehicle for delivery of the data and communications component, as a "key element" in the rollout of the SMP. The establishment of the DCC's services were likewise said to be "critical to the success" of the programme as a whole (DECC, *Smart Metering Implementation Programme: A consultation on the detailed policy design of the regulatory and commercial framework for DCC* (2011), FTT open bundle, p.232). As Mr Frankel put it rather more bluntly, but equally accurately, without the communications and data system there is no SMP."

33. He concluded at §96 that:

> "…the contents of this PAR, with its focus on the communications and data component, is sufficiently closely connected to the success of the SMP overall. Furthermore, the SMP's objectives include relevant environmental impacts. The disputed information accordingly falls within regulation 2(1)(c)."

VI Analysis:

34. *(a) The grounds of appeal:* The Department, whose case I summarised at [7] above, advanced four grounds of appeal. They are:
    (1) The Tribunal misapplied regulation 2(1)(c) in failing to identify the correct "measure". It erred in treating the Smart Meter Programme as the relevant measure and overstated the significance of the communications and data component to the continuation of the Smart Meter Programme.
    (2) The Tribunal erred in finding that the "bigger picture" approach was permissible and/or appropriate in identifying the relevant "measure. The approach taken by the Tribunal went beyond the broad approach to construction that is required of the EIR and the Directive. It was not entitled effectively to disregard the actual document and measure which is the subject matter of the disputed information.
    (3) The Tribunal erred in its treatment of the *Mersey Tunnel* case which it should have distinguished on the ground that, unlike the disputed information on the communications and data component in the Project Assessment Review, the disputed information on "tolling" of the Mersey Gateway Project was a measure which it was conceded would be likely to have an impact on the environment, or alternatively because the measure in the *Mersey Tunnel* case may have had an effect on the environment regardless of the "bigger picture". Mr Choudhury did not develop this ground in his oral submissions, but he did not abandon it.
    (4) The Tribunal erred in failing to consider whether the information in the Project Assessment Review was "on" the Smart Meter Programme. "On" a measure means "about" that measure and requires a direct connection between the information and the measure. The Tribunal erred in concluding that the Project Assessment Review was "on" the Smart Meter Programme when it was in fact about the communications and data component. It erred in regarding the fact that the communications and data component was "integral to [the Smart Meter Programme's] success" as a sufficient basis on which so to regard the Project Assessment Review. The Smart Meter Programme was not contingent upon the information considered in the Project Assessment Review or any particular communications and data component system.

35. *(b) The "bigger picture":* As I have indicated, in my judgment consideration of the issue in this case is not assisted by using the phrase the "bigger picture". Its use can appear to go beyond the familiar principle of construction that determines meaning in the light of the relevant context. It can also deflect attention from the statutory definition in regulation 2(1)(c) and lead to an approach that assesses whether information is "on" a measure by reference to whether it "relates to" or has a "connection to" one of the environmental factors mentioned, however minimal. That was precisely what the CJEU in *Glawischnig's* case (see [17] above) stated is not permissible because, contrary to the intention of the Directive, it would lead to a general and unlimited right of access to all such information.

36. Mr Choudhury is thus correct to submit that an approach which is not focussed on the statutory definition is liable to introduce uncertainty and error. However,

despite his elegant submissions, for the reasons I give in the remainder of this part of my judgment, I have concluded that the Upper Tribunal did not err in law in its application of regulation 2(1)(c) of the EIR. In using the phrase the "bigger picture", the Upper Tribunal did not, in this instance, impermissibly allow any connection between disputed information and a measure to be sufficient.

37. *(c) Identifying the relevant measure or measures:* There is an important difference between the definition of "information" in section 1(1) of FOIA and the definition of "environmental information" in section 2(1)(c) of the EIR. The former focuses on the information itself: see *Independent Parliamentary Standards Authority v Information Commissioner* [2015] EWCA Civ. 388, [2015] 1 WLR 2879 at [35] – [36]. The latter also focuses on the relevant measure rather than solely on the nature of the information itself. It refers to "any information" "on … (c) measures … affecting or likely to affect the elements and factors referred to" in regulation 2(1)(a) and (b)" (emphasis added). It is therefore first necessary to identify the relevant measure. Information is "on" a measure if it is about, relates to or concerns the measure in question. Accordingly, the Upper Tribunal was correct first to identify the measure that the disputed information is "on".

