Communication to Aarhus Convention Compliance Committee by Irish Environmental Non-Government Organisations (NGOs)

Contents

1. Information on Correspondent 2
2. Party Concerned 3
3. Facts of the Communication 4
4. Nature of Alleged Non-compliance by the Republic of Ireland 6
   - 4.1 General 6
   - 4.2 Article 3.1 6
   - 4.3 Article 4 9
   - 4.4 Article 5 18
   - 4.5 Article 6 20
     - 4.5.1 General 20
     - 4.5.2 Article 6(4) 20
     - 4.5.3 Article 6(8) 24
     - 4.5.4 Article 6(9) 25
   - 4.6 Article 7 30
   - 4.7 Article 8 35
   - 4.8 Article 9 41
     - 4.8.1 Article 9(1) 41
     - 4.8.2 Articles 9(3) and 9(4) 43
     - 4.8.3 Article 9(5) 47
5. Provisions of the Convention Relevant for the Communication 48
6. Use of Domestic Remedies or other International Procedures 48
7. Confidentiality 51
8. Supporting Documentation 51
9. Summary 52
10. Signatures 52

Appendix A 54

Summary of Public Participation on Planning Decision 54

1. Foylatalure Wind Farm, County Kilkenny 54
2. GDNG Renewables County Donegal 57
3. Corkermore Wind Farm County Donegal 58
4. Cloghan Wind Farm County Offaly 60

Appendix B 61

Summary of Submissions in Marshall Day Report 61

1. INFORMATION ON CORRESPONDENT

The implementation of the EU's renewable energy programme in Ireland through the Irish National Renewable Energy Action Plan (NREAP) involves some three thousand wind turbines (7,145 MW) and 6,000 km of new grid extension to the landscape of rural Ireland. The Compliance Committee has already ruled in Communication ACCC/C/2010/54 with regard to the EU as a Party and the non-compliance of the implementation of the Irish NREAP with the Convention. Furthermore, a compliance report relating to the failings of the EU to comply with the findings and recommendations in ACCC/C/2010/54 will be addressed in the forthcoming Meeting of the Parties in June 2014.

In addition to the renewable infrastructure contained in the NREAP, the EU's Projects of Common Interest also involve Ireland. Namely further grid infrastructure on the island of Ireland with new interconnectors to the UK and France, several thousand additional wind turbines to be installed in the Irish landscape and two valleys to be flooded with sea water on the West Coast of Ireland. A Communication ACCC/C/2013/96 has been accepted in relation to the EU as a Party to the Convention and these Projects of Common Interest, which involve all the 28 Member States.

Throughout Ireland there is increasing opposition from groups opposed to the huge financial and environmental costs associated with these renewable energy plans and projects. On the 15th April a major demonstration took place on the streets of Dublin, involving some 7,000 protestors, where the various groups throughout the country came to express their concerns and outrage at the manner in which these developments were being imposed on their communities in a completely undemocratic and dictatorial fashion[1]. The principal groups, i.e. environmental Non-Governmental Organisations (NGOs) involved in this protest, are also represented in this Communication, namely:

- Lakelands Wind Information Group
- Rethink Pylons
- Wind Aware Ireland
- Kingscourt Residents Against Local Windfarms
- Meath Wind Turbine Information Group
- Environmental Action Alliance - Ireland
- European Platform Against Wind Farms

[1] See U Tube clip of evening news coverage of 15th April march on Ireland's TV3 channel: http://www.youtube.com/watch?v=SurWiW5YHRY&feature=youtu.be

The responsible persons on behalf of the above Irish Environmental NGOs for this Communication are:

Name	Address	Contact Details
Neil Van Dokkum	[redacted]	[redacted]
David Malone	[redacted]	[redacted]
Pat Swords	[redacted]	[redacted]

2. PARTY CONCERNED

The subject matter relates to non-compliances with the Convention in Ireland. The Party concerned is therefore the Republic of Ireland, which ratified the Convention in June 2012.

