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ar son na hAeráide & Comhshaoil
Department of Communications,
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11th August 2016

Ms Fiona Marshall,
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Aarhus Convention Secretariat,
United Nations Economic Commission for Europe,
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Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by Ireland with the Convention in connection with the Laois-Kilkenny Reinforcement (Electrical Substation) Project (ACCC/C/2015/132)

Dear Ms Marshall,

1. Thank you for your letter of 11th March 2015 inviting Ireland to submit the within Response of Ireland. Due to the complex and wide ranging nature of the communication, Ireland reserves the right to request the opportunity to supplement this response should same be required.

A. SUMMARY OF THE COMMUNICATION

2. While the Communication is framed in an extremely broad manner it would appear that the case for seeking the remedies, referred to below, rests on the Communicant alleging that Ireland is in breach of the Aarhus Convention specifically as follows (primarily at page 13 of the Communication et seq):-

Article 5.1(a) It is asserted that the Commission for Energy Regulation ("CER") has not carried out a strategic environmental assessment ("SEA") for its Gate 3 decision.

It is also asserted that Eirgird has never published an SEA for the entirety of the GRID25 plan. Additionally, complaint is made that the SEA carried out only covered the initial phases up to 2016 so that the whole plan was not assessed, and the SEA did not involve public participation and so failed to comply with the SEA Directive (page 5 of the Communication).

It is asserted that no-one has published an SEA for the Greenwire plan.

A complaint is also made that the proposed substation has a huge capacity and the public has not been informed why it is so large, and was therefore prevented from effective participation on the basis of this lack of information raising an Article 6 point (page 7 and 8 of the Communication)

Article 6.4 It is asserted that no SEA has been carried out in respect of Ireland's decision to favour wind energy above other forms of electricity generation.

It is claimed that the public was notified too late in the process, and not aware of the Laois-Kilkenny reinforcement project becoming the obvious connection point for additional power lines into the future.

Article 6.6 It is asserted that information contained in the EIS was incomplete as it did not include details of the whole project, in particular the fact that it is catering for far greater development in the future than has been disclosed.

It is claimed that the SEA for the GRID25 plan was not considered by An Bord Pleanála in its assessment of the project at issue in this Communication, in combination with the fact that no SEA was conducted for the Gate 3 windfarms infrastructure or the Greenwire windfarms – so that the information on the significant impacts was incomplete and missing, undermining any assessment carried out by An Bord Pleanála.

Article 9.4 It is asserted that judicial review is not an adequate or effective remedy because:

(i) it has a high threshold for those seeking permission ("leave") from the Court to challenge a decision
(ii) even covering one's own costs (estimated by the Communicant at approximately €50,000) is prohibitively expensive
(iii) risk of the court ordering that costs of other parties be paid by an applicant seeking to challenge a decision (which in this case is now asserted as the reason why an appeal was not pursued)

(iv) the scope of review is legalistic and not clearly set out for the public who face well-resourced and experienced state legal teams
(v) the State funds judicial review training for wind developers, whereas no such training is available for small communities who are left to learn about the process and prepare legal documents alongside other busy life commitments
(vi) there is no mechanism to effectively prevent a case being transferred to the commercial court which, it is asserted, places additional pressure on applicants
(vii) the Court will take a narrow view on the grounds for the legal challenge
(viii) the burden of proof is on the applicant
(ix) if an applicant seeks to change the grounds for the legal challenge they may open up further, the possibility of costs being awarded against them
(x) a losing applicant wishing to appeal must request permission from the same Judge who ruled against them in the substantive case

In addition to the above alleged breaches, more generalised complaints are made as follows:

At page 3: it is asserted that the pre-consultation process between the decision making body and the developer as provided for under the relevant national legislation does not allow for public participation, in breach of **Article 6**

At page 3: it is claimed that the national legislation in respect of strategic infrastructure projects removes a level of review at the local planning authority stage, which is afforded to members of the public in other planning applications, in breach of **Article 9**

At page 3: it is also asserted that the same national legislation provides that the only means of challenging a strategic infrastructure development is by means of judicial review in the High Court which involves a high threshold in order to be granted permission ("leave") by the Court to pursue the court challenge, in beach of Article 9

The Communicant seeks various remedies against Ireland in respect of a planning permission granted for a specific case - the Laois-Kilkenny Reinforcement Project. The RTS Substation Action Group seeks the following urgent effective remedies:

(a) The flawed planning permission should be immediately revoked entirely, or
(b) Injunctive relief should be granted immediately 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.

These are stated to be required on an urgent basis as construction work is due to start imminently, however it should be noted construction of the development has not commenced and is unlikely to commence before 2017.

As the Communication is so wide-ranging, Ireland is setting out the complaints in a more structured manner below, for the ease of use for the Committee and in the interests of clarity.

B. ADMISSIBILITY OF THE WITHIN COMMUNICATION AND SCOPE OF THE CONVENTION

3. Pursuant to paragraph 9 of the Committee's Preliminary determination of admissibility dated 18th December 2015, Ireland takes the opportunity in this response to deal with both the admissibility of the within Communication and its substance, having furnished brief general observations on preliminary admissibility by emailed communication dated 15th December 2015.

4. Firstly, it is submitted that there are aspects of the complaints made that it is submitted the Committee does not have jurisdiction to consider, for example the Gate 3 decision refers to a process which took place in 2008, when Ireland was not a Party to the Convention within the meaning of Article 2 of the Convention. The Convention imposes prospective obligations only.

5. Secondly, there are aspects of the complaints made which are not relevant to the subject matter of the Convention, thereby falling outside its remit, for example compliance by the Party Concerned with the SEA Directive or the EIA Directive.

6. Thirdly, the seeking of reliefs from the Committee, such as injunctive relief to prevent construction, does not come within the scope of the Convention and therefore the Communication is manifestly unreasonable and in breach of paragraph 20 of Decision I/7. The Committee does not possess the power to make such an order.

7. Further, the facts do not ground some of the complaints made, so that the Communicant is lacking the necessary factual nexus to make such complaints. For example, this is true in relation to the complaint regarding the threshold imposed in order for an applicant to be able to obtain permission ("leave") from the national Court to challenge a decision (see paragraph 76 for further detail on the national Court procedures). The fact is that the Communicant sought leave from the national Court to challenge the decision at issue, and was granted such leave to pursue that challenge, and in fact did so.

8. For these reasons Ireland respectfully submits that aspects of the Communication are an abuse of the right to make a communication and are manifestly unreasonable.

9. Paragraph 21 of the Annex to Decision I/7 imposes a requirement upon communicants to exhaust domestic remedies unless the remedy is unreasonably prolonged, or obviously ineffective or insufficient as a means of redress. The provision does not impose any strict requirement that all domestic remedies must be exhausted; however, failure to make use of available domestic remedies might be grounds for the Committee to determine that the matter should be pursued at the level of domestic procedures rather than through the Compliance mechanism.

10. In the present case the Communicant has not exhausted all available domestic remedies. The Communicant has gone before the Irish courts by way of judicial review, was unsuccessful in January 2015, brought an application for permission to appeal, but on Wednesday 28th January 2015 withdrew the application, of its own volition, thereby not exhausting all domestic remedies.

11. In addition, the Communicant seeks to complain on the basis of alleged breaches of European Union Law and of human rights - it is claimed that *"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."* Ireland would respectfully say that matters relating to European Union law and other international treaties are clearly issues outside the scope of the Convention and further the Communicant's claims in this regard are unspecified and unclear. Therefore this Communication involves an abuse of the right to make such Communications under paragraph 20(b) of Decision I/7, and/or is manifestly unreasonable under paragraph 20(c), and/or is incompatible with the provisions of that Decision and/or with the Convention under paragraph 20(d). In that regard, the Committee does not possess the power to make such an Order or otherwise provide a relief of this kind. Jurisdiction to make such orders and/or award relief of the type sought is reserved to the domestic legal process, and by extension, the CJEU, which were not pursued. In effect the Communicant seeks to raise matters before the Committee which the Committee does not have jurisdiction to determine and thereby seeks to circumvent the domestic procedures and remedies (the domestic courts having refused the relief sought).

