To the Aarhus Convention Compliance Committee

Secretary to the Aarhus Convention Compliance Committee
United Nations Economic Commission for Europe
Environment Division
Palais des Nations
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Subject: Communication to the Aarhus Convention Compliance Committee regarding Ireland's Renewable Energy Plan and the Laois-Kilkenny Reinforcement Project.

I. Information on correspondent submitting the communication

This submission is made both on behalf of the RTS Substation Action Group and in a personal capacity as a member of the public directly affected by the issues outlined within this submission.

Name:	RTS Substation Action Group
Contact person:	Fand Cooney
	Member of the RTS Action Group and resident in the area of concern.
Permanent address:	[redacted]
Telephone:	[redacted]
E-mail:	[redacted]

II. Party concerned

Ireland

IV. Facts of the communication

Please note that this communication will focus on the most significant issues regarding the planning permission granted for a specific case - **the Laois-kilkenny Reinforcement Project**. There are many, many procedural and substantive issues that have never been adequately dealt with which are not raised in this submission as it is not the appropriate forum for dealing with them. However, the fact that they are not raised here should not be construed as acceptance that they are dealt with or are no longer a concern. For clarity - all issues raised to date with the Irish authorities remain issues of concern.

An effective remedy is now urgently sought for this specific case i.e.

- The flawed planning permission should be immediately revoked entirely or
- injunctive relief should be immediately granted to prevent construction commencement pending the outcome of a full (procedural and substantive) and independent review of the planning decision for the Laois-Kilkenny reinforcement project and the information on which it was based measured against the requirements of democracy, human rights and EU / International environmental law.

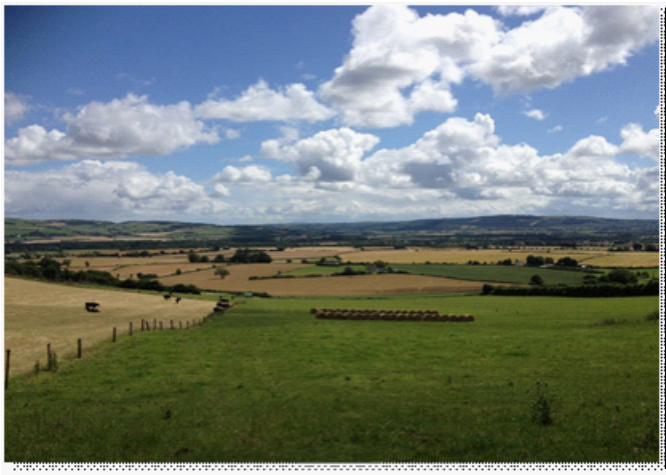
Urgency - construction work has not yet commenced on the site in question, however, it is anticipated by the community that it is likely to commence in early 2016. As such, there is now an urgency to quickly establish an effective remedy to this flawed planning permission.

Introduction & Overview

While Ireland is a signatory to the Aarhus convention (both in its own right and as a member of the EU), the rights enshrined in the Aarhus convention are proving to be extremely difficult to access for Irish citizens on a systematic basis due to the acts and omissions of the Irish State Agencies.

This submission focuses on the specific case of the Laois-Kilkenny Reinforcement Project however, as many of the issues raised are systemic in nature they have a wide and ongoing impact on Irish Citizens on a nationwide basis.

- Ireland has been very slow to adopt the Aarhus convention and has failed to fully transpose the convention into Irish Law, as such, the reality in practice is that Irish Citizens have significant difficulty and no legal certainty in accessing their rights under the Aarhus convention.
- The community in the Ratheniska area never had any real opportunity to participate in the decision-making for the case concerned as the most basic information regarding the true nature and reasons for this €100million development had never been fully divulged and because key decisions had been made long before the public consultation process ever began.
- Ireland has embarked on and has been investing heavily for a number of years in a plan to generate 40% of its electricity primarily from wind power. An integral part of this plan/programme is the upgrading and expansion of both the electrical distribution and transmission systems. This national plan/programme has not been subject to a cost benefit analysis or the legally required Strategic Environmental Assessment including public participation. By the very nature of this plan/programme it is concentrated in the more rural areas of the countryside on a national scale. i.e. there is hardly any part of the rural countryside that will not be affected by this wind & grid project.
- A very high percentage of the Irish population live in rural areas i.e. approx. 38% equivalent to approx. 1,750,000 people. These are the people who will be most directly affected by the current wind energy plan. The primary culture and livelihoods in these areas are focussed on farming and tourism. About 64% of the total land area is used for farming with about 139,000 family farms with farming accounting for almost 10% of employment in the country. It is estimated that there are currently approximately 200 groups throughout the country that are seeking to have their voices heard and rights upheld with regard to the pylon and wind turbine projects that are being advanced by the state and others against the wishes of the communities that will have to live with the impacts. More community groups are forming each week. It is probably fair to say that these groups have little trust in the state to protect their interests and rights. Given the experiences of the Ratheniska community (RTS Group) it is to be expected that a large number of these communities are now facing into similar situations.
- In the absence of a proper cost-benefit analysis and Strategic Environmental Assessment there is absolutely no evidence to show that there is any benefit to these projects or that they are in any way sustainable - however communities are already suffering negative impacts before projects are even built by trying to engage with a system that is designed to favour developers and state authorities over the rights of citizens and the protection of the environment.



Ratheniska & surroundings, Co. Laois, Ireland:
the quality of this landscape and environment would serve sustainability much better as a natural touristic and agricultural asset rather than the proposed transformation to an industrialised area covered in energy infrastructure. As can be seen, the community in this area are closely involved with the environment here and have had no part in the decision-making that is likely to permanently alter this environment - our HOME!

Background timeline of relevant legislation, events and decisions related to and affecting the specific case:

1. In 2006 the [1]Planning and Development (Strategic Infrastructure Act) 2006 was introduced. (The Strategic infrastructure Act 2006 is listed as item 23 in Table 5 of Ireland's NREAP[2]). This act made major changes to the way in which strategic developments are determined within the Irish planning system. Strategic infrastructure development can generally be described as development which is of strategic economic or social importance to the State or a region i.e. arguably the types of development with greatest potential for significant environmental impact. There are three key points from this act most relevant to this application:
   - Firstly, this act mandates pre-consultation between the developer and the Decision-making body (An Bord Pleanala = public authority) without making any reference to the involvement of the public. (Section 37B of the Act). This pre-consultation process is operated in practice without any access for the public who are only able to view minutes of meetings/ correspondence once the process has concluded and a decision has been made whether the development will be classed strategic infrastructure. This pre-consultation process can last years. If it has been designated Strategic Infrastructure, the same practice - closed to the public, operates with respect to scoping for EIS. (See [3]Q's6&7, 9&10 from the An Bord Pleanala Website & Section 37D of the Act). A clear breach of public participation Article 6.
   - Secondly, the Act eliminated the previously existing level of administrative review procedure. Formerly, planning applications would have been made to a local planning authority. Any challenge to the planning decision could have then appealed to An Bord Pleanala -the planning appeals body at the time. The Strategic Infrastructure Act effectively removed this appeal level and mandated that Strategic Infrastructure applications should be made directly to An Bord Pleanala meaning that the more significant projects had less opportunity for checking or challenges. (See section 37A of the Act.). There is also a €50 fee for making such a submission to the Bord. (See [4]Q'18 An Bord Pleanala Website). Breach of Access to a review procedure- article 9.
   - Thirdly, the Act specified that the only means of challenging Strategic Infrastructure Development was through the High Court via Judicial review (Section 50 of the Act) and that a high threshold applied to be able to even bring a challenge at all (Section 50A (3)). Breach of Access to justice Article 9 i.e. this is not wide access to justice..