As was recorded in the findings and recommendations on Communication ACCC/C/2010/54 (ECE/MP.PP/C.1/2012/12 and Corr.1) in paragraphs 52 and 71; namely the EU approved the Convention in February 2005 through Decision 2005/370/EC:

- *The international responsibility of the EU under the Convention for acts and omissions of Ireland is commensurate with the EU competence, namely with whether they relate to matters for which it is responsible under the Convention.*

Therefore, while Ireland did not ratify the Convention until 2012, it was part of Community Legal Order in Ireland since 2005 and accordingly Ireland was bound by the provisions of the Convention. One can also add that as Ireland signed the Convention in 1998, as the "Aarhus Convention: An Implementation Guide" second edition clarifies:

- *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.*

3. FACTS OF THE COMMUNICATION

There has been a failure of Ireland to address the findings and recommendations on Communication ACCC/C/2010/54. The official position of the Irish administration, as presented in an Affidavit to High Court proceedings in this matter of 19 January 2013:

- *In so far as the Applicant seeks to rely on the findings and recommendations of the Committee, is that Ireland was not a party to the Committee's proceedings and was not heard and the findings of the Committee were against the EU only; furthermore by reason of provision of Article 15 of the Convention and because effect has not been given in Irish law to the operations or findings of the Committee, those findings cannot have any implications for this State or a decision of this honourable Court.*

As the renewable energy programme was never subject to assessment at either EU or National Level, and the necessary procedures such as Strategic Environmental Assessment were by-passed, there is a dearth of environmental information to justify or even explain the programme to the Irish public. Citizens and environmental groups, when they sought to exercise their rights in relation to requests for environmental information, have been met with repeated refusals to provide such information. In theory they should have recourse to an appeals procedure with the Commissioner for Environmental Information, but as this office does not receive funding, appeals get left unattended for more than a year at a time. As an example of this failure to disseminate environmental information, a cost benefit study was completed for a renewable export programme, for which a Memorandum of Understanding was signed with the UK authorities. However, there was a refusal to publish this cost benefit study or make it available on request despite it being relevant to an on-going public participation on this export programme.

With regard to the further implementation of the National Renewable Energy Action Plan (NREAP), this requires public participation procedures to be adopted in relation to:

- Approval of projects falling under the Annex I of the Convention, namely wind farms and high voltage transmissions systems, which are defined in the EU's Directive on Environmental Impact Assessment.

- Approval of regional Development Plans, which are plans and programme related to the environment and determine the outcome of planning decisions

- Approval of guidance documents, which are generally applicable legally binding normative instruments used to determine the outcome of planning decisions

However, such public participation takes place on a pro forma basis. Options are effectively closed as the decision criteria are based on the central Government's renewable energy programme, which was developed prior to the adoption of the NREAP. Essentially there is a refusal to address environmental considerations related to it, such as effectiveness, costs, alternatives, impacts on human health, etc. Public participation raising these and other issues is not therefore taken into account in the final decision.

In the context of failures to comply with the Convention, this can be explained in relation to the Final Draft of the Recommendations on Public Participation in

Decision-making in Environmental Matters of February 2014, as prepared by the UNECE Task Force on Public Participation in Decision-Making[2], which defines:

- *The "zero option" means the option of not proceeding with the proposed activity, plan or programme at all nor with any of its alternatives.*

The Recommendations further clarify in Point 16 on *Public participation on the "zero option"*

- *In line with the Convention's requirement for the public to have an opportunity to participate when all options are open,[3] the public should have a possibility to provide comments and to have due account taken of them, together with other valid considerations required by law to be taken into account, at an early stage of decision-making when all options are open, on whether the proposed activity should go ahead at all (the so-called "zero option").[4] This recommendation has special significance if the proposed activity concerns a technology not previously applied in the country and which is considered to be of high risk and/or to have an unknown potential environmental impact. The opportunity for the public to provide input into the decision-making on whether to commence use of such a technology should not be provided only at a stage when there is no realistic possibility not to proceed.[5]*