12. On the basis of the Communicant's failure to comply with paragraphs 20 and 21 of decision I/7, Ireland respectfully requests the Compliance Committee to find the present Communication inadmissible in its entirety or in part.

C. PLANNING HISTORY IN THIS CASE

13. This communication relates, among other things, to the approval granted by An Bord Pleanála (**the Board**)[1] to the Laois-Kilkenny Reinforcement Project on foot of an application by EirGrid. The application was made to the Board under Section 182A of the Planning and Development Act 2000 (**the 2000 Act**), which was inserted into that Act by section 4 of the Planning and Development (Strategic Infrastructure) Act 2006 (**the 2006 Act**) and subsequently amended. Sections 182A, 182B and 182E of the 2000 Act, as amended, set down a procedure for the approval of development comprising or for the purposes of electricity infrastructure that is separate from, but analogous to, the general procedure established under the 2006 Act for strategic infrastructure development. Under Section 182A, the application is made directly to the Board, i.e. the application is not made to the planning authority in the first instance. Pre-application consultation with the Board is provided for under Section 182E of the Act and, under Section 182B, the Board may direct the payment by the applicant of such costs as the Board "in its absolute discretion considers to be reasonable costs" to persons as a contribution to the cost of their participation in the process. The Board's decision on a

[1] An Bord Pleanála is the national planning appeals board

development application may be challenged by way of judicial review (as outlined in the communication) under Section 50 of the 2000 Act.

14. The Board is an independent decision–maker in planning and development matters, established by Statute. The Board carries out its functions independently and without reference to or direction from the State. Ireland therefore had no direct involvement in relation to the approval application or the subsequent judicial review but, to the extent that such matters are raised in this Communication against Ireland, the State will seek to address the issues. Ireland understands that the Board held 4 pre-application consultation meetings with EirGrid in relation to this project over the period August 2009 to October 2012. Records of these meetings were published on the Board's website following the conclusion of the consultations: see http://www.pleanala.ie/casenum/VC0035.htm.

15. EirGrid applied to the Board on 25th January 2013 for approval for the project. On 29th April 2013, the Board requested EirGrid, under Section 182A(5)(a) of the 2000 Act, to submit an environmental impact statement for the proposed development. This report was received by the Board on 18th August 2013. An oral hearing in relation to the proposed development was held over 6 days in Portlaoise in November 2013. The Communicant was the main third party group participating in the application process including at the oral hearing, and made numerous submissions to the Board's inspector, which are set out in the Inspector's Report which is publicly available, and engaged in detailed cross-questioning with EirGrid as applicant on a range of issues arising. The Board approved the proposed development under Section 182B of the 2000 Act, subject to 11 conditions, on 23rd April 2014. The Board also decided on that date, in accordance with Section 182B(5A) and (5B), that no monies should be paid by the applicant to the Communicant as a contribution to their costs incurred during the course of consideration of the application. See http://www.pleanala.ie/casenum/VA0015.htm.

16. The Communicant and Environmental Action Alliance Ireland sought, by way of judicial review, a Court order of certiorari quashing the Board's decision to approve the proposed development [2014 No. 340 J. R.]. Mr Justice Haughton, in a judgment delivered on 14th January 2015[2], found that the applicants had not succeeded in any of the grounds in respect of which leave was granted and dismissed the proceedings with no Order as to costs against any of the parties to the application.

D. GENERAL PLANNING-RELATED COMPLAINTS

> **Page 3:** ***"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... 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… A clear breach of public participation Article 6."***

[2] See **Appendix 1** attached – copy judgment of Mr Justice Haughton, 14 January 2015

17. It must be recognised that the pre-application consultation procedure under Section 182E of the 2000 Act is not a process of deciding on whether to permit a proposed activity, within the meaning of Article 6 of the Aarhus Convention. As the section states, its purpose is to enable the Board to give advice to the prospective applicant regarding the proposed application and in particular, regarding the procedure involved in making the application and what considerations related to proper planning and sustainable development or the environment may, in the opinion of the Board, have a bearing on its decision in relation to the application.

18. In **Callaghan v An Bord Pleanála and others**, where a similar challenge of an alleged lack of public participation was made against the pre-application consultation procedures in that case Costelloe J had this to say[3]:

"82. Simply because the national procedure commences with a pre-application procedure, it does not follow that the procedure required by the Directive to exist in national law has to commence at this point. It is clear from *Križan* that the public participation right mandated by the Directive must afford the public merely an effective participation in the procedure when all options and solutions are possible. In *R(Wells)* it was held that the EIA must in principle be carried out as soon as it is possible to identify and assess all the effects which the project may have on the environment. This cannot be done before the application for planning permission has been submitted even if the public was entitled to participate at the pre-application stage. These cases do not lead to the conclusion that the Directive must be interpreted as precluding a member state from engaging with any issues which touch upon or concern the EIA at a stage in the statutory scheme from which the public is excluded as was argued by the applicant.

83. In fact in the case of C-431/92 *Commission v. Germany* it was held by the ECJ that the public participation provisions of the Directive apply from the date when the application for consent is formally lodged and not sooner. On the facts the ECJ rejected an argument that the preliminary consultations preceding the formal application for consent were a significant part of the consent procedure and therefore the Directive would have applied to the preliminary consultation. The Court held as follows:-

> *"30 The German Government argues, however, that the formal application for consent of 26 July 1988, accompanied by the complete file on the project, had been preceded by a preliminary stage which was a significant part of the consent procedure. During that preliminary stage, which was initiated on 18 May 1987, the competent authority was to advise the developer on the content and lodging of the application for consent. A series of meetings took place at which specialist departments were also represented. In addition the project is said to have been notified on 7 March 1988 to the competent authority in accordance with the Landesplanungsgesetz (Law of the Land of Hesse on planning).*
>
> *31 That argument cannot be accepted.*
>
> *32 Informal contacts and meetings between the competent authority and the developer, even relating to the content a proposal to lodge an application for consent for a project, cannot be treated for the purposes of applying the directive as a definite indication of the date on which the procedure was initiated. The date when the application for consent was*

[3] [2015] IEHC 357 paragraphs 82 to 84

formally lodged thus constitutes the sole criterion which may be used. Such criterion accords with the principle of legal certainty and is designed to safeguard the effectiveness of the directive. The Court moreover followed this approach in Bund Naturschutz, cited above (paragraph 16).

33 The consent procedure for the project at issue must accordingly be regarded as having been initiated after the deadline of 3 July 1998, with the result that the project was required to undergo an assessment of its effects on the environment in accordance with a directive."

84. Therefore, applying this analysis, as I am obliged to do, to the facts in this case, the public participation provisions of the Directive were not triggered until the formal application for development consent was submitted in October, 2014, notwithstanding the fact that there were pre-application consultations with the prospective applicant. It follows that they do not apply to the pre-application procedure, even where that procedure involves extensive consultation with and the giving of advice to the developer on the content and lodging of the application for consent. Thus all of the applicant's arguments predicated upon the submission that the requirements of the Directive applied to the pre-application procedure must be rejected."

19. Section 182E(5) of the 2000 Act provides that neither (a) the holding of consultations under subsection (1), nor (b) the provision of an opinion under Subsection (3), shall prejudice the performance by the Board of any other of its functions under this Act or regulations under this Act, or any other enactment and cannot be relied upon in the formal planning process or in legal proceedings. The practical effects of this enactment can be seen in the fact that, in the pre-application consultation procedure, the Board indicated that an environmental impact statement (EIS) appeared to be unnecessary for the subject development, whereas in the course of its substantive consideration of the proposed development application - which was open to extensive public participation – the Board requested the developer to submit an EIS in order to enable the Board to carry out an environmental impact assessment of the overall development.