38. Mr Choudhury submitted that the Upper Tribunal made two principal errors. The first was to take as its starting point whether the Smart Meter Programme was a measure and whether it was one affecting or likely to affect the elements and factors referred to in regulation 2(1)(a) and (b), whereas the starting point should be the disputed information which was in the Project Assessment Review. Although there are advantages in starting with the disputed information and a risk in not doing so, this is in substance a semantic criticism. The Smart Meter Programme is clearly a "measure", and it is common ground that it is one that affects or is likely to affect the elements and factors referred to in the regulation. Where the Tribunal started does not matter provided it did not err in its approach to the crucial question; whether the disputed information is "on" the Smart Meter Programme as a whole rather than only "on" the communications and data component.

39. *(d) Identifying the measure(s) the information is "on":* As to the crucial question, Mr Choudhury submitted that the Upper Tribunal erred in finding that it is permissible to look beyond what the information is concerned with because it had regard to the bigger picture. This, however, overlooks the language used by the Judge at §83. He did not state that because the Smart Meter Programme is a "measure" that affects or is likely to affect the elements and factors referred to in the regulation, the disputed information in the Project Assessment Review is therefore "on" the Smart Meter Programme as a whole. He stated that it is "permissible to look beyond the precise issue with which the disputed information is concerned" in identifying the relevant "measure" (emphasis added). This does not amount to a finding that it is permissible to look at issues with which the information is not concerned, or at issues with which the information is merely connected. It simply means that the Tribunal is not restricted by what the information is specifically, directly or immediately about. In my judgment, this is consistent with the language used in regulation 2(1)(c). Nothing in that language requires the relevant measure to be that which the information is "primarily" on.

40. I add that this is also seen from the way the Judge applied the test to the facts of this case. He showed at §91 that he accepted that it was clear that some types of information that are relevant to a project which itself has some environmental impact do not amount to environmental information within the regulation. He stated at §95 that the information in the Project Assessment Review was "integral" and "critical" to, and a "key element" in the success of, the Smart Meter Programme. That would not have been necessary if it sufficed that the information was merely connected to the Smart Meter Programme as a whole.

41. In my view, Mr Choudhury's approach effectively introduces a requirement that the information in question is directly or immediately concerned with a measure which is likely to affect the environment. In requiring the Tribunal to focus on what the information is directly and immediately about (i.e. the communications and data component), the Department's approach in effect precludes consideration of the context, which is contrary to the general principles of construction set out at §§32-37 of the Upper Tribunal's judgment which were not criticised, and the principles I have summarised at [11] – [17] above.

42. Furthermore, Mr Choudhury accepted that it is possible for information to be "on" more than one measure. He was right to do so. Nothing in the EIR suggests that an artificially restrictive approach should be taken to regulation 2(1) or that there is only a single answer to the question "what measure or activity is the requested information about?". Understood in its proper context, information may correctly be characterised as being about a specific measure, about more than one measure, or about both a measure which is a sub-component of a broader measure and the broader measure as a whole. In my view, it therefore cannot be said that it was impermissible for the Judge to conclude that the Smart Meter Programme was "a" or "the" relevant measure.

43. It follows that identifying the measure that the disputed information is "on" may require consideration of the wider context, and is not strictly limited to the precise issue with which the information is concerned, here the communications and data component, or the document containing the information, here the Project Assessment Review. It may be relevant to consider the purpose for which the information was produced, how important the information is to that purpose, how it is to be used, and whether access to it would enable the public to be informed about, or to participate in, decision-making in a better way. None of these matters may be apparent on the face of the information itself. It was not in dispute that, when identifying the measure, a tribunal should apply the definition in the EIR purposively, bearing in mind the modern approach to the interpretation of legislation, and particularly to international and European measures such as the Aarhus Convention and the Directive. It is then necessary to consider whether the measure so identified has the requisite environmental impact for the purposes of regulation 2(1).

44. I consider that, although the Judge's use of the phrase the "bigger picture" is, for the reasons I have given, unhelpful, what he meant was simply that, in purposively applying regulation 2(1), the information has to be considered in its context. Contrary to Mr Choudhury's submissions, the Judge did not use the "bigger

picture" approach to find that information that is simply "connected with" a measure, can properly be described as "on" that measure for the purposes of regulation 2(1)(c). In my judgment, the "bigger picture" approach is permissible to the extent that it enables the Tribunal to look beyond the precise issue with which a measure is concerned. The Judge's reasoning at §89 applies this version of the "bigger picture" approach by finding that the evaluation as to what (or which measure) the information is "on" is factually and contextually specific.