     "*(3) The Court shall not grant section 50 leave unless it is satisfied that— (a) there are substantial grounds for contending that the decision or act concerned is invalid or ought to be quashed, and…*"

2. December 2007 the Commission for Energy Regulation (CER) commenced a consultation which culminated with a decision in late 2008 (Gate 3) which clearly set the development framework for nationwide electricity plans i.e. the massive increase in wind energy including the additional electrical infrastructure and conventional generation backup need to support it. (Gate 3 is listed as item 10 in Table 5 of Ireland's NREAP[5])
3. October 2008 - State Transmission System Operator, EirGrid published what they called the GRID25 Strategy to double the transmission capacity of the Irish transmission grid by 2025.

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[1]http://www.irishstatutebook.ie/eli/2006/act/27/enacted/en/pdf

[2] http://www.dcenr.gov.ie/energy/SiteCollectionDocuments/Renewable-Energy/The%20National%20Renewable%20Energy%20Action%20Plan%20(PDF).pdf

[3]http://www.pleanala.ie/sid/sidpp.htm

[4]http://www.pleanala.ie/sid/sidpp.htm

[5] As per reference 2

(GRID25 is listed as item 11 in table 5 of Ireland's NREAP[6]). This was called a 'strategy' but in fact has many characteristics of a plan as it also identified projects. e.g. in relation to the Laois Kilkenny project it states on page 37 that:

> *''Grid development in the region will include tapping into the existing 400 kV line to strengthen the 110 kV network around Portlaoise providing capacity to supply the continuing strong growth in Kildare and Laois;"*

4. [7]13 November 2008 - CER press release - note the reference to 160 projects. (Gate 3 – further information)

> *"The Commission for Energy Regulation (CER) has today published a proposed decision which facilitates the connection of an additional circa 3,900 MW of renewable power (mostly wind) to the electricity system in the coming years. "Gate 3" is specifically designed to ensure that Ireland meets the Government's recently announced renewables target of 40% of electricity consumption from renewable sources by 2020.*
>
> *The scale of Gate 3 is unprecedented and it represents a huge commitment to the development of renewable and indigenous energy and to tackling climate change in Ireland. The following points indicate the scale and importance of Gate 3:*
>
> *• Renewable power connected to the system will increase five-fold between now and 2020;*
>
> *• Of this five-fold increase, 3,900MW will be connected as a result of today's announcement;*
>
> *The CER paper also lists the projects which will receive a connection offer – there are over 160 separate offers to be issued for projects all around the country and offshore."*

5. 16th December 2008 - the CER published a direction to the system Operators [8]CER/08/260. in this Document GDS is linked as a reference to GRID25. (Gate 3 – further information)

> page 3 - *"The Grid Development Strategy (GDS) option and approach will be applied in Gate 3. This is EirGrid's forward-looking transmission development strategy which plans the development of the transmission system now to cater for anticipated requirements for the long-term, i.e. for 2025…"*
>
> page 11 - *"Furthermore, the GDS processing approach will allow for the long-term development of the transmission system to connect both anticipated renewable and conventional generators (including interconnectors), using the methodology described earlier."*

6. [9]18th December 2009 - the Commission for Energy Regulation issued this press release reconfirming the link between interconnection, additional conventional generation backup capacity for wind and the gate 3 renewables/wind power decision. (Gate 3 – further information)

> *"To support this level of wind, a decision has been issued today by the CER which will allow for an additional 1,600 MW of "conventional" electricity generating capacity, along with an additional proposed interconnector to the UK, to connect to the Irish electricity grid over the next few years. This is in addition to the circa 4,000 MW of wind generators that are entitled to be connected to the electricity network on foot of a CER decision on "Gate 3". Gate 3, as decided by the CER, is specifically designed to ensure that Ireland meets its target of 40% of electricity consumption from renewable sources by 2020."*

7. In mid-2012, EirGrid published their [10]SEA for the GRID25 Implementation Programme 2011-2016. A few points to note:

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[6] As per reference 2

[7]http://www.cer.ie/docs/000464/pressrelease13112008.pdf

[8]http://www.cer.ie/docs/000903/cer08260.pdf

[9]http://www.cer.ie/docs/000513/cer09201.pdf

[10]http://www.eirgridgroup.com/app-sites/nsip/docs/en/environmental-documents/volume-3b/reference-material/3B_11)%20EirGrid%20(2012)%20Grid25%20Implementation%20Programme%20(IP)%202011-2016%20SEA.pdf

- GRID25 ‘strategy’ was for grid development up to 2025 but this SEA only covered the initial phases up to 2016 - the whole plan was never assessed.
- This SEA did not involve public participation and so did not comply with the SEA Directive.
- page 86 of this document , section 8.3 indirect and cumulative effects clearly states that:

  “There is also no spatially specific National Wind/Renewable Energy Strategy, nor is there any SEA of such policy objectives. It is the sequence of policy assessment that facilitates the assessment of cumulative effects. The absence of these other relevant plans that create context (and their associated assessments) renders it premature – and therefore impractical – to make any meaningful assessment of cumulative effects between high level and national plans or policies.”

- The SEA mandated that certain environmental issues were to be dealt with at EIA stage.
- The Laois-Kilkenny reinforcement project, appeared in this document as project CP0585 described as follows:

  “New 400/110 kV transmission station in Co. Laois. The station will be looped into the existing Dunstown- Moneypoint 400 kV line and Carlow-Portlaoise 110 kV line. A new 110 kV circuit from the new station to Kilkenny using the existing Ballyragget- Kilkenny 38 kV line which is built to 110 kV standards. A new 110/38 kV station at Ballyragget to cater for loss of the Kilkenny-Ballyragget 38 kV line.

- Note also that the designs for the specific case commenced 3 years before the SEA under which it was to be covered was completed.

Applicability of the Aarhus Convention in Ireland:

The Third Amendment to the Constitution of Ireland permitted the Irish state to join the European Communities and provided that European Law would take precedence over the constitution. This was achieved by the Third Amendment of the Constitution Act[11], 1972, which was approved by referendum signed into law on 8 June of 1972.

