THE HIGH COURT

COMMERCIAL

Record No. 2023/280 MCA

[2024] IEHC 49

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 61(3) OF THE COMMUNICATIONS REGULATION ACT 2002 (AS AMENDED)

BETWEEN

COMMISSIONS FOR COMMUNICATIONS REGULATIONS

APPLICANT

AND

EIRCOM LIMITED

RESPONDENT

JUDGEMENT of Mr Justice Twomey delivered on the 2nd day of February, 2024.

INTRODUCTION

1. An issue in this case, which does not appear to have been considered previously, is the effect of the statutory requirement (on a regulator) of *maintaining* confidentiality of a regulated entity's information, where that information has been seized by the regulator, pursuant to its powers of search and seizure.

2. The issue arises in the context of an electronic search (using keywords) which has to be conducted on the seized data to remove privileged/irrelevant information before the investigation by the regulator continues.

3. The question which arises is whether the confidentiality requirement under statute means that the *regulated entity*, rather than the regulator, should conduct the electronic search of the information, which has been *seized by the regulator*.

4. In this case the regulated entity is the respondent ("**Eircom**") and the regulator is the applicant ("**ComReg**") and so the question is whether Eircom or ComReg should conduct the electronic search of the information, which ComReg has seized, in order to eliminate privileged and irrelevant information, before ComReg continues its investigation with the refined data.

5. Eircom claims that if ComReg conducts the electronic key word search to remove privileged/irrelevant information, then, by virtue of ComReg being the party *conducting* the search, it is likely that ComReg will have access to privileged or private/confidential, which belongs to Eircom. On this basis, Eircom claims, that this will mean that the confidentiality of its information is not *'maintained'*, as required by statute. Accordingly, Eircom claims that it should conduct the electronic search of its data, that has been seized by ComReg, and then provide the refined data to ComReg, after the removal of privileged and irrelevant information.

BACKGROUND

6. ComReg commenced an investigation into Eircom's compliance with its regulatory obligations under Decisions imposed by ComReg pursuant to the Communications Regulation Act, 2002 ("2002 Act").

7. This investigation commenced after Eircom published details of a proposed discount scheme for access by its wholesale customers (e.g. Sky and others) to Eircom's fibre into homes and businesses. ComReg informed Eircom that this proposed discount scheme ("**CRD 967**") did not meet its regulatory requirements. ComReg also informed Eircom that the proposed scheme raised concerns regarding the impact it would have on competition. As a result, Eircom withdrew the discount scheme.

8. Notwithstanding the withdrawal of CRD 967, in its oral submissions, ComReg summarised its continuing concerns about what happened by saying that it was not necessarily consistent with Eircom's regulatory obligations for '*Eircom to engage in discussion with other operators in the market about proposed discount schemes'*, i.e. before the scheme had been approved by ComReg.

9. As a result, ComReg conducted an unannounced search of the premises of Eircom over three days (31 May 2023 - 2 June 2023) and it seized some of Eircom's digital data ("Seized Data"). The data was seized using ComReg's powers of investigation of regulated entities in the electronic communications market, pursuant to the 2002 Act.

10. ComReg instituted these proceedings because, in order to continue its investigation into this matter, ComReg wishes to access the Seized Data, that it now has had for over six months, while at the same time respecting Eircom's rights to confidentiality regarding any information contained therein that is privileged or irrelevant.

11. Accordingly, it has brought an application under s 61 of the 2002 Act (which is set out below) for this Court to approve the steps ("Step Plan") it proposes to take to eliminate privileged and irrelevant/private information from the Seized Data.

12. It is important to note that the Seized Data is not the original data, but a copy of the original data, as the original data has remained with Eircom. Accordingly, Eircom has been able to search the Seized Data to determine the extent to which material therein is either privileged or irrelevant to ComReg's investigation. ComReg, however, has not had access to the Seized Data, pending this Court's decision, as it is in '*sealed evidence bags*' (*per* the Step Plan, which is set out below)

13. It is accepted by ComReg that some of the Seized Data will be irrelevant to its investigation and that it will also contain legally privileged material. Hence, it has proposed the Step Plan, to enable it to analyse the Seized Data, in order to exclude privileged and irrelevant material, for the purposes of its investigation into Eircom. In broad terms, this Step Plan envisages doing a series of electronic word searches ("**Electronic Word Searches**") of the Seized Data, in each case taking into account any submissions of Eircom regarding what search terms should be used, in order:

- to search for file/domain names which relate for example to healthcare providers, airline reservations *etc* which are clearly personal and so to *eliminate irrelevant information*,
- to search for domains, names and email addresses of lawyers *etc* to *eliminate privileged material*,
- to search using terms which will *identify relevant material* to its investigation.

After completing these Electronic Word Searches, ComReg would then propose to commence its analysis of the Seized Data for the purposes of its investigation into Eircom.

14. On the first day of the search and seizure (31 May 2023), ComReg handed a letter of that date ("**Case Opening Letter**") to Eircom staff. As this letter also provides the relevant background to the dispute, it is proposed to set out the key parts of that letter at this juncture. Insofar as relevant, it states:

"On the basis of the information known at this time, as described in this letter, and in accordance with the functions of the Commission for Communications Regulation ('ComReg') as set out at Sections 10(1)(a), 10(1)(d) and 10(2) of the Communications Regulation Act 2002 (as amended) ('the Act'), ComReg has opened an investigation into Eircom's compliance with the obligations of Non-Discrimination, Transparency and Price Control imposed by ComReg Decision D10/181 and D11/182. Case No.1680 is the number that has been allocated to this investigation (the 'Investigation') and I am the lead investigator in Case No. 1680.

The obligations in respect of which compliance is being investigated include, but are not limited to, the following:

- Obligations relating to Non-discrimination, as set out at Section 9 of Annex 20 of D10/18;
- Obligations relating to Transparency, as set out at Section 10 of Annex 20 of D10/18;
- Obligations relating to Price Control, as set out in Section 12 of Annex 20 of ComReg
- Decision D10/18 and further specified in ComReg Decision D11/18 including Eircom'sobligation not to cause a margin squeeze between FTTH-based VUA and FTTH-based Bitstream and Eircom's obligation not to introduce wholesale promotions or discounts for Wholesale Local Access or Wholesale Central Access services (Section 5 of Annex 1 of D11/18 and paragraph 12.51 of ComReg 18/95).

Background

CRD 967 sought to introduce a Volume Discount scheme for FTTH[1] (the '**FTTH Volume Discount Scheme**'). This CRD was formally notified to ComReg on 1 February 2023 via Wholesale Notification 23-003.

On examination of the notification, ComReg took the view that the proposals contained therein did not meet the requirements set out in ComReg Decisions D10/18 and D11/18 and raised significant concerns as regards the impact it would have on investments and competition and, accordingly, advised that it should not be put into effect.

During February and March, there was significant engagement between Eircom and ComReg regarding the proposed discount scheme, including a meeting and letters from Eircom's CEO to ComReg's Chairperson. Following a further exchange of correspondence wherein ComReg indicated its strong concerns with the proposed scheme, on 15 March 2023 ComReg received confirmation from Eircom that it would not proceed.