Page 3: "*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 Bórd Pleanala meaning that the more significant projects had less opportunity for checking or challenges... There is also a €50 fee for making such a submission to the Bord... Breach of Access to a review procedure article 9."*

20. While the right to appeal a decision by a planning authority on a planning application to the Board is the norm in Ireland, it is not a European or constitutional requirement, and neither is it a requirement under the Aarhus Convention. The issue is whether public participation is available prior to a decision being made and this is the case under the procedure for considering applications for a SID, including major electricity infrastructure. Under the statutory procedure, before the developer for such a project applies directly to the Board for approval for a project, it must publish in one or more local newspapers a notice that, among other things, invites the making of submissions or

observations to the Board in respect of the proposed development[4] (this was done in the case of the Laois-Kilkenny Reinforcement Project). A copy of all application documentation including environmental impact statement and natura impact statement are made available for inspection free of charge or can be copied for a fee not exceeding the reasonable cost of making a copy[5]. Where the Board receives, on request from the developer, significant additional data in relation to the proposed development, the developer must also publish in one or more local newspapers a notice that, among other things, invites the making of submissions or observations to the Board in respect of that additional information[6] (this was done in the case of the Laois-Kilkenny Reinforcement Project). The Board, in its absolute discretion, may hold an oral hearing as part of its consideration of the application[7] and must consider any submissions or observations made to it before making a decision in respect of the proposed development. As referred to above, the €50 fee for making a submission or observation to the Board in respect of an SID is the same as for making a submission or observation on a standard planning appeal.

21. Development coming within the scope of section 182A is in the nature of strategic infrastructure development (SID). There is an assumption of an oral hearing, which is not the case with other what might be classified as "normal" (Section 34) planning applications. The Planning Authority is a key "Prescribed Body" to the application and their submissions are prepared to the same level of scrutiny and detail as occurs for a normal application and this informs the An Bord Pleanála decision (along with those submissions from other Prescribed Bodies and members of the public). Regarding the reference to applicable fees, it is a one-off €50 fee. Therefore, the Communicant's contention that there has been a breach of access to a review procedure on the basis of these fees is entirely without merit.

22. It is important to stress that the Communicant had at its disposal a full review process. It applied for and obtained leave for a judicial review of the planning decision. The application for Judicial Review was unsuccessful and it is submitted that a claim that there was a breach of access contrary to the Convention is misplaced and incorrect.

E. THE SPECIFIC CASE – THE LAOIS KILKENNY REINFORCEMENT PROJECT

Pages 6-8: *Lack of public participation prior to SID application*

23. At paragraph 3 on page 7 the Communicant states *"The substation has a 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"*. The Complainant makes further observations regarding lack of participation at paragraphs 4, 5, 6, 10, 11, 12, 13, and 14.

24. It is important to note that the Board's inspector included in his report to the Board dated 31st January 2014 a summary chart of the public consultation process over the period 2009 to 2012, as set out at pages 55 and 56 of the applicant's planning report.

[4] Section 182A (4)
[5] Section 182A (4)
[6] Section 182A (7) and (8)
[7] Section 134A

This involved 5 sets of newspaper notices, 3 sets of open days spanning 10 days, and information clinics spanning 6 days. It should be noted that this consultation process was undertaken by EirGrid as non-statutory pre-application consultation, and that this informed the development of the project, including its nature, location and extent. Specifically, consultation was undertaken at key milestones in the development of the project – from the early stages of considering options, to specific siting and routing of the proposal. This was separate to the statutory period of public consultation carried out by the Board (7 weeks for the making of submissions to the Board in respect of the application), and also including the subsequent oral hearing conducted by the Board. Moreover, applications for Strategic Infrastructure Development such as in this case must include the creation of an application-specific website[8] to facilitate public participation in the decision-making process.

Pages 14-17: ***It is asserted the permitting for the Substation should have been subjected to public participation under Article 6 of the Convention. It is also suggested that an Appropriate Assessment under the Habitats Directive was required***

25. All details of the project were fully disclosed and engagement with the public on the project was significant. The substation development was the subject of an SID application directly to the Board, which decided to hold an oral hearing in respect of same. The RTS Action Group presented their issues and concerns to the Board both in written submissions, and at the oral hearing. The Board's decision-making/application process fully satisfies the "public participation in environmental decision-making" requirements under the provisions of Article 6 of the Convention. Full public participation occurred in this case as evidenced by the significant public consultation as identified above, and which was specifically noted and addressed by the Board inspector in his report to the Board.

26. The Board, as the competent authority, approved the proposed development. In reaching its decision it fulfilled all Appropriate Assessment (**AA**) requirements in respect of the proposed development under domestic and EU law, having regard to a Natura Impact Statement (**NIS**) submitted by EirGrid with the application for approval. Its decision was the subject of a Judicial Review case by the Communicant to the Irish High Court. Following a full hearing at which both sides were legally represented, the Court ruled in favour of the Board, and this ruling was not appealed by the Communicant to the final stage in the Irish courts.

27. The Board completed a screening exercise for appropriate assessment of the impacts of the proposed development on 3 European sites and concluded that the proposed development, in itself or in combination with other plans or projects, would not be likely to have a significant effect on these sites. The Board completed an appropriate assessment of the potential impacts of the proposed development on the River Barrow and River Nore Special Area of Conservation. The Board concluded that, subject to the implementation of the identified mitigation measures, the proposed development, in itself or in combination with other plans or projects, would not adversely affect the integrity of this area, in view of the conservation objectives for the site.

[8] http://www.eirgridlaoiskilkenny.ie

Page 15: Early and effective public participation – Article 6.4 - *It is asserted that no SEA was carried out in relation to the decision to favour wind energy over other forms of electricity…. And no public participation…. and that this "plan" sets the framework for the development of wind farms etc.*

28. Ireland has made no "decision" or "plan" to favour wind over other forms of electricity generation. Government policy commits Ireland to achieving its binding EU targets through, inter alia, achieving 40% of electricity demand from renewable sources of energy (this could include all sources e.g., wind, biomass, hydro, ocean, etc.). Accordingly, no "plan" sets the framework for the development of wind farms, and an SEA was not required. The dominance of wind energy is market driven.

29. It is also recalled that the Commission for Energy Regulation's Direction in relation to Gate 3 is not a plan or programme under the SEA Directive and an SEA was not required. This Gate 3 Direction does not set the development framework for the development of future wind farms - applications are driven by investment decisions of project developers. In any event, this Direction was subject to public consultation before being finalised in 2008, which predates the ratification by Ireland of the Convention.

Page 15: *the substation would provide a "massive amount of unexplained capacity" to facilitate this plan; that no options were open to the public when they were notified of the project; that the substation would itself set the framework for future development.*

30. Details of the project were fully disclosed and engagement with the public on the project was significant. In particular, the statutory process clearly involved the provision to the public of the full details of the proposed development by way of public notice. These were also set out in the other application documents which were available to the public.