The new insertion into Article 29.4 of the constitution stated inter alia that:

> *“No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the Communities or prevents laws enacted, acts done or measures adopted by the Communities, or institutions thereof, from having the force of law in the State.”*

Article 2 of the European Communities Act 1972 [12]states:

> *“From the 1st day of January, 1973, the treaties governing the European Communities and the existing and future acts adopted by the institutions of those Communities shall be binding on the State and shall be part of the domestic law thereof under the conditions laid down in those treaties.”*

Article 288 of Treaty on the Function of European Union states:

> *“To exercise the Union’s competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.”*

While the European Union ratified the Aarhus Convention in February 2005, the preparatory work for the transposition of the principles of the Convention are found in Directive 2003/4/EC on public access to environmental information and Directive 2003/35/EC –‘the public participation Directive’ which provided inter alia for significant amendments to the Environmental Impact Assessment (EIA) directive. See recitals 5 to 10 of Directive 2003/35/EC as well as recitals 18 to 22 of the codified EIA Directive 2011/92/EU & Regulation (EC) No 1367/2006.

Re. Directive 2003/35/EC see specifically recital 12

> *“Since the objective of the proposed action, namely to contribute to the implementation of the obligations arising under the Århus Convention, cannot be sufficiently achieved by the*

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[11] http://www.irishstatutebook.ie/eli/1972/ca/3/enacted/en/print

[12] http://www.irishstatutebook.ie/eli/1972/act/27/enacted/en/print.html

Member States and can therefore, by reason of the scale and effects of the action, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective"

The Aarhus Convention had already been a binding part of the EU legal order since 2005 and thus placed binding obligations within Irish environmental law via obligations arising under EU law. Of particular relevance here are the Strategic Environmental Assessment (Directive 2001/42/EC) and Environmental Impact Assessment (amended Directive 2011/92/EU).

Judge Hogan J in *NO2GM Ltd v EPA*[13]:

"insofar as the [Aarhus] Convention has binding force as part of the domestic law of this State, it is only by virtue of the force of and within the proper scope of application of European Union law."

As such, prior to ratification in June 2012, Ireland was already required to give effect to rights guaranteed under the Convention – at least in so far as these rights are governed by EU law. Also worth noting is that Ireland signed the Aarhus Convention in 1998 and the Aarhus implementation Guide (page 227 of the second edition) explains that:

"Signing a convention does not have a binding effect on the prospective Party concerned if the convention requires ratification. However, in accordance with the Vienna Convention (Article 18), after a country signs a convention, it is obliged to refrain from acts which could defeat the object and purpose of the convention. The object and purpose of the Aarhus Convention are set out, in particular, in its preamble and in Article 1."

Importantly, Ireland has long been aware of it's obligations under the Aarhus convention. It will also have been aware of the shortcomings of it's NREAP through the Compliance Committee's finding in ACCC/C/2010/54 (draft findings 29th April 2012) and the subsequent high court case taken by Pat Swords against the Irish State regarding the NREAP (leave granted 12th November 2012-Judicial review 2012/920 JR).

Amazingly, none of this appears to have had any impact on the following specific case which was largely processed after these events. This complaint identifies non-compliances with the Aarhus convention as well as non-compliance with the SEA and EIA Directives i.e. environmental procedures and obligations derived from EU law as regulated by the provisions of the Aarhus Convention.

Specific Case - Laois Kilkenny Reinforcement Project.
This sequence of events is not strictly chronological but attempts to indicate the sequence in which the local community discovered / became aware of various issues:

1. 26th October 2009 - EirGrid, (the state owned Electrical Transmission System Operator and developer of the project) issued the [14]first public notice that they intended to build a new electrical substation near Ratheniska, Co. Laois, Ireland. The stated intention was to join 2 existing power lines (400kV & 110kV) and add one extra powerline (110kV). This would require 5 connection points within the substation. The location where the two existing powerlines intersect is a small townland called Loughteeog.

2. The notice indicates a small circle as the study area for the substation itself and a rectangle indicating the study area for the entire project. My home is on the edge of the circle and yet the first I heard of the planned substation was from a neighbour coming to my door. The notice indicates that the location of the substation is
   '*to be determined*' and '*the input into the constraints map will allow us to proceed to the next stage in the process which is to identify potential route corridors within the study area'* (refer to Attachment 1 page 3).

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[13]http://courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/d89a502c7ffac36c80257a720051f2c5?OpenDocument

[14]http://www.eirgridgroup.com/site-files/library/EirGrid/Appendix%20F-1%20Newspaper%20Notice%201%20-%20Oct%202009.pdf

As you will see however, even these issues had already been determined at this stage these options were no longer open.

3. We soon realised the substation would be huge, far larger than necessary for the reasons we were given-stated in point 1 above. i.e. It would require approx. 18 acres of land and would be capable of connecting up to 16 powerlines - as big as the largest substation in the country. The huge capacity made no sense to us - a small community in a rural agricultural area away from any city. Despite a full planning process, repeated questions and a court case - the community have never been given information as to what the future capacity is for.

i.e. the substation has spare capacity for 11 extra power lines and the only reason given to the public was 'futureproofing'! Without access to this information regarding the full description of the project it was simply not possible for the public to effectively participate in decision-making at any level i.e. Article 6 of the convention could never be complied with in the absence of this basic information. Becoming aware that we were not being told the whole truth, we searched for answers… (Lack of access to information Articles 5 &6)

4. We found that Europe had mapped and published the specific location for this substation in June 2009 before the community had heard anything about the project. The ENTSO-E map refers to the tiny townland of Loughteeog specifically. (see Attachment 1 page 4). (Lack of participation.)

5. We had heard that EirGrid were planning a powerline from Cork and investigated - to discover a map presented by EirGrid to industry in late 2010. This was a map of the Irish Grid envisaged for 2020. That map clearly showed the Laois-Kilkenny substation at Loughteeog, however it also showed 4 power lines including one HVDC line connecting to the Loughteeog substation that had never been mentioned (see attachment 1 page 10). (lack of access to information & participation)

6. The reference to the extra lines alarmed us and led to further investigation. We found that Eirgrid had commissioned a report into the potential use of High voltage direct current schemes on the Irish Transmission Network in 2008. The final report was dated [15]18th October 2009 but was never brought to our attention. Page 124 of that report clearly shows a scheme for a HDVC power line from Cork to the substation at Loughteeog. (See Attachment 1 page 12 for an extract from that report). (lack of access to information & participation)

7. Our research led to understanding that a HVDC power line cannot simply connect to an AC powerline. To connect it needs a substation on the AC power line to act as a socket/a significant connection point - this appears to be the ultimate objective of the Loughteeog substation. However, to connect these two different AC & DC systems, a huge converter station is also required. According to our former energy Minister, Pat Rabbitte such a converter station is larger than the pitch in our largest stadium and nine storeys tall (Attachment 1 page 13).

8. (Attachment 1 slide 14 shows an example of the difference in size between such a GIS connection substation and a DC converter station). The smaller one is what we had been told about - no mention of the other, significantly larger converter station. These maps and information demonstrated that what was planned was more than just a standalone project and clearly set the framework for significant future electrical development. It was the first stage of a major energy hub and plans were already in progress for future phases. This information was only found through extensive research carried out within the local community and has never been confirmed or denied by the state developers. (ref. slides 10-14 of Attachment 1)-(lack of relevant information Articles 5&6)

9. We also established that the public consultation carried out was only for appearances and practically no options were open for participation. i.e. the planned routes for the power lines had already been decided before the initial newspaper advert to the public. This is in contravention to Article 6(4) of the convention.