In or around April 2023, ComReg obtained information from a number of operators suggesting that CRD967 may be connected with tender processes or other commercial negotiations for the provision of wholesale broadband services. This included a tender process where Sky Ireland Limited ('**Sky**') has engaged with multiple operators both individually and via a public tender process since August 2022, with the intent of establishing long-term contracts for the purchase of wholesale services. Sky is seeking wholesale services that pertain to FTTH and other related wholesale services connected to FTTH.

Purpose of the Investigation

[1] This is an acronym for Fibre To The Home.

The Investigation will seek to establish the circumstances and reasons surrounding CRD 967 including the details and **extent to which Eircom, as a provider of wholesale services, has been involved in discussions or processes with operators** establishing long-term contracts for **the purchase of wholesale services**, and **whether the FTTH Volume Discount Scheme, was a factor, a part of, or had any impact on those discussions or processes**.

Furthermore the Investigation will also seek to establish **the extent of any internal and external distribution, dissemination, or utilisation, by Eircom, of information regarding discounts** including the FTTH Volume Discount Scheme.

Having considered the above matters, the Investigation will assess whether Eircom has complied with its obligations referred to above.

Information Required

As an Authorised Officer appointed by ComReg, I am of the opinion that activity connected with the provision of electronic communications services, networks or associated facilities takes place at Eircom's premises at 2022 Bianconi Avenue, Citywest Business Campus, Dublin 24 ('**the Premises**'). I further suspect that information required by ComReg for the purposes of the Investigation is held at the Premises.

Therefore, ComReg Authorised Officers are today attending at the Premises and will exercise the powers conferred on them pursuant to Section 39(3) of the Act for the purposes of the Investigation. The said Authorised Officers have been appointed by ComReg pursuant to its powers under Section 39(1) of the Act. [….]

A Protocol document will be furnished to you following the conclusion of the Authorised Officers' visit and it will describe the manner in which the information obtained and the

books, documents and records removed and any copies and extracts taken, will be dealt with by ComReg" (Emphasis added)

ANALYSIS

15. The key issue in this case is whether this Court, pursuant to its powers under the 2002 Act, will approve of the Step Plan that has been prepared by ComReg and in particular the fact that it provides for ComReg to be the party which will conduct the Electronic Word Searches. Because of the crucial role the wording of the 2002 Act plays in determining whether this Court should approve the Step Plan, it is necessary to set out the relevant sections of the Act.

16. It is appropriate to start with those sections of the 2002 Act that outline the functions and objectives of ComReg, which are sections 10 and 12.

The functions and objectives of ComReg under the 2002 Act

17. Section 10 (1) states:

(1) The functions of [ComReg] are -

(a) to ensure compliance by undertakings with obligations in relation to the supply of access to electronic communications services, electronic communications networks and associated facilities and the transmission of such services on such networks, […]

(d) to carry out investigations into matters relating to –

(i) the supply of, and access to, electronic communication services, electronic communication networks and associated facilities and the transmissions of such services on such networks, and

(ii) the provision, content and promotion of premium rates services,

(da) for the purpose of contributing to an open and competitive market and also for statistical purposes, to collect, compile, extract, disseminate and publish information from undertakings relating to the provision of electronic communications services, electronic communications networks and associated facilities and the transmission of such services on those networks(e) to ensure compliance, as appropriate, by persons in relation to the placing on the market of communications equipment and the placing on the market and putting into service of radio equipment [...]

(2) [ComReg] may carry out an investigation referred to in subsection (1) either **on its own initiative** or on foot of a complaint (Emphasis added)

Section 12 states:

"(1) The objectives of [ComReg] in exercising its functions shall be as follows –

(a) in relation to the provision of electronic communications networks, electronic communications services and associated facilities-

(i) **to promote competition**,

(iii) to contribute to the development of the internal market, and

(iii) promote the interests of users within the Community […]

(2) In relation to the objectives referred to in subsection 1(a), [ComReg] shall take all reasonable measures which are aimed at achieving those objectives, including –

(a) in so far as the promotion of competition is concerned –

(i) ensuring that users, including disabled users, derive maximum benefit in terms of choice, price and quality,

(ii) ensuring that there is no distortion or restriction of competition in the electronic communications sector […]" (Emphasis Added).

The powers of search and seizure of ComReg under the 2002 Act

18. The next relevant section is s. 39, pursuant to which the search and seizure was carried out by ComReg in this case. This section, insofar as relevant, states:

"(3) For the purposes of the exercise by [ComReg] of its functions under this Act […] an authorised officer may –

(a) enter, at any reasonable time, any premises or place or any vehicle or vessel where any activity connected with the provision of electronic communication services, networks or associated facilities or poster services or premium rate services takes place or, in the opinion of the officer takes place, and **search and inspect** the premises, place, vehicle or vessel and any books, documents or records found therein[…]

(e) remove and retain such books, documents or records for such period as may be reasonable for further examination."

19. It is to be noted that this is a very wide-ranging power of search and seizure. It seems clear to this Court that these powers of search and seizure on the part of Comreg are for the purposes of ComReg's objectives of promoting, *inter alia*, competition, and its express power of carrying out investigations into matters and ensuring compliance by persons in relation to, *inter alia*, the placing on the market of communications equipment and the placing on the market and putting into service of radio equipment.

20. It is relevant to note that s. 39(3) does not circumscribe the powers of investigation, beyond that they are for the *'purposes of the exercise by [ComReg] of its functions'*. For example, it is not a precondition of a search and seizure operation by ComReg, that ComReg have obtained a warrant from a District Judge (who was satisfied that there are reasonable grounds for suspecting that evidence of, or relating to, the commission of an offence is to be found in a premises), as was the requirement in the *CRH plc & Ors v. The Competition and Consumer Protection Commission* [2017] IESC 34, referenced below.

The reasons for/scope of the investigation

21. It is appropriate at this juncture to make reference to the reasons for the investigation by ComReg of Eircom, and the related question of the scope of this particular investigation by ComReg. For this purpose, reference must be made to Case Opening Letter, which is set out above. It will be seen from this letter that the purpose or scope of the investigation is expressly set out under the heading '*Purpose of the Investigation'.*

The scope of the investigation is not sufficiently clear?

22. Eircom complains that the scope of the investigation is not sufficiently clear, and this is the reason it has given for refusing to make any submissions to ComReg regarding the format of Electronic Word Searches (beyond, according to ComReg, just certain email addresses of its lawyers, as well as domains and names of staff and lawyers who would have authored or appeared on privileged documents).

23. In support of its position, Eircom relies on the statement of the General Court of the EU in C-247-14 P *Heidelberg Cement AG v European Commission* at para [24], regarding inspections carried out by the EU Commission at the premises of the appellant, that:

> "Since the necessity of the information must be judged in relation to the purpose stated in the request for information, **that purpose must be indicated with sufficient precision**, otherwise it will be impossible to determine whether information is

necessary and the Court will be prevented from exercising judicial review".(Emphasis added)

24. However, this statement does not assist Eircom. This is because this case is not authority for there being a general proposition that a regulator has to state specifically the infringements which it is investigating before requesting information, conducting an investigation or undertaking a search or seizure. This is because it is clear from the *Heidelberg Cement* case that this statement was made in the context of a specific regulation, i.e. Article 18(3) of the Regulation No 1/2003, which specifically required the Commission to state the basis and purpose of the request for information, and the foregoing statement must be seen in that context, and not as a statement of general application to regulators. This is clear from para [18] of the judgment, where the General Court states that Article 18(3):

> "provides that the Commission 'shall state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which it is to be provided'. Moreover, it states that the Commission 'shall also indicate the penalties provided for in Article 23', that it 'shall indicate or impose the penalties provided for in Article 24' and that it 'shall further indicate the right to have the decision reviewed by the Court of Justice'".