31. It would not be unusual with projects of this sort to seek to future proof a development as much as possible, (i.e. to allow for future development in the event that same is permitted; following submission to all the usual processes – planning permission, EIA etc.) given the significant capital expenditure involved in this type of infrastructure development, and provide for potential additional generation capacity in the longer-term, beyond any currently committed or contracted generation. Substations are an integral part of any transmission system. Substations function to improve the quality of supply and security of supply to a given region. The primary purpose of substations is to allow different circuits (lines) to be connected, isolated for fault clearance or maintenance purposes. They also facilitate the connection of existing generation and demand customers in a particular location and enable future growth should the need materialise and should the planning authorities permit such further development. The issue of future-proofing in the design of the proposed substation was specifically raised by the Communicant at the oral hearing before the Board, and was addressed by EirGrid as applicant, as part of a lengthy discussion of the issue, clearly to the satisfaction of the Board. Its remit under the legislation in determining strategic infrastructure applications includes, inter alia, consideration of the likely consequences for "proper planning and sustainable development" in the area in which it is proposed to situate the proposed development of such development. The High Court upheld the Board's decision to grant the EirGrid application.

32. It is clear that options for public participation were open to the public when they were notified of this project, both during the lengthy pre-application phase from 2009-2013 as recorded in EirGrid's application documents and in the Inspector's Report, and also during the statutory planning process. The options included participation in the planning decision making process before the Board and the option of a judicial review before the Irish courts, as set out above. **It must be noted that the Communicant availed of all these public participation opportunities during the development and decision-making in respect of the Laois-Kilkenny Reinforcement Project; it is therefore unclear why the Communicant now argues that these opportunities were somehow not available to the Group.**

33. The assertion that the EirGrid substation project would of itself set a framework for future development is not accepted. EirGrid is the national electricity Transmission System Operator (TSO), whose statutory role and obligations under Article 8 of the European Communities (Internal Market in Energy) Regulations 2000 (SI 445/2000 – available at http://www.irishstatutebook.ie/eli/2000/si/445) include operating and ensuring the maintenance of, and if necessary developing, a safe, secure, reliable, economical and efficient electricity transmission system in all cases with a view to ensuring that all reasonable demands for electricity are met and having due regard for the environment. In pursuit of these obligations, EirGrid proposed a reinforcement of the existing national electricity grid in the Laois/Kilkenny area. This project proposal was approved by the independent State planning authority, following a process of public participation in decision-making. However, the project itself does not set any framework for future development.

> **Page 10, paragraph 26 states** ***"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,…"***

34. The Board's decision on the proposed development indicated that it considered the report of its inspector which assessed its impacts on, among other things, drinking water and on the underlying aquifer. The Board completed an environmental impact assessment and concluded that the proposed development would not be likely to have significant adverse effects on the environment. The High Court subsequently dismissed the complainant's second ground for challenging the Board's decision, viz. "*The [Board] failed to carry out, and record, proper environmental impact assessment contrary to national and European law. In particular, the respondent failed to properly assess the cumulative impacts of the development and the implications of the development for human health.*"

35. The Board's decision on the proposed development indicates that the Board completed a screening exercise for appropriate assessment of the impacts of the proposed development on 3 European sites and concluded that the proposed development, in itself or in combination with other plans or projects, would not be likely to have a significant effect on these sites. The Board completed an appropriate assessment of the potential impacts of the proposed development on the River Barrow and River Nore Special Area of Conservation. The Board concluded that, subject to the implementation of the identified mitigation measures, the proposed development, in itself or in

combination with other plans or projects, would not adversely affect the integrity of this area, in view of the conservation objectives for the site. The High Court subsequently dismissed the complainant's fourth ground for challenging the Board's decision, viz. rejecting the Applicant's claim that "*The [Board] failed to carry out a proper appropriate assessment contrary to national and European law contrary to Article 6 of the Habitats Directive 92/43/EEC.*" Therefore, it is clear that all impacts of this project were fully considered.

36. Any future projects that might avail of this particular infrastructure will have to undergo their own development consent applications and their own assessments including public participation. Such assessment will have to include any cumulative effects of those projects with any then existing developments, including this particular project. Risks to the aquifer, if any, will thereby continue to be monitored and assessed with the benefit of all necessary public participation.

F. PUBLIC PARTICIPATION: ACCESS TO ALL INFORMATION – ARTICLE 6.6

> **Page 16:** ***the description of the whole project was never disclosed; that the Board's assessment of the project was flawed/undermined and the scoping of EIS was inadequate because other assessments were not carried out (no SEA for "Gate 3 wind-farms" or "Greenwire" and no AA under Habitats Directive); and accordingly, The Board was not in a position to provide the information required under Article 6.6.***

37. All details of the project were fully disclosed, and most specifically by way of a statutory public notice of the making of the planning application. Prior to this, during the evolution of the project, EirGrid undertook significant pre-application public consultation in different defined "Stages", where the amount of detail known at a particular point in the development of the project was set out for consultation and engagement with stakeholders including the general public. Details of the activities, including public consultation carried out in the pre-application stage were included within the application particulars submitted to the Board to inform its decision-making. Overall, it is considered that engagement with the public on the project was significant both in the pre-application stage, and in the application stage in which the Board actively facilitated the making of both written and oral submissions in respect of the proposal. We stated before that the Communicant participated extensively in all these opportunities for public participation. If and when they arise, further information regarding future planned projects would also be made publicly available at the relevant time, in the context of EirGrid's annual Transmission Development Plans (**TDPs**). These plans set out planned network development projects over the subsequent ten year period, and are publicly available on EirGrid's website www.EirGrid.ie. EirGrid has both statutory and licence obligations to produce a TDP annually, and draft plans are subject to public consultation before submission to the Commission for Energy Regulation for approval.

38. The Board decided that an environmental impact assessment (**EIA**) was required, having regard to the report of its inspector which addressed this issue, and to a screening for EIA report submitted with the application for approval, and following adherence to this process the consent of the Board was granted. When the Communicant challenged this consent, the High Court upheld the Board's decision to grant the EirGrid application. We have noted previously that an AA was carried out by the Board in making its decision

in respect of the proposed development. There is no "plan or programme" for "Gate 3 wind-farms" – these are quite simply wind-farms that have been provided with an offer to connect to the grid under the Gate Group Processing process; as there is no "plan" or "programme", no SEA is required. "Greenwire" was a proposal for a project (no longer being developed) for export of renewable energy directly to the UK without accessing the transmission grid (and is therefore not relevant in the context of the Laois-Kilkenny Reinforcement Substation). It was never the subject of a project proposal, and in any event as a project in itself, it was not a "plan or programme" requiring SEA.

> **Page 13 (entry in the table dated 29th April 2013): where it references that the Board made a decision that an EIS was required as part of the planning application for the Laois-Kilkenny reinforcement project noting that it stemmed from the GRID25 plan,: *the Communicant states "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***

39. We address later in this Response (paragraphs 46 - 49) the facts above that the wind farms granted a connection under Gate3 and the Greenwire connection to the UK bypassing the transmission system, are projects, but are not part of any "plan or programme". As addressed further below, the Laois-Kilkenny project is specifically referenced in EirGrid's strategic environment assessment (**SEA**) for its Grid25 Implementation Programme 2011-2016. It is important to note the extent to which EIA must consider the likely environmental effects of possible future projects, in addition to the cumulative likely environmental effects of the proposed projects and existing and approved projects. Annex IV of the EIA Directive requires "a description of the likely significant effects (including direct, indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative) of the proposed development on the environment…". Annex III, which sets out selection criteria for determining whether Annex II projects should be subject to an EIA, specifies that the characteristics of proposed development must be considered having regard, in particular, to "the cumulation with other projects". 2009 European Commission guidance on "The Assessment of Indirect and Cumulative Impacts as well as Impact Interactions within the Environmental Impact Assessment (EIA) process" defined 'Cumulative Impacts' as "Impacts that result from incremental changes caused by other past, present or reasonably foreseeable actions together with the project." The report of An Bord Pleanála's inspector noted (page 112 and 113) that there were no permitted wind farm developments in the vicinity of the proposed development and considered that it would be unreasonable that theoretical developments (i.e. proposed development where the necessary permissions had not yet been granted) would be factored in to consideration of the proposed development. The High Court judgment on the subsequent Judicial Review application referred to the 'helpful' *Sloane* decision (paragraph 94) and accepted that the Board was not required to consider possible wind farms for which planning permission had yet to be obtained (paragraph 96) and found that the applicants' complaint that there was no proper EIA in respect of potential wind farms in the region was not well grounded (paragraph 97).