10. e.g. Attachment 1, page 6 shows correspondence from the developer, EirGrid to the local authority dated 26th August 2009 attaching a preliminary route corridor map and explaining that the study area was selected to encapsulate these. The only way route corridors could have been set would be if the start and finish points (substations) were already determined. (lack of participation – article 6)

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[15]http://www.eirgrid.ie/site-files/library/SONI/documents/Projects/Publications/3-TRANSGRID-REPORT.pdf

11. Mid-2012 EirGrid published the SEA for the Implementation Plan 2011-2016 of GRID25. The Laois-Kilkenny project is part of the GRID25 plan and was clearly proceeding ahead of any SEA for the overall plan. In accordance with the Directive, SEA is required to be completed before the plan is adopted. (lack of participation-Article 6)

12. Mid-2012 the public in the Irish Midlands became aware of a plan for massive industrial windfarms across the 5-7 counties purely to export wind energy via a proposed new, private electrical network. This was in addition to the previously mentioned Gate 3 wind projects etc. (see attachment 1 page 11 mapping the plans for industrial wind installations relative to the location of the substation). It seemed obvious now that there was some link between these projects and the substation. One of those projects, Greenwire, entered pre-consultations with An Bord Pleanala on 16th July 2012 seeking Strategic Infrastructure Designation. To date, 8th November 2015, no SEA has been carried out but these pre-consultations have not concluded and thus the minutes of meetings have not been disclosed to the public ([16]see PC0148 Greenwire Project). At the same time, Element Power, the project developer for Greenwire are progressing windfarm projects through the planning process. (lack of participation & information Articles 5&6)

13. In November 2012, An Bord Pleanala (ABP, the national planning authority) made a decision that the substation project should be considered Strategic Infrastructure. This decision removed any right to appeal the planning decision to an independent 3rd party and left only judicial review as an appeal mechanism. This decision did not involve any public consultation but was subsequent to private 'pre-consultation' discussions between the planning authority and the developer. (lack of participation article 6, lack of effective remedy article 9)

14. The public are only allowed access to minutes of meetings between the developer and the planning authority once the decision re. strategic infrastructure has been made. We reviewed these minutes and discovered that in a meeting on 5th August 2009 (see Attachment 1 page 5, or [17]weblink for full letter) (Lack of participation & information). EirGrid presented to the planners that:

    - the project was designed to facilitate other networks. (Note that this is in the midlands of an Island state where there are no other networks).
    - route options had already been identified and environmental constraints reports were already being worked on for those route options. i.e. EirGrid were confident that the substation location and route options that they selected were proceeding.
    - An Bord Pleanala would consider whether an Environmental Impact Statement was required at all.

15. Originally nearly €20,000 was raised by the community to participate in the planning process as we had very little knowledge of the complex planning laws. A planning application was made by EirGrid (State Transmission System Operator/Developer) to ABP and the RTS group made detailed submissions. A 6 day oral hearing was held during working days - the RTS group attended and made further detailed submissions. The community applied to An Bord Pleanala for costs associated with submitting detailed observations and attending the oral hearing. We received €'NIL' for our participation while all other state authorities were paid for attending. [18]see last page of the planning direction document. (not fair or equitable, lack of state support/ framework for effective participation).

16. The public raised many significant concerns, issues and legal errors as highlighted previously - most of which were not dealt with and planning permission was granted by ABP in April 2014 regardless. e.g. The planning authority does not view consideration of Strategic Environmental Assessment(SEA) to be part of their remit, so even if a valid SEA were ever carried out (which did not happen in this instance), the Planning Bord does not integrate this into it's consideration

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[16]http://www.pleanala.ie/casenum/PC0148.htm

[17]http://www.pleanala.ie/documents/letters/VC0/LVC0035A.pdf

[18]http://www.pleanala.ie/documents/directions/VA0/SVA0015.pdf

of the planning application. (see Inspectors report[19] page 46/47. Further information can be provided regarding the particular issue raised if required.)

17. The only option to challenge the flawed planning permission was judicial review. This meant a second massive fundraising exercise for the small rural community in Ratheniska. €50,000 is approximately what is needed to take such a challenge to the high court. The state provides no resources to assist the public in this but the state authorities have access to public funding (not fair or equitable, prohibitively expensive-Article 9).
18. EirGrid (state agency developer), moved the case to the Commercial court. This is favoured by developers as it greatly shortens the time taken to go through the court process however, it also puts more pressure on communities to manage complicated legal documents in their spare time between working and taking care of families. It can also be argued that the commercial court takes a stricter interpretation of the grounds of a case - something which clearly puts inexperienced rural communities at a clear disadvantage when challenging the more experienced and well resourced state authorities. (Article 9)
19. The decision to move to the commercial court cannot be effectively challenged because, if you resist going to the commercial court and then loose your case later - you are likely to be liable for the costs the extra delay caused to the developers business by going through the slower court process. In contravention to Article 9 of the convention - this situation is not fair as effectively, the public have little or no ability to prevent this move and are put under even greater pressures by it (e.g. even shorter time constraints, arguably the legal costs are greater and flexibility to revise or amend grounds is highly restrictive). Again, developers are fully in control. (Article 9)
20. This particular case was brought to the court on environmental grounds and as such, should have been subject to cost protection i.e. the community should have been protected from the costs arising from An Bord Pleanala's and EirGrid's legal teams. However, cost protection in environmental cases is very weakly legislated for in Irish law. The discretionary nature of the legislation means that it provides no legal certainty and proves difficult to put in place in practice thus making it ineffective. The legislation in this instance is [20]Section 50B of the 'Planning and Development Act - Costs in Environmental matters'. Without this protection, legal challenges that are already prohibitively expensive move into the area where they can threaten people's homes and livelihoods. (article 9)
21. EirGrid agreed to the principle of cost protection on environmental grounds in advance of the court case. (Attachment 3)
22. ABP refused to accept the principle of cost protection. When we indicated that we would ask the judge to decide on cost protection in advance of the full hearing, ABP threatened to add the costs of this as an extra action against us if the judge considered it to have been an unnecessary extra hearing (which they advised us that they would argue). Any additional costs were of concern and so we had no cost protection in advance of the court case. (Attachment 4) (Article 9)
23. Unfortunately, the case was lost in the commercial court. An Bord Pleanala argued strongly for a narrow view of the grounds to be taken and this was accepted with the result that many relevant arguments were not allowed to be dealt with. In contravention to Article 3 of the convention, the restrictive and literal view of the grounds meant that the substance of the case was never truly dealt with and failed to provide actual access to justice let alone wide access to justice. This goes against the very basis of the convention i.e.
    - *Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights, -*
    - *Concerned that effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced,*
24. The local community believe firmly that the planning permission in this case is fundamentally flawed on many different levels so, we drafted grounds to appeal. The case to appeal would have involved another round of fundraising to bring the case to court. Additionally, if you want to

[19]www.pleanala.ie/casenum/VA0015.htm

[20]http://www.lawreform.ie/_fileupload/RevisedActs/WithAnnotations/EN_ACT_2000_0030.PDF

appeal a court judgement in a planning case in Ireland, you must be given permission to do so by the same judge who gave the original judgement. i.e. you have no recourse to a person independent of the judgement. I am advised that this is different to a normal Judicial Review where you can take your application to appeal to a different judge.