Accordingly, this case does not support Eircom in its refusal to fully engage with ComReg regarding the finalisation of the Electronic Word Searches.

<u>No challenge by Eircom to legality of search and seizure or its scope</u>

25. More generally, it is relevant to note that no challenge has been made by Eircom to the legality of the search and seizure. It follows that the legality of the search and seizure is not an issue in these proceedings. Thus, insofar as Eircom seeks to rely on this reason (that the scope of the investigation is not sufficiently clear) for its failure to engage in finalising the Electronic

Word Searches, this reason is not a matter for this Court. This is because if Eircom wished to challenge the legality of the search and seizure, and in particular any issues it has regarding the scope of the investigation, as notified to it by ComReg, it was open to Eircom to do so by judicial review or similar proceedings. However, it has chosen not to do so. For this reason, the allegedly insufficiently clear scope of the investigation is of no relevance to this Court's decision as to whether it should approve the Step Plan or not. Accordingly, the scope of the investigation, for this Court's purposes, remains unchallenged and is the scope, which is set out in the Case Opening Letter.

Preferrable if Eircom had sought to finalise terms for Electronic Word Searches

26. Bearing in mind that Eircom chose not to challenge the legality of the search and seizure, or the scope of the investigation, the caselaw supports the view that it would have been preferable if it had engaged with ComReg in the process of identifying Electronic Word Searches that would eliminate privileged and irrelevant information.

27. This is particularly so when one considers that it is Eircom, as the creator or receipt of the Seized Data, is the party best placed to know the type of *irrelevant* information in the Seized Data and the *privileged* information in the Seized Data. Combined with this is the fact that Eircom has been able to access that data for 6 months (while ComReg's copy has been sealed). Furthermore, Eircom has conducted searches of the Seized Data for relevant data and privileged data, using its search terms, (something which ComReg has not been able to do, as the data is sealed), for the purposes of arguing before this Court that of the 323,821 documents seized, there are 66,643 relevant documents out of which approximately 7,000 are privileged.

28. In this context, it is relevant to note the comments of the Supreme Court in *CRH*, which concerned similar issues of electronic searches by a regulator of a regulated entity's data. At p 652, Charleton J. noted:

> "It would have assisted the process for genuinely private and sensitive material to be **precisely specified by the plaintiffs** in their legal submissions to this court. This has not been done, certainly that is not the fault of counsel, and it +should have been done by them in order to assist in this process. It **is clearly important to the outcome of the case that such specification be done**; that a party the subject of the search and seizure should simply state the particular items of genuinely private concern and of no relevance to the case under investigation have been taken and state clearly what these are. To fail to do that is to undermine any such later case that might be made; *Janssen-Cilag SAS v France*(App No. 33931/12) (Unreported, European Court of Human Rights, 21 March 2017)." (Emphasis added)

29. Like Charleton J. in *CRH*, in this case, this Court also would have expected Eircom to have sought to engage with ComReg to agree the Electronic Word Searches in the six months since the search and seizure took place. This is particularly so since, it became clear at the hearing that the only real issue between the parties in this case, is not whether the search and seizure was lawful or whether the scope of the investigation is too wide, but rather it is *who was going to conduct* the Electronic Word Searches to eliminate privileged and irrelevant information from the Seized Data. Thus, it was always going to be the case that one party or the other was going to have to conduct the Electronic Word Searches and so their terms would have to be finalised. Yet, apart from a preliminary engagement, Eircom has chosen not to seek to progress the finalisation of the Electronic Word Search terms with ComReg. Eircom is the party best placed to suggest and explain to ComReg the format of Electronic Word Searches which would meet Eircom's concerns regarding privileged/irrelevant information, but it has failed to do so. As a result, several months have been lost in a State regulatory authority pursuing an investigation, which presumably, it believes is in the public interest, in light of its role in, *inter alia*, protecting competition in the telecommunications market.

The treatment of irrelevant/private and privileged material seized under the 2002 Act

30. The focus of this case is on the treatment of privileged and irrelevant/private material that is part of the Seized Data. Before considering the operative sections of s 61 i.e. s 61(1) to 61(5), reference should be made to s 61(6) and s 61(8), since the operative sections regarding the treatment of that material must be read subject to those two subsections.

Section 61 (6) states:

> "*Subsections* (*1*) to (*5*) also apply to irrelevant material and references in those subsections to "privileged legal material" shall be construed as referring to irrelevant material as the case may be."

Section 61(8) defines 'irrelevant material' as follows:

> "'irrelevant material" means information which, in the opinion of the High Court, a person is entitled to refuse to produce on the grounds that it is not relevant to the purpose for which it is sought by [ComReg]."

Thus, when reading the key sections in the Act for the purposes of this Court's decision, i.e. sections 61(1) to 61(5), one must read in the term *'irrelevant material'*, as required by s 61(6)

31. Sections 61(1) to 61(5) deal with the treatment of privileged and irrelevant material. They state:

> "(1) Subject to *subsection (2)*, nothing in this Act or a related enactment shall compel the disclosure by any person of privileged legal material [or irrelevant material] or authorise the taking of privileged legal material [or irrelevant material].
>
> (2) The disclosure of information may be compelled, or possession of it taken, pursuant to this Act or a related enactment, notwithstanding that it is apprehended that the information is privileged legal material, provided that the compelling of its disclosure

or the taking of its possession is done by means **whereby the confidentiality of the information can be maintained** (as against the person compelling such disclosure or taking such possession) pending the determination by the High Court of the issue as to whether the information is privileged legal material [or irrelevant material].

(3) Without prejudice to *subsection (4)*, where, in the circumstances referred to in *subsection (2)* information has been disclosed or taken possession of pursuant to this Act or a related enactment, the person –

(a) to whom such information has been so disclosed, or

(b) who has taken possession of it, shall (unless the person has, within the period subsequently mentioned in the subsection, been served with notice of an application under *subsection (4)* in relation to the matter concerned) **apply to the High Court** as soon as is reasonably practicable **for a determination as to whether the information is privileged legal material [or irrelevant material]**." (Emphasis added)

Section 61(4) is not relevant for present purposes and s 61(5) adds:

"Pending the making of a final determination of an application under *subsection* (3) […], the High Court may give such interim or interlocutory directions as the court considers appropriate **including, without prejudice to the generality of the foregoing**, directions as to –

(a) the preservation of the information, in whole or in part in a safe and secure place in any manner specified by the court,

(b) the appointment of a person with suitable legal qualifications possessing the level of experience, and the independence from any interest falling to be

determined between the parties concerned, that the court considers to be appropriate for the purpose of –

(i) examining the information, and

(ii) preparing a report for the court with a view to assisting or facilitating the court in the making by the court of its determination as to whether the information is privileged legal material [or irrelevant material]. (Emphasis added)

32. Since ComReg took possession of the Seized Data, for the purposes of s 61(2), it has applied to the High Court for the approval of the Step Plan, which it has sought as one of the orders and/or interlocutory orders, which the High Court is entitled to make, under s 61(3) and 61(5) of the 2002 Act.