Page 16: ***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***

40. Further, we have previously pointed out that the full extent of the proposed development is set out in a public notice of the application for approval and the planning application documentation which was made available for inspection and consultation by members of the public. The report of the Board's inspector confirmed (page 70) that "*The EIS contains the information which it is required to contain under Article 94 of the Planning and Development Regulations, 2001*." The Board's Determination of the application noted (page 2) that the Board was "*satisfied that the information available on file is adequate to allow an environmental impact assessment and appropriate assessment to be completed.*" It should be noted that any future projects in the area will need to go through the development consent process and thus any relevant EIA and AA process and public participation process.

Page 16: ***Also, the information requested for the EIS did not comply with the new 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.***

41. In fulfilment of the requirements of Article 5 of, and Annex IV to, the EIA Directive 2011/92/EU, the Planning and Development Regulations 2001 to 2015 specify in Article 94 and Schedule 6 the information to be included in an environmental impact statement. Any imputation that Article 94 and Schedule 6 of the Planning Regulations do not fully transpose into Irish law the requirements of Article 5 of, and Annex IV to, the EIA Directive 2011/92/EU is rejected. The key issue is that the Board, as competent authority for EIA, found the EIS submitted as part of the application to be adequate, and facilitated it in carrying out an EIA.

42. On page 17, the Communicant states that significant and basic information relevant to the project was missing at the outset of the process for the Laois-Kilkenny Reinforcement project, basing this allegation on an assertion that the EIS and Appropriate Assessment were not satisfactory, and that therefore there is non-compliance with Article 6.6. However, irrespective of the EIS / AA process, which it is asserted was fully adequate; the relevant information on the Laois-Kilkenny Reinforcement project has been made available to the public at www.Eirgrid.com

G. SEA ISSUES

Pages 8/9: ***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 its consideration***

43. In passing, it has to be observed that the Committee does not have jurisdiction in respect of the implementation of, or compliance with EU law, the SEA Directive, the EIA Directive or the Habitats Directive. Nevertheless for the assistance of the Committee and the Complainant we will proceed to deal with the matters raised in this and following sections.

44. Under the Planning and Development Act 2000, the Board's remit relates to the assessment of projects, including application of the EIA Directive in appropriate cases, and not the assessment of plans and programmes under the SEA Directive. In this connection, the Board is not listed as one of the environmental authorities to which SEA competent authorities must give notice of their intention to make a plan which is subject to SEA.

45. The EIA Directive does not require that a body carrying out EIA for a project must consider SEAs conducted in respect of plans or programmes relevant to that project. Rather, it is the SEA Directive (European Union Directive 2001/42/EC "on the assessment of certain plans and programmes on the environment") that places an obligation on Member States to require SEA for certain plans and programmes. An SEA was carried out by EirGrid in respect of its Grid25 Implementation Programme 2011-2016 (wherein as we have noted, the planned Laois-Kilkenny Reinforcement Project is specifically referenced). This matter was taken into consideration by the inspector in his report to the Board.[9]

> **Page 14:** ***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.***

46. This aspect of the Communication is fundamentally misconceived. In the first instance, the Greenwire development is a project and not a plan. Without prejudice to this, it is not the case that the SEA Directive applies equally to private plans and programmes (i.e. plans and programmes developed by private individuals, companies or entities). Article 2 of the SEA Directive states that, for the purposes of that Directive:

> "*'plans and programmes' shall mean plans and programmes, including those co-financed by the European Community, as well as any modifications to them:*
> — *which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and*
> — *which are required by legislative, regulatory or administrative provisions*;".

47. Even though not expressly stipulated by the Convention, it seems common ground that article 7 relates to plans, programmes and policies prepared by public authorities and not to those of private persons – many private individuals, companies or other entities prepare plans, programmes or policies "relating to the environment", and these are not within the scope of the Convention. This is in keeping with the general approach of the Convention, which addresses its obligations to the Parties themselves and not to private individuals[10]. An indirect indication to support this view of Article 7 is the requirement that the "public which may participate shall be identified by the relevant public authority".

48. Having regard to the above, it would appear that the Greenwire project, even if considered (incorrectly in our view) to be a plan, it is not a plan of/for a public authority by reference

[9] The Board also took into account the county development plan which sets out planning policy for that planning authority area which plan is revised every five years and which is subjected to an SEA on each revision.
[10] See The Aarhus Convention Implementation Guide page 173.

to Article 2 of the SEA Directive. Such a project does not require SEA and does not come within the scope of the Convention. Similarly, with regard to dissemination of information obligations under Article 5(1)(a), as the Greenwire project was not a public plan, there is no requirement on the developer to provide information under the Aarhus Convention.

49. The SEA requirements are observed once a private developer wants to implement its project. In this instance, for example, Greenwire proposals for individual wind farm projects would have required planning permission, including - depending on their extent – either mandatory EIA or determination as to whether the proposals would be likely to have significant effects on the environment and consequently require EIA. The Greenwire project is no longer a live project and therefore compliance with any EIA/SEA requirements simply does not arise.

> **Page 14:** ***It is asserted that the CER does not possess an SEA for its Gate 3 decision to satisfy "Ireland's target of 40% renewable electricity primarily from wind generation"; and that the individual "projects from this plan" are proceeding through the planning process seemingly without any state authority looking for the SEA.***

50. This assertion by the Communicant is incorrect and mistaken. The CER Direction to System Operators on Criteria for Gate 3 Renewable Generator Offers & Related Matters (CER/08/260, here referred to as "**the Gate 3 decision**") is not a "plan" or a "programme" in the meaning of Article 2, SEA Directive, does not set the framework for development consent and therefore does not require a SEA.

51. Under Section 34 the Electricity Regulation Act 1999, System Operators are required to issue a connection offer to anyone applying for a connection to the transmission or distribution system. Applications for connection are driven by investment decisions of project developers. System Operators process these applications and issue connection offers subject to terms and conditions specified by the CER in its Directions to the System Operators. According to these terms and conditions, System Operators have so far issued offers to renewable generators in 3 consecutive batches - known as "Gates".

52. As is the case with all Directions issued by CER, the Gate 3 decision was subject to public consultation before being finalised and published in December 2008. This was prior to Ireland ratifying the Convention.

53. Thus, the CER Gate 3 decision is not a plan or a programme for the purposes of the SEA Directive, and accordingly, it is incorrect to suggest that individual projects "from this plan" are proceeding "without any state authority looking for the SEA". Individual projects are based on commercial investment decisions by project developers, and their applications for connection are then processed by the System Operators in line with the CER's terms and conditions. Developers with a gate offer cannot proceed to construct the development without first obtaining a development consent under the planning and development process. Moreover, the planning process does not require an SEA for individual projects. The relevant level of assessment for individual projects is an EIA. It is therefore incorrect for Communicant to assert that an SEA should have been carried out.

54. Without prejudice to the above, information in regard to Gate 3 is available at www.cer.ie, meeting requirements under Article 5(1)(a).