25. 27th January 2015 - ABP and EirGrid were issued with a copy of our intended appeal grounds. They were fully aware that the community intended to seek leave to appeal the judgement.

26. Wednesday 28th January 2015 - just prior to the judge arriving in the court, solicitors for ABP approached our solicitor and indicated that they would now pursue us for costs back to the beginning of the case if we did not withdraw our request for permission to appeal. We were advised that EirGrid indicated the same approach. (Attachment 5) (article 9)

Our group was not present in the court on that day as we had not anticipated such an ambush. Our group contact was called by phone while at work and literally given 3 minutes to consider whether we should proceed and risk exposure to estimated costs of €500,000-€750,000 or withdraw our intention to seek leave to appeal.

We withdrew the request for permission to appeal for this cost reason alone. Basically, these state agencies used their access to state resources to bully citizens out of court and effectively blocked access to justice.

The toll on this small rural community has already been great in terms of constant stress, loss of resources as people spend time on this rather than other more productive activities, the economic costs of taking a court case and other associated expenditure is money lost to our small local economy.

The more significant impacts are yet to come, the threat to our vulnerable clean water (phase 1 of this massive infrastructure project is due to be built on top of a regionally important aquifer which is already classified as vulnerable. Digging into the ground for foundations will only create a greater risk for this important resource.) An Annex I priority habitat (as per the habitats directive) that will almost certainly be damaged or destroyed by the project, the lost opportunity to attract tourism to our beautiful area as the landscape faces industrialisation, the devaluation of our homes and farms, the health impacts associated with the powerlines and substation. Then there is the issue of the approx. 22,000 hectares zoned for windfarms surrounding the substation. It turns out that ABP have been in consultation with one such developer of industrial scale windfarms since mid-2012[21] (the Greenwire project). As this is categorised as 'pre-consultation' under the 2006 Strategic Infrastructure Act, the public are excluded from these discussions and have no access to information regarding what is planned, however, both ABP and EirGrid do. In fact, EirGrid carried out a feasibility study in 2013 into how this developer could connect their industrial windpark plan to the national grid[22]. The list goes on...but two key issues are clear:

- firstly, this tiny community is facing into many many costly and stressful planning challenges in the coming years and
- secondly, in the absence of a cost-benefit analysis and proper SEA and Environmental Impact Assessments in full compliance with EU Environmental law & Aarhus, the proposed €100million project can never be said to comply with the underpinning fundamental ethos of the Aarhus convention as stated i.e.

"Affirming the need to protect, preserve and improve the state of the environment and to ensure sustainable and environmentally sound development"

[21] http://www.pleanala.ie/casenum/PC0148.htm

[22] http://www.eirgrid.com/mediaExportingRenewableEnergy-JointStudybyEirGridandNationalGrid%28Feb%202013%29.pdf

Timeline of decisions and allegations relevant to the Applicability of the Aarhus Convention in Ireland:

Date	Decision / Event	Comment
1998	Ireland Signs Aarhus Convention	
June 2003	Public Participation Directive enters into force and has a binding effect on EU based Environmental legislation in Ireland	Amendment e.g. '*The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken*'
2005	EU ratifies Aarhus Convention Requirements of the Aarhus convention become binding on Ireland where it involves implementation of EU law e.g. SEA, EIA, public participation and environmental information Directives,	
13 November 2008	Commission for Energy Regulation Gate 3 Decision incl. GRID25.	National Energy plans such as this required implementation of the SEA Directive compliant with Aarhus. No such SEA was carried out at all and therefore there was no public participation when all options were open. This decision and its associated GRID25 plan precluded effective public participation at EIA stage regarding the specific case. (part of NREAP-see ACCC/C/2010/54) Non-compliance with Articles 5 & 6
29th April 2012	ACCC/C/2010/54 Draft Findings & recommendations - re. communication concerning compliance by the European Union regarding Ireland's NREAP	*"The Committee finds that the Party concerned by not having in place a proper legislative framework to implement article 7 of the Convention with respect to the adoption of NREAPs by Member States on the basis of Directive 2009/28/EC has failed to comply with article 7 of the Convention (para. 86);* *by not having properly monitored the implementation by* ***Ireland*** *of article 7 of the Convention in the adoption of Ireland's NREAP also has failed to comply with article 7 of the Convention (para. 86);* *by not having in place a proper legislative framework to implement article 7 of the Convention with respect to the adoption of NREAPs by Member States on the basis of Directive 2009/28/EC has failed to comply also with article 3, paragraph 1, of the Convention (para. 87);"* Irish State aware of NREAP non-compliance issues
20th June 2012	Ratification of the Aarhus Convention by Ireland	

Date	Decision / Event	Comment
29th June 2012	ACCC/C/2010/54 Findings & recommendations - communication concerning compliance by the European Union regarding Ireland's NREAP	Paragraph 98 of the Committee's findings - Recommendation: *"...recommends that the Party concerned adopt a proper regulatory framework and/or clear instructions for implementing article 7 of the Convention with respect to the adoption of NREAPs. This would entail that the Party concerned ensure that the arrangements for public participation in one of its member States are transparent and fair and that within those arrangements the necessary information is provided to the public. In addition, such a regulatory framework and/or clear instructions must ensure that the requirements of article 6, paragraphs 3, 4 and 8, of the Convention are met, including reasonable time frames, allowing sufficient time for informing the public and for the public to prepare and participate effectively, allowing for early public participation when all options are open, and ensuring that due account is taken of the outcome of the public participation. Moreover, the Party concerned must adapt the manner in which it evaluates NREAPs, accordingly".*
16th July 2012 - ongoing	Greenwire lodged with An Bord Pleanala for Pre-application consultation PC0148.	To date – November 2015, the consultation has not yet concluded and therefore the details of meetings and content of files are not accessible to the public. No SEA is available for this plan but individual windfarm clusters are starting to be processed through the planning system. Some of these are planned in the vicinity of this specific case (see attachment 1 page 11) Greenwire – summary by developer- • Proposed development of up to 40 wind farm clusters across five counties • Establishing a new export industry from a free surplus natural resource • Greenwire supports Irish Government policy to export renewable energy • Memorandum of understanding signed between British and Irish Governments to facilitate renewable energy trading
18th Sept. 2012	Aarhus Convention in force in Ireland (90 days)	
February 2013	SEA STATEMENT of the GRID25 Implementation Programme 2011-2016 Strategic Environmental Assessment published	GRID25 is the 2008-2025 plan to expand the Irish grid to accommodate 40% wind energy onto the grid and includes long-distance interconnectors to export wind energy. GRID25 is part of Ireland's NREAP which is central to the finding of non-compliance by the Aarhus Compliance Committee in ACCC/C/2010/54. Note that this SEA is incomplete (i.e. phase 1 only) and thus never provided the full detail of the relevant information for the specific case i.e. the Laois-Kilkenny project. It also did not take cumulative impacts of the associated windfarm plans on which it is based into account as no such SEA has been conducted.