Can the High Court approve a plan, such as the Step Plan, under the 2002 Act?

33. At this juncture, it is to be noted that s. 61(5) provides a general power to the High Court to make directions in the context of it making a determination on whether information, which has been seized by ComReg, is privileged or irrelevant. While *some* examples, of the types of directions which might be made by the High Court, are contained in that section, this section does not limit the power of the Court regarding the form of those directions. The use of the phrase, '*including and without prejudice to the generality of the foregoing'*, makes this clear. However, it is also clear from the examples of the orders which are given in the remainder of that section that these orders are for the purposes of the Court making a determination as to whether the information, which has been seized, is privileged or irrelevant to ComReg's investigation. Thus, the Court can appoint an independent legally qualified person to prepare a report in order to assist or facilitate the Court in making such a

determination. However, it is important to note that this is only an example of the type of direction, which the Court can give under s 61(5).

34. In light of the broad powers granted to the Court under s. 61(5), it seems clear to this Court that any scheme or arrangement between ComReg and Eircom, whether proposed by Comreg or Eircom, which aims to determine, or assist the Court in determining, if information is irrelevant or privileged could, as a matter of principle be ordered by the High Court and therefore be subject to directions issued under s. 61(5).

35. At paragraph [65] of its legal submissions, Eircom states that

> "Section 61 is very clear that **it is the Court which is to determine which documents are legally privileged / irrelevan**t. Yet, as is considered below, the Step Plan is predicated on **ComReg supplanting the court's role in that regard**". (Emphasis added)

This written submission, by its reference to ComReg's Step Plan *supplanting* the Court's role in determining which documents are privileged/irrelevant, was interpreted by ComReg as Eircom suggesting that the *Court must determine on a document-by-document* basis whether each document is privileged or irrelevant, rather than, say, approving an Electronic Word Search based on keywords agreed between the parties with/without the assistance of the Court. It is clear to this Court that this interpretation would not be a practical or realistic approach, However, it is also clear from the oral submissions that Eircom is not, in fact, making this suggestion. Indeed, later on in its own written submissions, Eircom proposes its own electronic search (and thus *not* a document-by-document determination by the High Court). This is because it suggests at para 106(iv)(b) of its submissions an *'alternative'* approach to the Step Plan, with '*Eircom applying those keywords [i.e. agreed and appropriately targeted keywords]'* to its documents to eliminate irrelevant documents.

36. Thus, as a matter of principle, because of the wide-ranging power granted to the High Court to make directions under s 61(5), this Court concludes that it is not obliged to individually review each document to make a determination that a document is privileged or irrelevant. Rather, this Court is firmly of the view that, because the powers in s 61(5) are not circumscribed, this Court has the jurisdiction to approve the use of a plan, such as the Step Plan, which provides for the use of keywords *etc*, in order to determine whether seized information is privileged or irrelevant. Support for this view is to be found in the *CRH* case.

The use of search terms to eliminate both privileged *and* irrelevant information

37. An issue that was considered by the Supreme Court in *CRH*, was the use of search terms in order to eliminate *irrelevant* information from a search. That case involved similar issues to this case, since there had been a search and seizure by the Competition and Consumer Protection Commission of CRH's premises, although in that case the Commission had a warrant which had been obtained from the District Court (who had to be satisfied that there were reasonable grounds for suspecting that evidence of, or relating to, the commission of an offence was at the premises).

38. Unlike this case, the relevant legislation in the *CRH* case referred only to *privileged* information and did not provide any means for dealing with *irrelevant* information which was seized by the Commission. For present purposes, it is relevant to note that in the *CRH* case, although no orders were made regarding keyword searches to eliminate irrelevant information (since there was no jurisdiction to do so), the Supreme Court nonetheless clearly approved, in principle, the use of such terms by parties. This is because at para. [212] Laffoy J. stated:

> "[T]here is no reason why, in a particular case, an undertaking or an individual whose digital material has been seized and is to be searched could not **reach an agreement** with the Commission on an appropriate mechanism to resolve the difficulty, which

might **include a keyword search process** and a rendering of out-of-scope material invisible [..]" (Emphasis added)

39. While it is important to note that Charleton J did not make orders that electronic search terms be used to determine if material was irrelevant in the *CRH* case, as he had no power to do so, he also had no issue, in principle, with search terms being so used since at para. [267] he stated:

"In assisting the process, and within the specific context of this legislation, the following might be offered as a suggestion:-

(a) the plaintiffs are entitled to, and might usefully, write a letter to the Commission setting out what private material has been copied in the email server of Séamus Lynch and why there is an especial sensitivity that attaches to it which requires the protection of his privacy rights under article 8 of the Convention, **specifying either dates or the subject matter requiring protection;**

(b) the Commission, in the context of this litigation, **has suggested particular forms of electronic search of the material and it may therefore assist for the Commission to invite submissions as to word searches** and the appropriate analysis to bring to light relevant material and the plaintiffs are entitled to respond to that, bearing in mind that the statutory responsibility for the final decision is that of the Commission". (Emphasis added)

40. Thus, it seems to be clear that this Court can give directions for a plan, such as the Step Plan, which provides for Electronic Word Searches to eliminate privileged and irrelevant information.

Who applies the search terms to the seized information, the regulated or the regulator?

41. It is relevant at this juncture to refer in particular to the wording of s. 61 (1) of the 2002 Act, which is set out above. This is because Eircom, in seeking orders from this Court that it be the party to conduct the Electronic Word Search, places particular reliance on the requirement therein that the confidentiality of its information be *'maintained'*.

42. However, it is important to note that while reaching '*agreement on appropriately targeted keywords'* (as suggested by Eircom in its alternative proposal) is likely to include every conceivable reasonable precaution (on the part of Eircom) to ensure that all privileged (and irrelevant) information is removed, one can never say with 100% certainty that no privileged (or irrelevant) documents will be missed.

43. This is the case, whether Eircom does the Electronic Word Searches or ComReg does the Electronic Word Searches. Indeed, this is an issue in every case, even where searching is done by humans, rather than machines, since it is always possible that privileged or irrelevant material will be missed.

44. This observation focuses attention on the real issue in this case. The key issue is not the use of keyword searches, or not, as a means of determining whether material is privileged or irrelevant. Nor, it seems, is it the reaching of agreement between the parties regarding the search terms, since this is a daily issue in discovery disputes. Rather, the key issue is whether this search is to be conducted by Eircom, the regulated entity which has had its data seized, or by the regulator, Comreg, which has that data as a result of the exercise of its search and seizure powers for the purpose of its investigation of Eircom.