Prior to the implementation of the EU's renewable energy programme through Directive 2001/77/EC in the mid-2000s, large scale industrial wind turbines (larger than 1 MW) did not essentially exist as a technology in the Irish landscape. The Irish public, particularly the 'public concerned', who live in rural Ireland where this technology was to be implemented, were never provided with the necessary environmental information or the opportunity to participate in decision-making at the "zero option" phase of this renewable programme. In particular, the consideration of environmental impacts related to the scattered nature of rural housing in Ireland and the inability to maintain adequate separation between such large scale industrial scale turbines and these residential developments.

As point 78 of the same recommendations clarifies in relation to: *Early public participation when all options are open (Article 6, paragraph 4)*

- *Information about the decision-making in the earlier tiers should be available in order for the public to understand the justification of those earlier decisions – including the rejection of the zero option and other alternatives.*

Despite the binding requirements of the Convention in relation to public participation, what is happening in Ireland is that directly conflicting and irrational information is used as reasons and considerations for planning approval of wind farm developments, which demonstrates that environmental considerations are not being integrated into the decision making. The same issues occur in relation to public

[2] http://www.unece.org/environmental-policy/treaties/public-participation/aarhus-convention/envpptfwg/envppppdm/ppdm-recs.html

[3] Article 6, paragraph 4 of the Convention.

[4] Compliance with regard to Lithuania, ECE/MP.PP/2008/5/Add.6, para. 74; Compliance with regard to the European Commission, ECE/MP.PP/2008/5/Add.10, para. 51; Compliance with regard to Slovakia, ECE/MP.PP/2011/11/Add.3, ECE/MP.PP/2011/11/Add.3, para. 61 and 63.

[5] Compliance with regard to Lithuania, ECE/MP.PP/2008/5/Add.6, para 74

participation on regional development plans and the review of guidance documentation, which will be used as the decision criteria for approving wind energy projects. This is the result of public authorities not being in possession of transparent environmental information relevant to the justification of a renewable programme of this nature.

The failures of access to justice provisions in Ireland are not limited to the ineffectiveness of the Commissioner for Environmental Information, to deal with appeals in relation to requests for information. Litigation costs in Ireland are already recognised as excessive and Irish legislation makes no allowance for the huge financial burden placed on potential litigants in environmental cases. Indeed, the case of Pat Swords, the Communicant in ACCC/C/2010/54, who brought the failure of the State to comply with the findings and recommendations of the Compliance Committee to the High Court in November 2012, is very illustrative of this fact. The State has repeatedly behaved in an obstructive fashion, the substantive issue on the Compliance Committee findings and recommendations have not been heard 18 months later. The State has repeatedly attempted to have the matter thrown out based on undue delay and is seeking more than ten days in the High Court to address the substantive issues. This represents a legal bill to the plaintiff of the order of €200,000 and as such is 'prohibitively expensive'. The State is well aware of this, and persists in its demands for a lengthy trial, as it wants the case withdrawn at all costs.

4. NATURE OF ALLEGED NON-COMPLIANCE BY THE REPUBLIC OF IRELAND

4.1 General

There have been systematic failures to comply with the Convention in Ireland in relation to the current renewable energy programme. These are documented with regard to Articles 3(1), 4, 5, 6, 7, 8 and 9 in the following sections.

4.2 Article 3.1

Article 3(1) of the Convention requires that:

- *Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.*

In its findings and recommendations on Communication ACCC/C/2005/11 (ECE/MP.PP/C.1/2006/4/Add.2) the Compliance Committee determined:

- *43. The Committee also recalls that according to article 3, paragraph 1, the Parties shall take the necessary legislative, regulatory and other measures to establish and maintain a clear, transparent and consistent framework to implement the provisions of the Convention. This too reveals that the independence of the judiciary, which is indeed presumed and supported by the Convention, cannot be taken as an excuse by a Party for not taking the necessary measures. In the same vein, although the direct applicability of*

international agreements in some jurisdictions may imply the alteration of established court practice, this does not relieve a Party from the duty to take the necessary legislative and other measures, as provided for in article 3, paragraph 1.