Date	Decision / Event	Comment
29th April 2013	An Bord Pleanala decision that an EIS is required as part of the planning application for the Laois-Kilkenny reinforcement project (this specific case = project stemming from GRID25 plan)	Significant concerns and issues raised by the RTS group to An Bord Pleanala during the planning process including the lack of SEA for full GRID25 plan and lack of SEA for windfarms. Based on the evidence provided, the Laois-Kilkenny reinforcement project appears to be designed as a connection point between GRID25, Greenwire, the Gate 3 windfarms and the export of this electricity to other countries via long-distance HVDC powerlines (PCI's) however, there is no SEA to assess the impact of such a huge plan. i.e. Non-compliance with Article 5 – relevant and required information was not provided.
23rd April 2014	Planning Permission Granted by An Bord Pleanala for the Laois-Kilkenny reinforcement project	Planning Authority stated their view that SEA was not part of their remit. i.e. no consideration of the finding of non-compliance by the Aarhus Compliance Committee in ACCC/C/2010/54 which is relevant and should have prevented a further non-compliant decision of this nature.
14th January 2015	Court Judgement 2014/340 JR	Case was lost but please see arguments explaining why this is not considered an effective remedy. Non-compliance with Article 9.4
27th January 2015	Grounds for appeal issued to An Bord Pleanala & EirGrid	
28th January 2015	Community Group threatened with massive legal costs minutes prior to seeking leave to appeal the court judgment	The threat of massive costs forced us to drop our request for leave to appeal the court judgment. Non-compliance with Article 9.4

V. Provisions of the Convention alleged to be in non-compliance

The [23]Aarhus Convention Implementation guide p119 states

"Public participation cannot be effective without access to information, as provided under the first pillar, nor without the possibility of enforcement, through access to justice under the third pillar."

In the specific case presented, namely the Laois Kilkenny reinforcement project:

- Information which was required to be made available from SEA levels of assessment was not provided. SEA is applicable to this project which results directly from a wind energy and export plan which was not subject to SEA. Non-compliance with Article 5.1 (a) this applies equally to Article 6.6 in general and 6.6 subsection (b)
- General non compliances with Article 6. We have set out here the most significant non-compliances with Article 6. More general non-compliances were elaborated in the court submissions.
- The public were involved too late in the process and options were not open i.e. non-compliance with article 6.4
- The relevant information was not provided – non-compliance with Article 6.6 in general and more specifically 6.6 (b).
- there was no effective or practical access to justice to challenge the decision i.e. non-compliance with Article 9.4

VI. Nature of alleged non-compliance

This communication relates primarily to a specific case concerning the Laois-Kilkenny Reinforcement project and spans violations of all three pillars of the convention. The community affected of which I am one were not afforded our rights under the Aarhus convention. In order to understand this specific case, it is also necessary to understand some of the background nationwide decisions that led to this

[23]http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

situation, added to and compounded the non-compliances e.g. the lack of an SEA for renewable electricity.

Article 5 - Collection and dissemination of environmental information
Non compliance with Article 5 subsection1(a):.
"*(a) Public authorities possess and update environmental information which is relevant to their functions";*

- The Commission for Energy Regulation (CER) does not possess a Strategic Environmental Assessment for it's Gate 3 decision to satisfy Ireland's target of 40% renewable electricity primarily from wind generation.
  Under the SEA Directive, and SEA was required to be carried out prior to the decision to proceed with this plan. The individual projects from this plan are proceeding through the planning process seemingly without any state authority looking for the SEA.

- EirGrid has never published an SEA for the entirety of the GRID25 plan.
  As the Grid developer they are obliged to possess this information. GRID25 is a plan for grid development up to 2025. The only SEA produced by EirGrid is for the GRID25 Implementation Plan from 2011-2016 i.e. the first phase only. This clearly leaves an information gap. The Laois-Kilkenny reinforcement project is significantly and directly affected by aspects of the GRID25 plan that are planned for but have not yet been assessed or published because they are planned for 2020 i.e. outside the timescale of the published SEA 2011-2016. (see attachment 1 page 10 which shows a map of the grid as envisaged by 2020). The public affected are entitled to know what the current plans are for future developments connecting to this substation i.e. what it's intended purpose is?

- No-one has published an SEA for the Greenwire plan which is a private developer's plan for windfarms and a cable network covering multiple counties in Ireland. However the SEA Directive applies equally to private plans and programmes. As such, the Irish state should indicate which public authority will be responsible for holding this information relating to energy.

Article 6 - Public Participation in Decisions on Specific activities

6.1 sets out when this article shall apply:

''1. Each Party:

(a) Shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I;

(b) Shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions; and

(c) May decide, on a case-by-case basis if so provided under national law, not to apply the provisions of this article to proposed activities serving national defence purposes, if that Party deems that such application would have an adverse effect on these purposes.''

As such, Article 6 of the Aarhus convention applies to this specific case because:

Firstly, on [24]29th April 2013 An Bord Pleanala determined that that the project required an Environmental Impact Assessment thus fulfilling the requirements under (a) above with respect to the Laois-Kilkenny reinforcement project. i.e. it is provided for under Annex 1 of the convention, Paragraph 20

Secondly, under (b) above, regardless of the aforementioned decision by An Bord Pleanala, by virtue of it's nature, size and location (substation, with capacity for 16 powerlines, atop a vulnerable aquifer with a high water table and adjacent to an Annex 1 priority habitat in accordance with the Habitats Directive- see Attachment 1 page 15) it is obvious that the proposed activity may have a significant effect on the environment

[24]http://www.pleanala.ie/documents/controls/VA0/CVA0015.pdf

Thirdly, under (c) above, the project is not related to national defence purposes.

Please note that there are wider non-compliances with Article 6 which were raised in the original court documents but that these have not been fully expanded on here where we have focused on detailing the most significant non-compliances.

Non compliance with Article 6. subparagraph 4.
"Each Party shall provide for early public participation, when all options are open and effective public participation can take place."

As explained and referenced initially, no SEA was carried out by the Irish state to arrive at the decision to favour wind energy above other forms of electricity generation meaning that there has been no evaluation of the environmental impacts of that decision and its implications for the national grid and no public participation. However, the plan was adopted and this set the framework for development of wind farms in Ireland in general and specifically in the location of this specific case. The evidence indicates that the massive amount of unexplained spare capacity in the substation is to facilitate this wind energy plan to a large degree (refer to Attachment 1 pages 5 & 11).