45. This is because whatever search terms are used, it is possible that certain privileged or irrelevant material will end up being missed and thus in the possession of the party doing the Electronic Word Search. For this reason, Eircom argues that if ComReg has access to this reduced data set (after the search has eliminated privileged and irrelvant material) there is therefore a possibility that it will have access to '*confidential'* information, even though s 61(2)

states that its confidentiality is to be '*maintained*.' On this basis, Eircom concludes that *it* should be the one doing the searches and having access to the reduced data set and, presumably, only handing it over to ComReg when it is satisfied that it contains no '*confidential'* information.

46. Before considering this interpretation of 2002 Act, which Eircom says follows from a literal or plain reading of the expression '*confidentiality* [is to] *be maintained'*, it is necessary to refer to the Supreme Court case of *Heather Hill Management Company CLG and Gabriel McCormack v An Bord Pleanala* [2022] IESC 43, at para. [109] et seq, which deals with the interpretation of statutes generally. Murray J. states:

> "What, in fact, the modern authorities now make clear is that with or without the intervention of that provision [s 5. of the Interpretation Act, 2005] , **in no case can the process of ascertaining the '*legislative intent'* or the '*will of the Oireachtas'* be reduced to the reflexive rehearsal of the literal meaning of words**, or the determination of the plain meaning of an individual section viewed in isolation from either the text of a statute as a whole or the context in which, and purpose for which, it was enacted." (Emphasis added).

47. Thus, in this instance, it seems clear to this Court that while Eircom might claim that their interpretation of the 2002 Act is based on the literal or plain meaning of the phrase *confidentiality* [is to] *be maintained'*, even if this phrase were to be interpreted literally as meaning that confidentiality must be guaranteed, this is not the end of the process. Murray J. goes on to state at para. [110] *et seq* that:

> **"**The decision in *AC* is both a very good, and the most recent, example of this analysis. Section 25 of the Non-Fatal Offences against the Person Act 1997 enabled the production in the course of the prosecution of offences involving the causing of harm

to a person, of a certificate purporting to be signed by a medical practitioner and relating to an examination of the person said to have been so harmed. When produced in accordance with the section, the certificate was admissible as *prima facie* evidence of *'any fact thereby certified'*. **The issue was whether this meant what it appeared to say**, so that a medical practitioner could sign such a certificate attesting to an examination undertaken by another doctor, thereby enabling the certificate to be admitted as *prima facie* evidence of its contents, or whether it was limited to proof by a doctor of their own medical records and of examinations conducted under their supervision." (Emphasis added)

48. In this case, the question is whether the expression '*confidentiality* [is to] *be maintained'* means what Eircom says it appears to say, namely that confidentiality is guaranteed, such that it must conduct the Electronic Word Searches, not ComReg. Murray J continued:

"O'Donnell C.J. (with whose judgment MacMenamin, Charleton, O'Malley and Woulfe JJ. agreed) explained the ambit of the literal approach (or as he framed it 'the plain meaning approach') in terms similar to those adopted by McKechnie J. in the cases to which I have referred earlier. It would be wrong, he said, to isolate the critical words and consider if they have a plain or literal meaning in the abstract. Instead '*if, **when viewed in context, having regard to the subject matter and the objective of the legislation**, a single, plain meaning is apparent, then effect must be given to it unless it would be so plainly absurd that it could not have been intended'* (at para. 7) (emphasis added [by Murray J.]). The section, he held, was ambiguous and required additional words to make its meaning clear beyond dispute: 'certification' implied that the person was in a position to authoritatively state the truth of some fact or matter. Viewed in the light of the purpose of the provision – including the fact that it was intended to enable

the admission of evidence against an accused in a criminal trial – it was properly limited in scope to situations in which the medical practitioner certified the record of an examination they personally carried out or which was carried out under their supervision. Were the position otherwise, as the judgment put it, a general practitioner in the West of Ireland could certify an examination conducted by a neurosurgeon in Dublin, an outcome that could not credibly be expected without far greater regulation within the legislation. Charleton J. arrived at a similar conclusion, observing '*the state of the law prior to the enactment and the purpose of the enactment are indispensable instruments for construction as well as the requirement that a court give to legislation its ordinary meaning*' (at para. 24).

I stress these features of the process of statutory interpretation here because there is both some merit to the suggestion in the Court of Appeal judgment that the High Court judge applied an overly literal interpretation to s. 50B, and (as I explain later) at the same time substance in the applicant's contention that the Court of Appeal pushed its analysis of the context too far from the moorings of the language of the section. The debate reveals an obvious danger in broadening the approach to the interpretation of legislation in the way suggested by the more recent cases - that the line between the permissible admission of *'context'* and identification of *'purpose',* and the impermissible imposition on legislation of an outcome that appears reasonable or sensible to an individual judge or which aligns with his or her instinct as to what the legislators would have said had they considered the problem at hand, becomes blurred. In seeking to maintain the clarity of the distinction, there are four basic propositions that must be borne in mind.

First, 'legislative intent' as used to describe the object of this interpretative exercise is a misnomer: a court cannot peer into minds of parliamentarians when they enacted

legislation and as the decision of this court in *Crilly v. Farrington* [2001] 3 IR 251 emphatically declares, their subjective intent is not relevant to construction. Even if that subjective intent could be ascertained and admitted, the purpose of individual parliamentarians can never be reliably attributed to a collective assembly whose members may act with differing intentions and objects.

Second, and instead, what the court is concerned to do when interpreting a statute is to ascertain the legal effect attributed to the legislation by a set of rules and presumptions the common law (and latterly statute) has developed for that purpose (see *DPP v. Flanagan* [1979] IR 265, at p. 282 per Henchy J.). This is why the proper application of the rules of statutory interpretation may produce a result which, in hindsight, some parliamentarians might plausibly say they never intended to bring about. That is the price of an approach which prefers the application of transparent, coherent and objectively ascertainable principles to the interpretation of legislation, to a situation in which judges construe an Act of the Oireachtas by reference to their individual assessments of what they think parliament ought sensibly to have wished to achieve by the legislation (see the comments of Finlay C.J. in *McGrath v. McDermott* [1988] IR 258, at p. 276).

Third, and to that end, the **words of a statute are given primacy within this framework as they are the best guide to the result the Oireachtas wanted to bring about**. The importance of this proposition and the reason for it, cannot be overstated. Those words are the sole identifiable and legally admissible outward expression of its members' objectives: the text of the legislation is the only source of information a court can be confident all members of parliament have access to and have in their minds when a statute is passed. In deciding what legal effect is to be given to those words their plain

meaning is a good point of departure, as it is to be assumed that it reflects what the legislators themselves understood when they decided to approve it.

Fourth, and at the same time, the Oireachtas usually enacts a composite statute, not a collection of disassociated provisions, and it does so in a pre-existing context and for a purpose. **The best guide to that purpose, for this very reason, is the language of the statute read as a whole**, but sometimes that necessarily falls to be understood and informed by reliable and identifiable background information of the kind described by McKechnie J. in Brown. However - and in resolving this appeal this is the key and critical point - the '*context'* that is deployed to that end and *'purpose'* so identified must be clear and specific and, where wielded to displace the apparently clear language of a provision, must be decisively probative of an alternative construction that is **itself capable of being accommodated within the statutory language**." (Emphasis added)

49. In light of these principles, this Court is now faced with the question of whether it can interpret the 2002 Act as entitling this Court to give directions approving the Step Plan, which directions will also provide that ComReg is the party to run Electronic Word Searches on the Seized Data. The core issue is whether this interpretation is permitted, when the 2002 Act provides that the confidentiality of the regulated entity's information is to be maintained, where it is impossible to guarantee that the searches conducted by ComReg will remove all privileged and irrelevant information.