Page 14: ***It is asserted that EirGrid has never published an SEA for the entirety of the GRID25 plan, with a SEA only undertaken by EirGrid for the GRID25 Implementation Programme from 2011-2016 i.e. the first phase only. It is asserted that this leaves an information gap (Page 14) and "the public affected are entitled to know what the current plans are for future developments connecting to this substation.***

55. Grid25, EirGrid's strategy for the development of the National Grid, is a high level (grid design) strategy rather than a plan or programme in the context of the Aarhus Convention; and would be subject to change depending on economic conditions. An SEA was not required for this high-level strategy document. Nevertheless, with regard to the dissemination of information obligations under Article 5(1)(a) in respect of the GRID 25, information is available at www.Eirgrid.com

56. Ireland is committed to observing its obligations under the Convention when they arise. Where specific actions outlined in the GRID25 strategy are to be implemented, as with the GRID25 Implementation Programme 2011-2016, an SEA was carried out. This included national public consultation on the draft programme and SEA, advertised through national newspapers, and facilitated by online provision of the draft documents. The review and drafting process for the subsequent implementation plan and SEA, has commenced in this the final year of the current plan's lifespan (5 years up to April 2017), in order to be finalised by April 2017.

57. The content of these documents (the Implementation Programme and SEA) will be subject to ongoing review and update over the lifetime of the Grid25 strategy, and all subsequent updated strategies. The SEA will also cover EirGrid's annual Transmission Development Plans (**TDPs**) by way of an accompanying Environmental Appraisal Report which confirms how the TDP meets the provisions of the SEA. These plans set out planned network development projects over a 10 year period. EirGrid has both statutory and licence obligations to produce a TDP annually, and draft plans are made publicly available and are subject to public consultation before submission to the CER for approval.

H. ACCESS TO JUSTICE – ALLEGED NON-COMPLIANCE WITH ARTICLE 9.4

Specific Complaints by the Communicant in relation to costs

Page 9, paragraph 20: ***Cost protection in environmental cases is weak and discretionary***

58. The Aarhus Convention envisages the charging of reasonable costs (Article 3.8).

59. The Irish legal system is a common law system operating under a written Constitution and the European Union Treaties. Dispute resolution operates primarily by way of an adversarial system and not an inquisitorial system. Litigants generally obtain legal representation or assistance from legal practitioners, i.e. solicitors and barristers who represent and advocate for their interests in the courts, although litigants may represent themselves if they wish. Legal proceedings are heard and decided before constitutionally independent judges and operate within a court system provided and funded by the State.

60. In Ireland, pursuant to Order 99 of the Rules of the Superior Courts, costs are generally awarded to the successful party to proceedings: this is known as "costs following the event".

61. However, prior to its ratification of the Aarhus Convention, Ireland created a special statutory costs regime ('special costs rule') for environmental proceedings to be found in Section 50B of the 2000 Act and in Part 2 of the Environment (Miscellaneous Provisions) Act 2011 (**the 2011 Act**).

62. The special costs rules mean that, in Ireland, the costs of other parties are not imposed upon an applicant in environmental litigation save for limited exceptional circumstances as provided for in the legislation. This protects litigants in the event that they lose but does not prevent them obtaining their costs if they win. An unsuccessful applicant will bear his own legal costs if he chooses to use legal representation and if the legal representative does not agree to act on a conditional fee ("no-foal, no-fee") basis.

63. These significant changes to Ireland's legal system mean that an applicant in relevant environmental cases is very rarely obliged to pay the costs of a respondent, even if the applicant is unsuccessful. On other hand, by application of the normal costs rules, the applicant is generally entitled to his or her costs if successful. Furthermore, in cases of exceptional public importance, an unsuccessful applicant may be awarded his or her costs.

64. There is, therefore, a marked difference in treatment between applicants and respondents in respect of certain environmental matters. Respondents will normally never obtain their costs if they win - whereas applicants can litigate in the knowledge that they will normally obtain their costs if they win. If they lose they are (bar rare circumstances due to their own conduct) protected from the making of a cost award against them.

65. Consequently, save in extreme circumstances, applicants are absolved of any award against them even of the reasonable and not prohibitively expensive costs envisaged by the Convention. This is an extremely privileged position for applicants, which, it is respectfully submitted, far exceeds Ireland's obligations under the Aarhus Convention.

66. It has long been recognised that the Irish courts have an inherent jurisdiction to make a protective costs order at any stage of proceedings. However, the enactment of Section 50B of the 2000 Act and Section 3 of the 2011 Act has rendered any requirement for protective costs orders (other than under the new statutory scheme) moot in certain environmental matters.

67. Section 50B(2) of the 2000 Act provides that, subject to certain provisions that cannot be determined in advance of the legal proceedings, each party to the proceedings shall bear their own costs. The matters that may result in the costs rule not being applied are "*because the Court considers that a claim or counterclaim by the party is frivolous or vexatious… because of the manner in which the party has conducted the proceedings, or where the party is in contempt of court*". Clearly these are not arbitrary matters; they involve serious failings by a party and it is reasonable to exclude such conduct from the scope of the section.

68. Section 7 of the 2011 Act provides for a party to a case to apply at any time before or during the proceedings to the court for a determination that the costs provisions of

Section 3 of the 2011 Act apply. Although applications in advance of a hearing on the merits are not expressly provided for in Section 50B, in practice, such applications have been made and considered by the Courts. In *Callaghan v An Bord Pleanála*[11] the applicant sought an order that Section 50B of the 2000 Act applied to the proceedings. Although the order was refused, the Court and the parties (including the State which was a respondent to the proceedings) accepted that it was an application which the applicant was entitled to make.

69. Ireland's changes to the costs rules represent a radical change in the manner in which costs are applied in environmental litigation in Ireland. They go far beyond what is required by the Aarhus Convention. They facilitate and enable access to justice by both any member of the public and any NGO.

Page 10, paragraph 26: *Group bullied out of appealing*

70. Under section 50B of the 2000 Act, it is a matter for the court to determine whether costs should be awarded against a party in proceedings to which the section applies. In accordance with standard practice, each party to a case is entitled to make submissions on the rulings that the court may make in the case and to notify other parties of its intentions in this regard. It appears that the Communicant made a voluntary decision to trade off a potential costs liability for a potential right of appeal, but there is no evidence that this was other than a voluntary decision. Insofar as the Communication states that the Communicant was given three minutes to consider a proposal, if this is so, it is difficult to understand why they would not have asked the Court for an adjournment if they required any further time to consider any proposal, and it is submitted that it is highly likely that the Court would have granted any such application for adjournment if same had been made.

I. ACCESS TO JUSTICE – ALLEGED NON-COMPLIANCE WITH ARTICLE 9

COMPLAINTS REGARDING THE JUDICIAL REVIEW PROCEDURE

Page 17 – 19: *The communicant alleges that judicial review is not an adequate or effective remedy for the public to challenge decisions on environmental grounds and does not comply with article 9.4*

71. The standard procedure for review of an administrative decision is judicial review, which includes public law and private law remedies. The traditional public law remedies of certiorari (quashing), prohibition, mandamus (mandatory orders) and quo warranto (challenges to the holding of office) are available together with injunctive and declaratory relief. Specific remedies are also available under statute. The review procedure required by Article 9(2) of the Aarhus Convention is satisfied by the judicial review procedure.