By the time the public were notified about this project, no options were open i.e.
- the specific substation location was chosen and had already been advised to the European Network of Transmission System Operators for Electricity (ENTSOE), An Bord Pleanala and the Local Authority and a nationwide HVDC study had been completed based on this location.
- the route options were selected and the environmental constraints reports were underway,
- the technology to be used was was effectively predetermined(not evidenced here but information relating to this was presented to the planning oral hearing as were the previous points),

This specific case, the Laois-Kilkenny reinforcement project is already planned to and will become the obvious connection point for additional electrical power lines and more windfarms. i.e. it will in itself set the framework for future development and close off other potentially less environmentally damaging alternatives.

The Aarhus Implementation guide is clear that the lack of open options means that there was no real opportunity for public participation in this specific case. See the following example page 145:

> *"However, providing public participation at a later stage, when certain decisions have already been taken, cannot rectify the failure to provide public participation at an earlier stage when all options were still open. In its findings on communication ACCC/C/2005/12 (Albania), the Committee found it important to:*
>
> > *make clear that once a decision to permit a proposed activity in a certain location has already been taken without public involvement, providing for such involvement in the other decision-making stages that will follow can under no circumstances be considered as meeting the requirement under article 6, paragraph 4, to provide "early public participation when all options are open". This is the case even if a full environmental impact assessment is going to be carried out. Providing for public participation only at that stage would effectively reduce the public's input to only commenting on how the environmental impact of the installation could be mitigated, but precluding the public from having any input on the decision on whether the installation should be there in the first place, as that decision would have already been taken."*

Non-compliance with Article 6, subsection 6 in general and non-compliance with Article 6.6. (b) in particular:
"6. *Each Party shall require the competent public authorities to give the public concerned access for examination, upon request where so required under national law, free of charge and as soon as it becomes available, to* ***all information relevant to the decision-making*** *referred to in this article that is available at the time of the public participation procedure, without prejudice to the right of Parties to refuse to disclose certain information in accordance with article 4, paragraphs 3 and 4. The relevant information* ***shall include at least****, and without prejudice to the provisions of article 4:*
(b) A description of the significant effects of the proposed activity on the environment;''

The national legislation governing the definition of an Environmental Impact Statement and assessment of likely environmental effects was amended as a result of the European Court of Justice judgement against Ireland in case c-50/09. One of the legislative amendments adopted as a result of that judgement was Statutory instrument [25]S.I. No. 419 of 2012 European Union (Environmental Impact Assessment).

This amendment provided much needed clarity and certainty to the public in terms of what information to expect to be included in the Environmental Impact statement. Among other things, those regulations set out the following definitions:

"2. The Planning and Development Act, 2000 (No. 30 of 2000) is amended—

(a) in section 2—

(i) by substituting for the definition of "Environmental Impact Assessment Directive" the following definition:
"Directive No. 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment",
and
(ii) in the definition of "environmental impact statement" by inserting the following words after "the environment": "and shall include the information specified in Annex IV of Council Directive No. 2011/92/EU"

Annex IV of the aforementioned EIA directive-2011/92/EU provides among other things that the following information must be provided as part of the Environmental Impact Statement:

"1. A description of the project, including in particular:

(a) a description of the physical characteristics of the whole project and the land-use requirements during the construction and operational phases;

3. A description of the aspects of the environment likely to be significantly affected by the proposed project, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archaeological heritage, landscape and the interrelationship between the above factors.

4. A description (1) of the likely significant effects of the proposed project on the environment resulting from:
(a) the existence of the project;
(b) the use of natural resources;
(c) the emission of pollutants, the creation of nuisances and the elimination of waste.

(1) This description should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the project."

Article 3 of that Directive clearly states the basis for the assessment of likely significant environmental impacts i.e.

"The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 12, the direct and indirect effects of a project on the following factors…"

As such, it is clear that the starting point for establishing the significant effects of the proposed activity on the environment is the information specified in AnnexIV of EIA Directive 2011/92/EU and in particular a full description of the **whole** project. (See also Annex IV items 1,3 and 4 referenced as quoted above).

As has been evidenced, the Laois-Kilkenny reinforcement project 400kV substation was planned to cater for much more development than had ever been disclosed i.e. the description of the whole project was never disclosed. Also, the information requested for the EIS did not comply with the new

[25]http://www.irishstatutebook.ie/eli/2012/si/419/made/en/pdf

definition of an EIS as per the 2012 Regulations relying instead on the old legislation which pre-dated the judgment in c-50/09 [26]i.e. Article 94 and schedule 6 of the planning and development regulations.

Additionally, the SEA for the first phase of GRID 25 clearly indicated environmental issues that were to be dealt with at EIA stage e.g. quarries. As has been evidenced, the planning authority, An Bord Pleanala states that it has no remit regarding SEA and so relevant aspects from that SEA were never included in the assessment. i.e. the scoping of the EIS was inadequate and the public were not involved.

Also, as there had never been an SEA conducted for either the Gate 3 windfarms infrastructure or the Greenwire windfarms, this key information was also not available to establish what effects needed to be considered at EIA stage.

Under the EIA directive, this information must be provided to the public and the decision-making authority has an obligation to take these consultations into account before carrying out the Environmental Impact Assessment to 'identify, describe and assess' the direct and indirect effects of the project on the environment.

Based on the likely significant impacts, further assessments under other environmental legislation such as the Habitats directive may also be required e.g. Appropriate Assessment has an extremely high quality requirement for assessment of impacts and specifies that activity may only proceed '*where no reasonable scientific doubt remains as to the absence of such effects*'.

It is only then, following these Assessments that the decision-making authority would be in a position to supply the information required under 6. 6. (b) i.e. 'the significant effects of the proposed activity on the environment'. It follows that completeness of identification of likely impacts at the outset is a key criteria for enabling an accurate assessment of significant effects at the end of the process.

That such significant and basic information relevant to the project was missing at the outset of the process for the Laois - Kilkenny Reinforcement project clearly undermines the effectiveness of all the subsequent assessments resulting in noncompliance with Article 6.6 in general and 6.6. subsection (b) also.

Access to Justice - Non compliance with Article 9. 4

*"In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide **adequate and effective** remedies, including injunctive relief as appropriate, and **be fair, equitable, timely and not prohibitively expensive**."*

When a project is designated as Strategic Infrastructure then the only mechanism provided to challenge planning permission for such a project is statutory judicial review. Having had experience of this process we submit that judicial review in any format is not an adequate or effective remedy for the public to challenge decisions on environmental grounds and does not comply with article 9.4 because:

- it has a high threshold for entry to the process (substantial grounds) - [27]Planning and Development (Strategic Infrastructure Act) 2006, Section 50A:.

  > "*(3) The Court shall not grant section 50 leave unless it is satisfied that— (a) there are **substantial grounds** for contending that the decision or act concerned is invalid or ought to be quashed, and…*"

- at approx. €50,000 per case it is already prohibitively expensive to cover just your own costs. Appeal costs, if appeal becomes necessary are in addition to this.
- the risk of costs of the other side being awarded against you is very real due to the uncertainty of cost protection in practice. This was a constant threat to us and ultimately resulted in having to drop our request to appeal the court ruling due to the threat of costs as evidenced i.e. it was prohibitively expensive.
- the scope of review allowed is very legalistic and is based on rules that are not clearly set out for the public but are known by the well resourced and experienced state legal teams, as such it is not equitable.