Can regulator conduct search if confidentiality of regulated entity has to be maintained?

50. This Court has already observed that s 61(5) grants a very wide discretion to this Court to approve a plan, i.e. in the general form of the Step Plan, namely providing for Electronic Word Searching to be the means for determining whether material is privileged or irrelevant.

51. The key question now is whether the requirement, in s. 61(2), that the confidentiality of privileged and irrelevant material is maintained, means this Court must direct that the

Electronic Word Searching is not done by the regulator, ComReg, but rather, as suggested by Eircom, by the regulated entity, Eircom.

52. In effect, Eircom is interpreting maintaining confidentiality in s 61(2) as synonymous with 100% guaranteeing that Eircom's confidential documents will not be disclosed to ComReg. Eircom claims that this interpretation is the result of the *'apparently clear language'* of s 61(2), to use the expression used by Murray J.

53. The following points are relevant to deciding this issue. Firstly, regardless of who does the searching, if one takes the very strict and very literal interpretation of s 61(2) taken by Eircom, as meaning that confidentiality must be 100% guaranteed, this could never be the case, whether Eircom or ComReg conducts the Electronic Word Search. This is because, as there are 323,821 documents to be searched (see para [102] of Mr. Kjeld Hartog's affidavit, on behalf of Eircom. With this number of documents,, this means there will always be a risk that some privileged Eircom documents, or private or personal information of an Eircom employee, might be contained in one of the documents after the Electronic Word Search has been completed. Thus, it seems to this Court that if one were to interpret s. 61(2) in the manner which appears to be suggested by Eircom, i.e. that confidentiality must be 100% guaranteed, then there could be no search done by *either party* of the 323,821 documents, which could ensure that this is the case. This would seem to be the case whether the search was conducted by an Electronic Word Search or by a painstaking document by document search by individuals. In both instances, whether because of human error or because certain documents simply escape the net because of the manner in which those documents are created, there are likely to be some documents that are irrelevant/private, which end up in the refined data set, for consideration by ComReg.

54. Thus, even if Eircom were to conduct the Electronic Word Search and supplement it with a search by individuals it is possible that Eircom will miss certain privileged or irrelevant

documents, through human or machine error. In this sense, the 'confidentiality' is never 100% guaranteed. Thus, just because ComReg cannot 100% guarantee confidentiality, this is not a reason *per se* for this Court to order that Eircom conduct the search, rather than ComReg. Another way to express this is that it is not '*apparently clear'* to this Court that the literal and plain meaning of *'confidentiality* [is to] *be maintained'* is that confidentiality must be 100% guaranteed – for the simple reason that that is not possible.

55. Secondly, for this Court to interpret the phrase *'confidentiality* [is to] *be maintained'* as meaning that confidentiality must be guaranteed (and so the Electronic Word Search must be conducted by Eircom) is only possible, if one reads this phrase in isolation from the rest of the statute i.e. without any consideration of the purpose of the Statute. While the second proposition in *Heather Hill* gives primacy to the actual words used in a statute, it is also clear from *Heather Hill* that the plain meaning of the words of a statute is not the sole basis for interpreting that statute, but rather it is a '*good point of departure'*.

56. Furthermore, it is clear from the fourth proposition in *Heather Hill* that when interpreting a phrase such as *'confidentiality* [is to] *be maintained',* this phrase is not interpreted as a provision which is *disassociated from the purpose of the statute*. In this regard, the best guide to the purpose of the statute is the statute as a whole. It is also clear from *Heather Hill* that where the purpose so identified displaces the apparently clear language of a provision, it must be '*decisively probative'* of the alternative construction.

57. So, what is meant in the 2002 Act by the statement that '*confidentiality* [is to] *be maintained'* for the documents of a regulated entity, whose data has been seized? This expression cannot be viewed in isolation, just as the doctor's certificate in the *AC* case (referred to by Murray J.) could not be viewed in isolation. In particular, this phrase cannot be viewed in isolation from the 2002 Act as a whole and the context and purpose for which that Act was enacted. Thus, regard must be had to what is the purpose of that expression in the context of a

search and seizure by a regulator, who is charged with investigating breaches of statutory regulations by regulated entities.

58. It seems to this Court that where a search and seizure by a regulator is permitted by statute, as in this case, the starting point is that the search of the data, so seized, is done *by* the regulator, not by the regulated, since otherwise the very purpose of the statute i.e. search *by the regulator*, is effectively set at nought. To put the matter another way, the apparent powers *of the regulator* conduct a search and seizure under s. 39. would have, in reality, no purpose, if the search was conducted by the regulated entity, since they would amount, in effect, to the power of the *regulated entity* to hand over what it chooses.

59. It seems to this Court that, as required by *Heather Hill*, this context and purpose of the 2002 Act is very '*clear and specific'* and cannot be in doubt, since the very nature of a search and seizure by a regulator is that it is *conducted by the regulator*. This is the context against which the expression *'confidentiality* [is to] *be maintained'* must be interpreted.

60. For this reason, and also because confidentiality can never be 100% guaranteed, this Court does not interpret the requirement, that the confidentiality of the seized information of a regulated entity is to be maintained, as meaning that the regulator must, in effect, hand back the seized information to the regulated entity to conduct the search. (Of course, if the information was in hard copies, this would be a physical handing back of the information. As we are dealing with digital or soft copies, it is a 'metaphorical' handing back. This is because Eircom retains the original, while ComReg's copy is under seal).

61. Yet, 'handing back' the seized information is the import of Eircom's suggestion that it, as the regulated entity under investigation, is the party which, in effect, should conduct the investigation, of itself, to see which documents are relevant and which documents it should hand over to the regulator.

62. It is for this reason that this Court concludes that the alternative construction (i.e. that ComReg conducts the search while seeking to maintain confidentiality, even though this cannot be 100% guaranteed for every single document) is the interpretation which is clearly consistent with the very clear and specific context and purpose of the 2002 Act (unlike the interpretation suggested by Eircom).

63. Another way to put this is, to use Murray J's expression and conclude, that the purpose and context of the 2002 Act is clear and specific and is '*decisively probative'* of the interpretation that ComReg, and not Eircom, conducts the Electronic Word Search.

64. This conclusion is reinforced by the fact that, on the one hand, the 2002 Act is granting a State regulatory authority *very serious powers* of search and seizure for good policy reasons, i.e. in order, *inter alia,* to conduct investigations of regulated entities and to ensure competition in the electronic communications market. Yet on the other hand, Eircom is claiming that the reference to maintaining the seized information confidential (until privileged and irrelevant material is excluded) means that the these very serious search and seizure powers are, in effect, *reversed* by returning the seized information to the regulated entity that is, or might be suspected, of having engaged in regulatory breaches. This Court does not accept that the requirement of maintaining confidentiality can be interpreted in such a manner.