72. The effectiveness of judicial review as a remedy was examined in the Case C-71/14. East Sussex County Council v Information Commissioner and Others

> "… *the Court has held that the exercise of the rights conferred by EU law is not made impossible in practice or excessively difficult merely by the fact that a procedure for the judicial review of decisions of the administrative authorities does not allow complete review of those*

[11] [2015] IEHC 618

> *decisions. However, also according to that case-law, any national judicial review procedure must none the less enable the court or tribunal hearing an application for annulment of such a decision to apply effectively the relevant principles and rules of EU law when reviewing the lawfulness of the decision (see, to that effect, judgments in Upjohn, C‑120/97, EU:C:1999:14, paragraphs 30, 35 and 36, and HLH Warenvertrieb and Orthica, C‑211/03, C‑299/03 and C‑316/03 to C‑318/03, EU:C:2005:370, paragraphs 75 to 77). Judicial review that is limited as regards the assessment of certain questions of fact is thus compatible with EU law, on condition that it enables the court or tribunal hearing an application for annulment of such a decision to apply effectively the relevant principles and rules of EU law when reviewing the lawfulness of the decision (see, to that effect, judgment in HLH Warenvertrieb and Orthica, C‑211/03, C‑299/03 and C‑316/03 to C‑318/03, EU:C:2005:370, paragraph 79).*"

73. Aine Ryall analysed this as follows:

> "*The East Sussex ruling provides valuable guidance on the standard of review that must be applied by the national courts when called on to enforce EU law. It confirms that "a complete review" of the contested decision, involving a full reassessment of questions of fact, is not necessarily required in order to comply with the principle of effective judicial protection. However, as Advocate General Sharpston put it with her characteristic clarity of expression:*
>
> > *The Member State must guarantee that the review procedure that it provides enables the reasonableness of a particular charge levied [for the supply of information] to be measured against the standard of reasonableness for such charges laid down by EU law. It is for the competent national court to interpret national law in such a way as to provide that review.*[12]"

While this is a CJEU judgment which analyses EU law as distinct from the Convention, it is submitted that the standard of judicial review recognised in that judgment also satisfies the principle of effective judicial protection under the Aarhus Convention.

> **Page 3: "*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…"***
>
> **Page 17: *Complaint that the Judicial Review Process has a high threshold for those seeking permission ("leave") from the Court to challenge a decision***

74. A judicial review, granted on substantial grounds, in respect of SID projects does provide a review procedure in line with the requirement, under Article 9(2) of the Aarhus Convention for a right of access "to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive

[12] In a paper entitled "Access to Information on the Environment: The Evolving EU and National Jurisprudence" for publication in (2016) 23 (1) Irish Planning and Environmental Law Journal.

and procedural legality of any decision….". The judicial review procedure in Ireland is not only a review of the procedural legality of decisions made by public bodies and public authorities, but judicial review also deals with the substantive legality of any such decision. Judicial review of administrative action is partly founded on the doctrine of ultra vires, whereby in the exercise of statutory powers, the public body or authority may not go beyond the limits (vires) fixed for it by the empowering statute. It also reviews for error of law, bias, breaches of fair procedures, control of discretionary powers, protection of legitimate expectations and so on. The High Court, when exercising its powers of judicial review, is primarily concerned with the legality of the decision under review rather than with the merits or substance of the decision.

75. Judicial review in the national Court involves a two stage procedure whereby an applicant must first seek and obtain the permission of the High Court to start the proceedings (known as obtaining "the leave" of the Court to bring the application). The purpose of this leave stage is to act as a screening process and "to prevent an abuse of the process, trivial or unstateable cases proceeding, and thus impeding public authorities unnecessarily"[13]. The inclusion of a threshold requirement of "substantial grounds" at the "leave" stage is a reasonable requirement to filter out frivolous or vexatious or patently unmeritorious cases, and does not involve any non-compliance with Article 9 of the Convention.

76. In this instance, the Communicant applied for the leave of the Court to challenge the decision of the Board, and was in fact deemed to have passed the "substantial grounds" threshold, and accordingly the High Court by decision of 23rd June 2014 granted the Communicant leave to move to the second stage of the Judicial Review procedure, and advance its substantive legal challenge. The Communicant therefore fully availed of the said Judicial Review procedure, was granted leave to bring its application before the court which proceeded to a full hearing. The Communicant lost its case following a substantive hearing, and elected not to appeal the matter to its conclusion.

Page 17: ***Complaint that even covering one's own costs at approximately €50,000 is prohibitively expensive***

77. As seen above in Part H of this Response, under the special costs rules, a successful applicant can be awarded costs but an unsuccessful applicant is protected and will not have to bear the costs of his or her opponents, although he or she can expect to bear their own costs if their legal representative does not agree to act on a conditional fee basis (see Appendix 2 for further detail).

78. Unlike many legal systems, the Irish courts permit individuals to represent themselves, thus potentially eliminating "own costs" altogether. Accordingly, in environmental proceedings in Ireland, own costs need never be 'prohibitive' in terms of access to justice.

79. Nothing in the Aarhus Convention prevents litigants within the Contracting Parties representing themselves as a way of reducing legal costs for litigants. Consequently, this too goes beyond the requirements of the Aarhus Convention. The choice by litigants to retain lawyers at their own cost cannot be said to constitute a prohibitive cost under Article 9(4).

[13] Denham J in G. V. DPP [1994] 1 IR 374

80. Should litigants choose to have legal representation, they need only be represented by a single solicitor, who has full rights of audience before the Irish courts at all levels. Solicitors are trained in advocacy, and many across the country have specialist knowledge of environmental law and litigation.

81. Barristers, a specialist body of court advocates, are not required to be retained at any time by a client.

82. The choice whether to retain any lawyer, and the choice as to the numbers and type of lawyers, are, therefore, entirely for each party. Furthermore the fees negotiated between a party and its legal team are a matter of private contractual relations

83. Ireland has a long-established and widespread practice of conditional fee assistance and voluntary working.

84. Details of how it is possible for a party to a case to minimise its costs are set out in Appendix 2 to this response.

Pages 9 and 17: ***risk of the court ordering that costs of other parties be paid by an applicant seeking to challenge a decision – that such costs would be prohibitive (which in this case is asserted as the reason why an appeal was not pursued)***

85. The specific costs in this case are a matter for the Board / EirGrid. The case referred to, in which the applicants withdrew their application for leave to appeal because of the alleged risk of costs, took place in January 2015. As such it would have been open to the applicants to seek a decision under Section 7 of the 2011 Act which would have established whether the applicants would have protection of the cost rules. Furthermore, as referred to in paragraph 68, while not expressly set out in legislation, the Irish courts have allowed costs determination under S50B to be determined during the course of proceedings.

Page 17: ***the scope of review is legalistic and not clearly set out for the public who face well resourced and experienced state legal teams***

86. An Bord Pleanála publishes information on judicial review and how an individual can seek to challenge a decision of the Board. See the following link: http://www.pleanala.ie/publications/2012/j_r_notice.pdf. It also refers interested persons to the citizens' information website which contains general information on judicial review. See following link: http://www.citizensinformation.ie/en/government_in_ireland/national_government/standards_and_accountability/judicial_review_public_decisions.html

87. A person seeking to litigate an environmental issue can readily obtain the assistance of a solicitor and / or, a barrister by entering into a conditional fee arrangement and thus mitigate or eliminate his exposure to legal costs.

88. Further, the special costs rules introduced by way of Section 50B of the Planning and Development Act 2000 and Part 2 of the Environment Miscellaneous Provisions Act 2011 protect applicants in environmental cases from prohibitive costs. They do not

protect respondent developers or public authorities who, by the operation of such special rules, have to bear the burden of the legal costs arising from environmental litigation.

Page 18: ***State bodies have access through public funding to legal teams***

89. The Communicant argues that EirGrid and the Board have access to public funding to take Judicial Review cases. Public authorities have limited resources and funds spent by the authorities on legal proceedings therefore reduce the funds available to discharge their statutory functions and provide services. The Aarhus Implementation Guide describes "Fair procedures require the process, including the final ruling of the decision-making body, to be impartial and free from prejudice, favouritism or self-interest. …Fair procedures must also apply equally to all persons, regardless of economic or social position, ethnicity, nationality or other such criteria (see also the commentary to article 3, paragraph 9, although fairness may also require non-discrimination with respect to other criteria, than those addressed in that provision, such as age, gender, religious affiliation, etc.)". Public bodies and agencies necessarily receive funding from the central Exchequer to carry out their statutory roles which includes responding to litigation brought against them in the courts. While the Implementation Guide does refer to "economic or social position" the Convention does not require that States provide funding to all private parties who wish to challenge any decisions or processes relating to environmental protection. Without a clear provision to this effect in the Convention, it is submitted that the Committee could not impose such a requirement.