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[26]http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d56a5cbe3be88144beb9f08cf2e4e885dd.e34KaxiLc3eQc40LaxqMbN4Oc38Oe0?text=&docid=84209&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=351709

[27]http://www.irishstatutebook.ie/eli/2006/act/27/enacted/en/pdf

- The state bodies EirGrid, An Bord Pleanala through public funding had access to such legal teams who are used to cases of this nature on a regular basis, access to expert resources and time to work on legal preparation full-time. The state even funds training in judicial review for wind developers (see Attachment 2) while there is no such training for small communities who have try and fit learning about and preparing legal documents in and around full-time work and family commitments. The RTS group have already invested 6 years in this struggle to have their rights acknowledged. This situation is not equitable.
- There is no mechanism to effectively prevent the move to the commercial court which disadvantages further those without access to significant funding or legal resources. The Commercial court takes a stricter approach with shorter timescales. It requires all arguments to be set out in writing and exchanged quickly in advance of the court hearing. The lack of registered objection to the move is then recorded by the court as acceptance of the move. see Judgement paragraph 20.
- The scope of judicial review is already restrictive and the courts can further restrict the arguments made when you enter the court. In our case an extremely narrow view of grounds was taken by the commercial court after the final legal arguments had been submitted see paragraph 19 judgment [28] here for the arguments that were ruled out but were important to our case. This effectively discarded significant work that had been done by members of the public in preparation for the case.. The Aarhus implementation guide states at page 201 = "*Equitable procedures are those which avoid the application of the law in an unnecessarily harsh and technical manner.*"
- You will note that the burden of proof in this instance was placed squarely on us, the small community rather than on the well resourced authorities to demonstrate that they had actually complied with the required procedures. Paragraph 21 of the judgement-

  "For the most part these additional grounds could be described as technical in nature and not supported by any evidence that the applicants or any of them had been adversely affected or that they were genuinely concerned by the complaint made. Their counsel indicated at the outset that no application would be made for any amendment of the Statement of Grounds and none was in fact made."
- Changes to grounds in such commercial court cases are possible but open up the further possibility of costs being awarded against you for slowing up the procedure.
- If you lose your statutory judicial review and you want permission to appeal, you must put your request for permission appeal to the same judge who ruled against you. i.e. the same judge decides if his/her judgement can be appealed and on which grounds. This is clearly not a fair procedure as the ruling judge clearly has an interest in whether their ruling is appealed.

At page 200, the Aarhus implementation guide states: "*The objective of any administrative or judicial review process is to have erroneous decisions, acts and omissions corrected and, ultimately, to obtain a remedy for transgressions of law. ".*

However, this is far from the outcome achieved for the challenge brought against the Laois-Kilkenny reinforcement project which has retained it's flawed planning permission despite never having had to even reveal basic information for example - what it is actually for.

Additionally, it seems that the European Court of Justice is now of the same view as us, i.e. that judicial review is not an effective remedy - decision in case [29]C-137/14 paragraph 42 states:

"that such a defect must affect 'a substantive legal position' to which the applicant is entitled, is also incompatible with Article 11 of Directive 2011/92. When an action is admissible, the Member States cannot place restrictions on the pleas in law which may be raised in support of that action. Consequently, if an administrative decision affects the public-law right of an individual and if that person has an interest in bringing proceedings, the national court having jurisdiction must carry out a full review of the legality of that decision. In so doing, it cannot ignore procedural defects, even if they do not infringe the applicant's rights of the defence."

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[28]http://www.courts.ie/Judgments.nsf/0/1E941D025D53295980257DDB0039E099

[29]http://curia.europa.eu/juris/document/document.jsf?text&docid=169823&pageIndex=0&doclang=EN&mode=req&dir&occ=first&part=1&cid=625716

VII. Use of domestic remedies

The [30]Strategic Infrastructure Act 2006 removed the previously existing administrative review process and mandated that the only means to challenge planning decisions for strategic infrastructure projects is through judicial review. The RTS Group attempted to challenge the planning decision through this designated process. Among other things, consistently highlighting the necessary linking between SEA and EIA and that in the absence of the necessary SEA and the information that future development was clearly planned centring around this specific project, the cumulative impacts of the projects could never been completely assessed at EIA level.

However the commercial court, relying on a very narrow view of the grounds of the case ruled against our challenge on 14th January 2015 - see judgment [31]here. 27th January 2015, we notified the other parties (An Bord Pleanala & EirGrid) of our intention to appeal the decision and our grounds for appeal.
On 28th January 2015, minutes before the application for certificate to appeal was to be made to the court, the threat of significant costs was made against the group. This threat of costs alone (€500,000-€750,000) forced us to withdraw the request for appeal. (see Attachment 5)

The arguments regarding non-compliance with Article 9.4 provides more detail on the practicalities of this judicial review procedure which we submit is not an effective remedy.

Neither An Bord Pleanala nor EirGrid come under the remit of the Ombudsman and therefore there is no further procedure to apply.

VIII. Use of other international procedures

- A submission was made to the European Court of Human rights in July 2015. The scope of the submission was breaches in the European convention of Human rights. No response has yet been received to indicate if the submission is accepted.
- A submission was made to the European Commission, DG Environment in March 2015 but on 2nd October 2015 they advised us that it has not yet been registered and in any event that they are "*not in a position to intervene in relation to a court judgment and the process that preceded the judgment*". On that basis it seems that the EC is indicating that it does not offer an effective remedy to the Laois-Kilkenny reinforcement project specific case which has been through the only review mechanism available i.e. judicial review.
- A general overview of this situation was sent to the UN Committee dealing with the Covenant on Economic, Social and Cultural rights in May 2015 due to the fact that Ireland was scheduled to meet that committee in June 2015. That submission restricted itself to the CESCR and did not deal with the specifics of the Aarhus convention. No response has been received and none is expected.

IX. Confidentiality

Confidentiality of this communication is not requested

[30]http://www.irishstatutebook.ie/eli/2006/act/27/enacted/en/pdf

[31]http://www.courts.ie/Judgments.nsf/0/1E941D025D53295980257DDB0039E099

X. Supporting documentation (copies, not originals)

Attachment 1	'The Laois-Kilkenny Reinforcement Project; Project Summary from the Community perspective - February 2015'
Attachment 2	Brochure demonstrating that the Irish state is funding training in judicial review matters for windfarm developers.
Attachment 3	Letter from EirGrid 3rd October 2014 accepting that the Ratheniska case regarding the Laois- Kilkenny reinforcement project came under the protection of costs in environmental matters i.e. Section 50B.
Attachment 4	Letter from ABP Solicitors 3rd November 2014 threatening the RTS group with additional costs if we went to court to formalise the cost protection in advance of the main court hearing.
Attachment 5	Statement from our legal representation confirming threat of costs unless we withdrew our request to appeal.

XI. Signature

Fand Cooney

23 November 2015
Date