45. *(e) The role of a purposive interpretation in this context:* A literal reading of regulation 2(1)(c) would mean that any information about a relevant "measure" would be environmental information, even if the information itself could not be characterised as having, even potentially, an environmental impact as defined. However, as recognised by the Judge (at §91), "simply because a project has some environmental impact", it does not follow that "all information concerned with that project must necessarily be environmental information". Interpreting the provision in that way would be inconsistent with the decision in *Glawischnig's* case discussed at [16] and [17] above. Since that case also stated that the Directive is to be given a broad meaning, I have concluded that the statutory definition in regulation 2(1)(c) does not mean that the information itself must be intrinsically environmental.

46. The question is how to draw the line between information that qualifies and information that does not. The example given by the judge (a report focussed on the public relations and advertising strategy of the Smart Meter Programme) and other examples canvassed at the hearing show that there may be difficulties in doing this. Mr Facenna recognised that not all information would qualify but submitted that the example given by the Judge would do so because having access to information about how a development is to be promoted will enable more informed participation by the public in the programme. His example of information that would not qualify was information relating to a public authority's procurement of canteen services in the department responsible for delivering a road project. This information would not qualify because it is likely to be too remote from or incidental to the wider project to be "on" it for the purposes of regulation 2(1)(c).

47. In my judgment, the way the line will be drawn is by reference to the general principle that the regulations, the Directive, and the Aarhus Convention are to be construed purposively. Determining on which side of the line information falls will be fact and context-specific. But it is possible to provide some general guidance as to the circumstances in which information relating to a project will not be information "on" the project for the purposes of section 2(1)(c) because it is not consistent with or does not advance the purpose of those instruments.

48. My starting point is the recitals to the Aarhus Convention and the Directive, in particular those set out at [15] above. They refer to the requirement that citizens have access to information to enable them to participate in environmental decision-making more effectively, and the contribution of access to a greater awareness of environmental matters, and eventually, to a better environment. They give an indication of how the very broad language of the text of the

provisions may have to be assessed and provide a framework for determining the question of whether in a particular case information can properly be described as "on" a given measure.

49. I next refer to the decision of the CJEU in Case C-673/13 P, *European Commission v Stichting Greenpeace Nederland* (23 November 2016), a case relied on by Mr Choudhury. The case concerned Regulation (EC) No 1049/2001 (public access to documents of certain EC institutions) and Regulation (EC) No 1367/2006 (on the application of the Aarhus Convention to Community institutions and bodies). Article 6(1) of Regulation 1367/2006 is very broad. It provides that "an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment …". The CJEU held that the General Court had erred in giving a broad and purposive interpretation to this provision so that any link between the information and emissions into the environment sufficed to fall within its scope.

50. Mr Choudhury relied on the *Greenpeace* case as showing a limit being placed on a definition whose language is plain but very broad. He argued that the approach of the CJEU informs the meaning of the word "on" in regulation 2(1)(c), because the CJEU held that it was wrong to ask whether the information contained a "sufficiently direct link" to the factor. For the reasons I give in the next two paragraphs, the different legislative context means that I do not consider that the Department is in fact assisted by the *Greenpeace* case. But the decision does show that a purposive approach can be used to interpret a provision more narrowly than its very broad literal meaning. At §80, the CJEU relied on the purpose of enabling public participation in environmental decision-making to narrow the otherwise over-broad definition in Article 6(1) of regulation 1367/2006. It in effect "read down" the provision by reference to the legislative purpose.