90. As indicated above the special cost rules introduced by way of Section 50B of the Planning and Development Act 2000 and Part 2 of the Environment Miscellaneous Provisions Act 2011 protect applicants in environmental cases from prohibitive costs. They do not protect respondent developers or public authorities who by the operation of such special rules have to bear the burden of the legal costs arising from environmental litigation.

91. In addition, as also indicated above, a person seeking to litigate an environmental issue can readily obtain the assistance of a solicitor and or a barrister by entering into a conditional fee arrangement and thus mitigate or eliminate his exposure to legal costs.

Page 18: ***the State funds judicial review training for wind developers, whereas no such training is available for small communities who are left to learn about the process and prepare legal documents alongside other busy life commitments***

92. Ireland takes issue with this assertion. Annex 2 to the communication from the Communicant is an IWEA brochure for a training day. The Irish Wind Energy Association is an industry association and is not funded by the State. IWEA, however, like other organisations and companies, is entitled to avail of Skillsnet funding and training. The judicial review training in March 2015 referenced by the Communicant was funded by IWEA with support from Skillsnet. This training was advertised widely. Skillsnet was established in 1999 and is a government initiative that funds and facilitates training through training networks of private sector companies who operate in the same sector or region and have similar training needs. It is funded from the National Training Fund ("NTF") through the Department of Education and Skills.

93. It is noted that this assertion is made in the context of a complaint that no training is provided to small communities "who have to try and fit learning about and preparing legal documents in and around full-time work and family commitments". However, it appears that the Communicant was fully legally represented during its judicial review proceedings in the Irish High Court. The Communicant has annexed legal advices from junior counsel to its Communication which confirms this, and Mr Phelim O'Neill is listed on the Courts website as the solicitor on record for the Group.

Page 18: ***there is no mechanism to effectively prevent a case being transferred to the commercial court, which places additional pressure on applicants***

94. The communicant alleges that an application transferring a case to the Commercial Court[14] favours developers. If a case falls under the remit of Section 50B or the 2011 Act, the transfer of the case to the Commercial Court has no influence on this.

95. As is clear from the judgment of Mr Justice Haughton delivered in the Judicial Review case instituted by this Communicant, when Eirgrid applied to the High Court for the transfer of the case to the Commercial Court, the Communicant did not object to that transfer (paragraph 20 of the judgment).

96. Furthermore, it is difficult to see how the shorter timeframe provided by the Commercial Court could be seen as not complying with Article 9 of the Convention which expressly requires access to justice to be "timely".

Page 18: ***the Court will take a narrow view on the grounds for the legal challenge*** **see also Page 9, paragraph 23**: ***Substance of the case not dealt with in court***

97. It is open to an applicant at the leave stage to seek to challenge a decision on whatever legal grounds appear to them to be relevant.

98. At the hearing of the Group's Judicial Review application, i.e. when all of the court papers had been filed and the matter was before the court for hearing, the judge refused to allow the applicants to broaden their challenge on a number of grounds which had not been raised at the outset of the case when they sought the leave of the Court to bring their judicial review case and were not therefore the subject of the grant of leave in the case. It would also have been open to the applicant to bring a timely motion before the court prior to the hearing date to seek to broaden its challenge. This option does not seem to have been availed of. It is a fundamental requirement of all judicial review applications in Ireland that an applicant must apply for leave to bring judicial review at the outset, in order to filter out patently unmeritorious cases, and an applicant must set out clearly at the outset the grounds upon which judicial review is sought. In the absence of a timely motion to amend, it is very difficult to broaden a judicial review challenge at a later stage of the proceedings, as leave will not have been granted by the High Court on those proposed additional grounds, and there is also a serious risk of a breach of fair procedures in that the respondent will not have had the chance to put in a Statement of Opposition to any such proposed additional grounds.

[14] The Commercial Court is a division of the High Court and was established in 2004 to provide efficient and effective dispute resolution in commercial cases.

Page 18: ***the burden of proof is on the applicant***

99. As regards the burden of proof being on the applicant, this is a standard requirement of all litigation in Ireland, as in most common and civil law systems - normally the person who brings a case has the burden of proving their case, on the balance of probabilities in civil cases. There is nothing arbitrary or discriminatory in requiring the applicant to discharge this burden in a judicial review case arising out of a planning and development decision made by the Board. This is a normal requirement in most legal systems.

Page 18: ***a losing applicant wishing to appeal must request permission from the same Judge who ruled against them in the substantive case***

100. The Communicant complains that if a person loses a judicial review application and wants permission to appeal, the request for permission to appeal is made to the same judge who heard the case and ruled against the person wishing to appeal. It is claimed that this is not a fair procedure as the ruling judge has an interest in whether the ruling is appealed. It is submitted that it is incorrect to suggest that a trial judge "clearly has an interest" in whether his or her ruling is appealed. There are many examples in Irish law where the application for leave to appeal must be made to the trial judge. The basis for such provisions is that the trial judge has a detailed knowledge of the issues in the case and the extent to which an appeal against any such issue might be justified. Other areas of law where a similar approach is adopted include immigration law.

J. MISCELLANEOUS COMPLAINTS

Page 8, paragraph 15: ***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. See last page of the planning direction document. (Not fair or equitable, lack of state support/framework for effective participation).***

101. When making its decision on the proposed project, the Board, in exercise of its power under section 182B(5A) of the Planning and Development Act 2000 to direct the payment by the applicant (Eirgrid) of such costs as the Board in its absolute discretion considers to be reasonable costs, directed that the applicant pay the sum of €821 to Kilkenny County Council and the sum of €3,255 to Laois County Council (both planning authorities) in respect of costs incurred by them during the course of consideration of the application. It should be noted that, in accordance with standard practice, the planning authorities made significant submissions to the Board based on a similar level of scrutiny and detail to that applied to a normal planning application and also attended the oral hearing.

102. This issue was one of the grounds considered in the hearing of the judicial review application by the group. The High Court accepted that there is no automatic entitlement to costs for persons appearing before an oral hearing in a planning matter and ruled that this ground must fail. The High Court ruled out a broadening of the grounds for the judicial review application to include the absence of reasons for the Board's "Nil" costs award (see paragraph 23 of the judgment).

Page 2: ***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.***

103. Ireland contends that it is fully in compliance with the Aarhus Convention and the Communicant's above complaint is without foundation. As Ireland has a dualist legal system, it was necessary to enact legislation to implement fully all of the obligations that are contained in the Aarhus Convention prior to ratification of the Convention. Ireland ratified the Convention in June 2012 following a long period of examination and legislative change to ensure that all provisions of the Convention were fully provided for in Irish law.

Conclusion

104. It is submitted that in respect of the application for, and granting of development consent for the Laois-Kilkenny Reinforcement project, Ireland has complied with its obligations under the Aarhus Convention. Its legislation and procedures have ensured that there was access to all relevant information, extensive public participation above and beyond what is required by the Convention and access to justice. The Communicant had access to all relevant information, it participated in a variety of opportunities for public consultation and participation and, dissatisfied with the outcome of the planning decision, it availed of a judicial review of that decision. It remains dissatisfied with the outcome of the planning process and the judicial review.

105. It now seeks reliefs from the Committee which are not within the jurisdiction of the Committee.

106. In the circumstances it is submitted that there is no basis for the complaints made by the Communicant.

107. Should you require any further information, please do not hesitate to contact me.

Yours sincerely,

Aoife Joyce
National Focal Point – Aarhus Convention
Assistant Principal Officer
Department of the Communications, Climate Action and the Environment

Cc Permanent Mission of Ireland to the United Nations Office and other international organisations in Geneva