65. Further support for this view is contained in the decision of the General Court in Case T-451/20 *Meta Platforms Ireland Ltd v European Commission* ECLI:EU:T:2023:276, at para. [221]. It is relevant to note that, in that case, the applicant, Meta was not concerned with a search and seizure of information by a regulatory authority, but rather with a request to a regulated entity (Meta), for information, from a regulatory body (EU Commission). Accordingly, it is not directly on point. However, the following statement from the General Court does seem to be of general application as it refers to undertakings under investigation by the Commission:

> "[I]t is for the Commission to decide whether a particular item of information is necessary to enable it to bring to light an infringement of the competition rules. Second, as the Commission and the Federal Republic of Germany correctly point out, if the **undertaking under investigation, or its lawyers, could themselves establish which documents were, in their view, relevant for the Commission's investigation, that would seriously undermine the Commission's powers of investigation**, with the risk that documents which it might regard as relevant would be omitted and never be presented to the Commission, with no possibility for verification." (Emphasis added)

66. It seems to this Court that when one interprets the 2002 Act in the manner set out in *Heather Hill*, the requirement of maintaining confidentiality in s 61(2) means that, whatever decision is made by this Court pursuant to s 61(3) or s. 61(5), the Court should take all reasonable steps to ensure that the confidentiality of privileged and irrelevant material is maintained. However, it does not mean that the search and seizure powers are in effect reversed, with the regulator being obliged to return the seized information to the regulated entity in order that the regulated entity can, in the words of *Meta*, establish which documents are relevant to the regulator.

67. Further support for the foregoing interpretation is the fact that one should not lose sight of the fact that s. 61 grants the 'search' rights to the regulator, ComReg (*albeit* subject to confidentiality). It does not grant search rights to the regulated entity, Eircom. If a regulated entity, under suspicion of a regulatory breach, was entitled to determine which material was relevant to the offence for which it was being investigated by the regulator, without any possibility of verifying the information which had been removed, this would, in this Court's opinion, undermine to a very significant degree the investigative powers of the regulator and so one of the purposes of the 2002 Act.

Substantial latitude granted to a regulatory body conducting a search and seizure

68. This Court also finds support for its conclusion in *CRH*, because there the Supreme Court made it clear that State regulatory bodies such as ComReg should be granted a substantial latitude when exercising their public duties, in particular in relation to determining, as in this case, whether material is relevant or not to their investigations. This is clear from the statements by McMenamin J. At para. [68], he stated:

> "**The State, or its organs, again exercising their public duties, are entitled to a substantial latitude**; the extent of such allowances to be measured in the light of the extent of the encroachment in the context in which this search and seizure took place, the nature of the alleged offence, and the factors identified earlier in this judgement." (Emphasis added)

At para. [13] he stated:

> "The CCPC officials were entitled to operate within s. 37 of the 2014 Act – if they acted in a proportionate manner, having regard to the constitutional and Convention rights involved. **As relevance will not always be obvious, there will always be a degree of latitude in such a search**". (Emphasis added)

69. All of this answers the key issue between the parties, namely who should be conducting the Electronic Word Searches of the Seized Data. In this Court's view, it is ComReg.

<u>Approval of the Step Plan</u>

70. It appeared to this Court that, once that question was answered, there was not much between the parties, since very little time was spent at the hearing on the actual terms of the Step Plan, as distinct from dealing with which party was going to conduct the Electronic Word Searches. However, it is necessary to set out at this juncture the precise terms of the Step Plan, since it is this plan which this Court is being asked to approve.

"Step.	Description	Date
1.	**PURPOSE: To enable ComReg to upload the Seized Data onto a review platform.** ComReg will unseal evidence bags and upload Seized Data to an electronic platform (RelativityOne). Representatives from Eircom can attend ComReg's offices to observe this step. As per ComReg's letter of 2 June 2023, ComReg will use RelativityOne, a cloud based platform hosted by VMGroup, the technical service provider engaged by ComReg for this Investigation. RelativityOne is ISO 27001 certified, HIPAA compliant, achieved SOC 2 Type II attestation, and is IRAP assessed to PROTECTED level. All files are encrypted at rest with 256-bit AES encryption. Data is encrypted in transit, internally and externally, via Transport Layer Security (TLS) certificates. RelativityOne is set up to audit activity on the platform and it allows for restrictions to be placed on how users can interact with files. It can facilitate different levels of permissions for documents or batches of documents.	
2.	**PURPOSE: To remove clearly irrelevant documents from the Seized Data prior to further processing.** ComReg will remove documents from the Seized Data that can be identified as clearly irrelevant to Eircom's business or purely administrative in nature. To do this ComReg will search for documents with domain names which relate to media, travel and accommodation, healthcare providers, out of office responses, retail adverts and similar topics. Eircom can make submissions in writing to ComReg on domain names or other terms to be applied to assist with this step. This should be done by Eircom 3 days in advance of the date set for this step. ComReg will consider such submissions but will not be bound by them. Representatives from Eircom can attend ComReg's offices to observe this step.	
3.	**PURPOSE : To identify documents that are potentially privileged and to store them separate to the documents to be reviewed** Eircom has provided a list of domains, names and email addresses by letter dated 7 June 2023. This list is intended to assist identifying potentially privileged documents. ComReg will apply those terms and will remove all responsive documents and store them separately as "**Potentially Privileged Data**". Eircom can make submissions in writing to ComReg on additional terms to be applied to assist with this step. This should be done by Eircom 3 days in advance of the date set for this step. ComReg will consider such submissions but will not be bound by them. Representatives from Eircom can attend ComReg's offices to observe this step.	

4.	**PURPOSE: To apply key words aimed at identifying the documents likely to be relevant to the Investigation to produce a dataset for review by ComReg.** ComReg then will apply keywords to the balance of the dataset. ComReg will apply the keywords it provided to Eircom by letter dated 18 July 2023. Eircom can make submissions in writing to ComReg on keywords or combinations of key words to be applied to assist with this step and this should be done by Eircom 3 days in advance of the date set for this step. ComReg will consider such submissions but will not be bound by them. Representatives from Eircom can attend ComReg's offices to observe this step. The results of this step, which ComReg will share with Eircom, may suggest that the application of fewer or additional key words or different combinations of key words may produce a more meaningful dataset (with a higher incidence of relevant documents) for review. ComReg will engage with Eircom in relation to further steps ComReg proposes in relation to key words and ComReg will consider further submissions of Eircom in this regard but will not be bound them. The outcome of this step will be the production of a data set for review by ComReg ("the Dataset for Review"). In the event of a dispute concerning key words aimed at identifying relevant documents and thereby excluding irrelevant documents ComReg will seek directions from the High Court. In the event that ComReg encounters potentially privileged documents during its review, ComReg will tag them as such and will remove them from the Dataset for Review and will add them to Potentially Privileged Data and will notify Eircom of such additions.	
5.	**PURPOSE: To narrow down the Potentially Privileged Data by the application of the same key word exercise in Step 4 to produce the "Refined Potentially Privileged Data"** The final set of key words applied in Step 4 will also be applied by ComReg to the Potentially Privileged Data. The resulting set will be the "Refined Potentially Privileged Data" and it will be a dataset on which Eircom will make submissions regarding privilege as set out in step 6. Representatives from Eircom can attend ComReg's offices to observe this step.	
6.	**PURPOSE: For Eircom to identify the documents in respect of which it asserts privilege and to justify its claims to privilege.** ComReg will provide Eircom with a schedule of the Refined Potentially Privileged Data. Within 4 weeks of receipt of same Eircom will identify documents from the schedule in respect of which it maintains a claim of privilege. In relation to each such document, Eircom shall set out the nature of the privilege claimed and the basis for same. ComReg will consider the claims made and will inform Eircom if it has any queries and if it accepts or rejects the claims. In the event of a dispute concerning privilege ComReg will seek directions from the High Court.	