51. *(f) Why the Greenpeace case does not assist the Department:* The reason I consider that the Department is not in fact assisted by the *Greenpeace* case is that the CJEU was concerned with a very different legislative context. It is not appropriate to take the wording or reasoning of the CJEU in a different legislative context, and to apply it strictly to the present case. The CJEU was particularly concerned with avoiding an over-broad definition of "information on emissions" because Article 6(1) created an irrebuttable presumption that information "on" emissions had to be disclosed, and the confidentiality exception could not apply. In other cases, Article 4(2) of Regulation 1049/2001 enabled the institutions to refuse access to a document where disclosure would undermine the protection of commercial interests including intellectual property "unless there is an overriding public interest in disclosure". That provision required a weighing up of the interests referred to. While not giving Article 6(1) a restrictive interpretation, the CJEU (at [81]) considered that the approach taken by the General Court "jeopardise[d] the balance which the EU legislature intended to maintain between the objective of transparency and the protection of those interests". Those concerns are not relevant in the present case. There is no irrebuttable presumption that environmental information within regulation 2(1) of the EIR must be disclosed. Part 3 of the EIR contains exceptions to the duty to disclose such information.

52. Additionally, I do not consider that the Upper Tribunal's approach in this case is open to the CJEU's criticism of the General Court's decision in the *Greenpeace* case. The CJEU stated that the General Court's decision deprived the exemptions in Regulation 1367/2006 protecting commercial interests and intellectual property of any practical effect and was a disproportionate interference with business secrecy which is protected by Article 339 of the TFEU. The Upper Tribunal's approach does not largely deprive the concept of "environmental information" of any meaning. Whether the communications and data component is sufficiently integral to the Smart Meter Programme is part of the application of regulation 2(1)(c). The question is not simply whether there is a "sufficiently direct link" between the disputed information and the Smart Meter Programme. The Judge at §36 made clear that "although the expression 'environmental information' must be read in a broad and inclusive manner, one must still guard against an impermissibly and overly expansive reading that sweeps in information which on no reasonable construction can be said to fall within the terms of the statutory definition".

53. *(g) Application in the present case:* In my judgment, the Upper Tribunal was correct to find, at §95, that the Project Assessment Review was "on" the Smart Meter Programme for the purposes of regulation 2(1)(c). While the Project Assessment Review focused on the communications and data component, it could nonetheless be described as also being about the wider Smart Meter Programme, because the communications and data component is integral to the programme as a whole. It would be unnecessarily narrow and artificial to draw a distinction between a Project Assessment Review on the communications and data component and a Project Assessment Review on the Smart Meter Programme. The communications and data component is not an incidental aspect of the Smart Meter Programme: the former is critical to the latter's success and thus fundamental to it. The Upper Tribunal was entitled to find that there would be no Smart Meter Programme without a communications and data component of some sort, and there is no basis for overturning this conclusion.

54. As I have stated, the application of the definition in regulation 2(1) of the EIR is informed by the purpose of the Aarhus Convention and the Directive. In the present case, since the objectives of the Project Assessment Review include assessing the progress of the communications and data component, it is clear the public may be better informed and better able to contribute to environmental decision-making if they are able to have access to the Project Assessment Review. The evidence before the FtT made clear that the Project Assessment Review considered a choice between two models. Those with experience of the electricity industry such as Mr Henney may be well placed to comment on the conclusion as to which model is most appropriate, or most likely to achieve the Smart Meter Programme's environmental objectives.

55. On the open evidence before the court, it appears that the communications and data component itself might properly be described as a measure affecting or likely to affect the elements and factors referred to in 2(1)(a) and (b). As this issue was not addressed by the Upper Tribunal and was not a ground of appeal, nothing turns on this. However, given the intrinsic link between a communications and

data component of some sort and the Smart Meter Programme and the finding that there would be no SMP without a CDC, it would be surprising if that component was not likely to affect the environmental factors, as its success would in turn be likely to determine the success of the Smart Meter Programme.

VII Conclusion and disposition:

56. For the reasons given in Part VI, if my Lords agree, the appeal will be dismissed and the matter will be remitted to the General Regulatory Chamber of the First-tier Tribunal for it to consider the substantive issues that arise under the EIR regime which applies to Mr Henney's request. I am very grateful to Mr Choudhury QC, Mr Hopkins and Mr Facenna QC, and their respective legal teams, for their assistance.

57. In conclusion, I emphasise that what I have stated in Part VI, particularly in sections (b) to (e), and (g), is not intended to provide a gloss on the statutory definition in regulation 2(1)(c). It will be necessary to consider each case on its own facts in order to determine whether disputed information can properly be said to be "on" a given measure and to have regard to the purpose of the EIR and the Directive.

Lord Justice David Richards

58. I agree.

Lord Justice Irwin

59. I also agree.