7.	**PURPOSE: To enable ComReg to apply key words to the original Seized Data during its investigation aimed at identifying additional relevant documents if this becomes necessary.** During the course if its review of the Dataset for Review, ComReg may consider that it should apply keywords to the Seized Data which were not applied at Step 4. This may arise as a result of information that ComReg learns during the review process. In the event ComReg considers this necessary ComReg will give advance notice to Eircom and Eircom will be requested to make submissions in respect of any such step. In the event of a dispute concerning this step ComReg will seek directions from the High Court.	

Notes: ComReg will take steps with its technical service provider, VM Group, to ensure that any documents removed from the Seized Data through the application of the above steps will be securely stored.

In the case of documents removed because they are clearly irrelevant (step 2) or not responsive to key words (step 4) they will be stored in a manner not accessible by ComReg subject to any directions of the High Court in relation to applying further key words (step 7) after ComReg's review has commenced.

In the case of documents removed because they are identified as being potentially privileged, they will be stored in a manner not accessible to ComReg until the outcome of the process of Eircom identifying documents in respect of which it is asserting a claim to privilege and ComReg considering such claims (Step 6). Where there are documents in the Refined Potentially Privileged Set in respect of which, on review (step 6), Eircom does not assert a claim to privilege such documents will be made accessible to ComReg for review.

For documents in respect of which there is a dispute regarding privilege, where any such document is ultimately determined (by a party appointed by the High Court) as not being privileged, it will be made accessible to ComReg for review."

71. ComReg made uncontroverted submissions that Eircom did not object to Step 1 and Step 2. As regards Step 3, which is to identify and remove privilege documents, it is clear from the terms of this Step, that Eircom can provide additional search terms (to those it has already provided to ComReg). Clearly, Eircom is in the best position to provide such search terms, as it knows which privileged matters are contained in the Seized Data.

72. In its oral submissions, ComReg indicated that it would not have any issue with there being a recourse to court (as there is for example in Step 4 regarding search terms for relevant

documents) in the event of there being a dispute over the search terms for privileged documents. Accordingly, this amendment should be made to Step 3. It is also clear from Mr. Michael Patterson's affidavit of 2 November, 2023, on behalf of ComReg, that it does not have an issue with other refinements of the Step Plan i.e. at para 34 it is stated:

"Despite the lack of constructive engagement, ComReg has taken into account Eircom's concerns and proposes refining this step in the Step Plan to include the following elements:

(a) In addition to searching for the domains, names and email addresses of Eircom's legal advisors in the to/from/cc meta data fields, those terms (as set out in Eircom's letter to ComReg of 7 June 2023) could be run as keywords <u>on the contents</u> of all documents to capture instances for example where a lawyer sent, received or was copied on an email further down in an email chain but where the lawyer is not a party to the most recent email in the chain (from which the email meta-data is drawn). (Emphasis in original)

(b) To facilitate the identification of any summarised legal advises within other documents, the names of individual lawyers, law firms and pseudonyms for both (to be provided by Eircom) will also be run as keywords on the contents of all documents. For example, such terms might include 'AC', 'Coxes', 'Cox', as keywords. The intention is that this additional element would capture a wider range of potentially privileged documents.

(c) ComReg will apply a further set of keywords specifically designed to identity instances where legal advice might be discussed or summarised but where legal advisors are not identified by name but advice is described or shared. Given that Eircom has had access to the Seized Data since the Inspection, it would be surprising if Eircom had not already carried out some analysis to identify different types or categories of privileged documents and should be in a position to propose such additional keywords for ComReg.

(d) With regard to any documents covered by litigation privilege, Eircom will provide to ComReg the name of the proceedings, the record number, names of any other counsel instructed, the name of the plaintiff/defendant (or counterparties to the dispute where litigation has not commenced) and any shorthand or pseudonym used by Eircom for the dispute. These will be added as keywords and applied in Step 3."

Accordingly, these changes should be made to the Step Plan.

73. As regards Step 4, regarding identifying only documents that are relevant to the investigation (and so excluding irrelevant/private documents), the key aspect of this step, from the perspective of ensuring, so far as reasonably possible, the confidentiality of Eircom's documents, is the fact that Eircom is entitled to supply ComReg with keywords which it believes will eliminate irrelevant/private documents.

74. In this regard, it is clear that Eircom is able to come up with search terms that will eliminate privileged documents, since it has provided sworn evidence that it has searched for, and found, several thousand privileged documents out of the 323,821 documents, which have been seized. Accordingly, Eircom should equally be able to come up with search terms to eliminate irrelevant documents. After all, Eircom as the creator/recipient of the documents, is best placed to know which search terms will eliminate irrelevant/private documents, particularly since it has had those 'irrelevant/private' documents as part of the Seized Data for six months.

75. The final paragraph of Step 4 states that if ComReg encounters potentially privileged documents at this stage of the review, it will remove them and notify Eircom. Eircom relied on this statement to support its claim that the confidentiality of the documents could not be maintained. In reality however, this simply is a recognition of the fact that no matter how careful Eircom is with the search terms it provides ComReg (combined with ComReg's search terms), it is always possible that a document that is arguably privileged could be missed. As

previously noted, this does not mean that this Step Plan cannot be approved, but rather it is an acknowledgement that no system of searching, whether by hand or by machine, is 100% guaranteed to remove all documents, that should be removed.

76. Step 5 is an application of the key words, agreed with Eircom at Step 4, to the potentially privileged data (after the application of the privileged key words, agreed with Eircom), in order to reduce the dataset further. In this sense, it does not appear to be controversial.

77. ComReg made uncontroverted submissions that Eircom had not objection to Steps 6 and 7.

78. In all the circumstances, this Court approves the Step Plan, as modified, for use in this case.

CONCLUSION

79. For the reasons set out, this Court concludes that the party which should conduct the search of the Seized Data is the regulator, ComReg, rather than the regulated entity, Eircom. Otherwise, the very purpose of search and seizure powers, by a regulator as part of its investigation of a regulated entity, would be undermined.

80. This Court approves the Step Plan, involving the use of an Electronic Word Search designed to eliminate privileged and irrelevant material from the Seized Data, which plan was provided by ComReg to the Court, subject to a small number of minor modifications, referenced in this judgment.

81. It is hoped that the parties will be able to reach agreement on the form of any final orders. For this reason, this Court orders the parties to engage with each other to see if agreement can be reached regarding all outstanding matters, without the need for further court

time, with the terms of any draft court order to be provided to the Registrar. However, this case will be provisionally put in for mention a week from the delivery of this judgment at 10.45 am (with liberty to the parties to notify the Registrar, if such a listing proves to be unnecessary).

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