In the Irish Administration's National Implementation Report for the June 2014 Meeting of the Parties, (ECE/MP.PP/2011/2/Add.1), in Section XXI on "obstacles encountered in the implementation of Article 7" it was stated:

- *Answer: It was alleged during the consultation process that the findings of the ACCC in ACCC/C/2010/54 constituted evidence of an obstacle in the implementation of Article 7 in Ireland. As this case is before the Irish courts at time of writing, it is not appropriate to comment further.*

The Irish High Court proceedings in *Pat Swords V Minister for Communications, Energy and Natural Resources 2013/4122P* are described in more detail in this Communication's section on Article 9. However, in summary the High Court proceedings relate to the failure of the Irish administration to ensure compliance of the implementation of the National Renewable Energy Action Plan (NREAP) with the terms of Article 7 of the Convention and the Directive on Strategic Environmental Assessment, 2001/42/EC, Note: The NREAP's non-compliance with Article 7 being a key finding in Communication ACCC/C/2010/54.

In their Statement of Defence of the 18th November, the Chief State Solicitor's office stated in Point 18:

- *It is denied that the NREAP is a plan or programme relating to the environment for the purpose of Article 7 of the Convention. If, which it was denied, NREAP was a plan or programme, or was alternatively a statement of policy relating to the environment, for the purpose of Article 7 of the Convention, the requirements relating to public participation in Article 7 were met by the public consultation that preceded the submission of the NREAP to the Commission.*

The findings on Communication ACCC/C/2010/54 documented:

- *75. The Committee finds that Ireland's NREAP constitutes a plan or programme relating to the environment subject to article 7 of the Convention because it sets the framework for activities by which Ireland aims to enhance the use of renewable energy in order to reduce greenhouse gas emissions, based on Directive 2009/28/EC. This view was taken by the communicant and was also confirmed by the Party concerned during the oral hearing and in writing in response to questions by the Committee. It follows from article 7 of the Convention that when an NREAP is prepared by a Party to the Convention, the requirements for public participation set out in article 6, paragraphs 3, 4 and 8, of the Convention apply, albeit that in the context of article 7 of the Convention "[t]he public which may participate shall be identified be the relevant public authority, taking into account the objectives of the Convention".*

So the State is contesting in the High Court that the Aarhus Convention applies to its renewable energy programme. In Point 19 of the Statement of Defence the State Solicitor further clarified:

- *If, which is denied the NREAP was a plan or programme the defendants deny that the State continues to be required to make appropriate practical and other provisions for the public to participate during preparation of NREAP, within a transparent and fair framework, having provided the necessary information to the public and complying with Article 6, paragraphs 3, 4 and 8, where applicable, as alleged at paragraph 18 of the Statement of Claim.*

Clearly there is intent not to comply with the recommendations of the Committee on ACCC/C/2010/54, which required the above measures to be adopted. Even more revealing is the position of the State in Pont 20 of the Statement of Defence:

- *The defendants deny that the public participation procedures provided for in the adoption of the NREAP were inadequate, as alleged at paragraph 21 of the Statement of Claim. Further, it is denied that the two-week period allowed was not a reasonable timeframe for the public to prepare and participate effectively in the adoption of the NREAP, as alleged.*

The position of the Compliance Committee in their findings on ACCC/C/2010/54 could not have been clearer:

- *83. Nevertheless, with respect to the consultation with the public conducted by Ireland the Committee finds that it was conducted within a very short time frame, namely two weeks. Public participation under article 7 of the Convention must meet the standards of the Convention, including article 6, paragraph 3, of the Convention, which requires reasonable time frames. A two week period is not a reasonable time frame for "the public to prepare and participate effectively", taking into account the complexity of the plan or programme (see findings on communication ACCC/C/2006/16 (Lithuania), ECE/MP.PP/2008/5/Add.6, para. 69). The manner in which the public was informed of the fact that public consultation was going to take place remains unclear; neither the Party concerned nor the communicant provided clarity on the matter. The Committee furthermore points out that a targeted consultation involving selected stakeholders, including NGOs, can usefully complement but not substitute for proper public participation, as required by the Convention.*

Note: the Compliance Committee referenced in relation to the NREAP consultation in Ireland its previous findings on ACCC/C/2006/16 (Lithuania). These findings were then endorsed by the Meeting of the Parties in Riga in 2008, ECE/MP.PP/2008/2/Add.12 [6], as to the fact that 10 working days (i.e. two weeks) were inadequate with respect to public participation. Note: In the Lithuanian case this was for a landfill project, which while complex, is nowhere near as complex as a national renewable energy programme for some 7,145 MW of wind energy (circa. three thousand turbines) and an increase in the grid by some 6,000 km of new pylons.

We now have a situation where the Irish State Solicitor is actively seeking to rewrite the international jurisprudence of the Convention in the High Court. It is also worth noting that during the hearing on *Swords V Minister of Communications, Energy and Natural Resources 2012/920JR,* which occurred in April 2013 in front of President of the High Court Justice Kearns, it was repeatedly stated by counsel for the State that

[6] http://www.unece.org/fileadmin/DAM/env/pp/mop3/ODS/ece_mp_pp_2008_2_add_12_e_Lith.pdf

the matters raised, the defendant himself and the ruling of the Compliance Committee were all “nonsense”.

While these judicial proceedings are on-going, in relation to alternative domestic remedies and the obligation of public authorities to ensure proper enforcement of the Convention, the Communicant on ACCC/C/2010/54, Pat Swords, lodged a formal complaint to the Irish Ombudsman on 11th November 2011. This complaint related to the failure of the Department of Communications, Energy and Natural Resources to comply with the Directive on Strategic Environmental Assessment and Article 7 of the Convention in the manner in which they adopted the NREAP. On the 13th February 2012 the Ombudsman finally accepted that there was an issue to be investigated in relation to the Directive on Strategic Environmental Assessment. However, with respect to the Aarhus Convention stated: *“Until such time as Ireland ratifies the Convention and adopts a specific legislative framework to implement the provisions of the Convention, our Office has no role in the matter”.* This was despite it being clearly spelt out in the complaint to the Ombudsman that the Convention was part of Community legal order in Ireland since its ratification by the EU in February 2005.

On the 4th February 2013 a letter was received from the Irish Ombudsman, referring to the matter that by Order dated 13th November leave had been granted in the High Court in case 2012/920JR for a judicial review of the current implementation of the renewable programme. As such then Section 5(1)(a)(i) of the Ombudsman Act 1980 applied, in that “*the Ombudsman shall not investigate any action taken by or on behalf of a person, if the action is one in relation to which the person affected by the action has initiated in any court civil legal proceedings”.* So in essence the Ombudsman’s office did absolutely nothing for a year and never made any contact as to what progress was occurring. This must be considered quite remarkable since the subject matter didn’t need any investigation, it already having been determined previously on appeal CEI/09/00016[7] to the Commissioner for Environmental Information, the Commissioner being same office holder as the Ombudsman that the Strategic Environmental Assessment for the renewable programme simply didn’t exist. One can only conclude, as has been confirmed by other examples, that the Ombudsman’s office does not provide proper enforcement.

In conclusion on Article 3(1) of the Convention, there are systematic failures of public authorities in Ireland to comply with the Convention. The only means of enforcement is for the citizen to initiate judicial proceedings at enormous personal expense. The State will then drag out the proceedings causing further cost to the citizen, even to the point of denying that internationally established jurisprudence on the Convention applies in Ireland. Clearly, outside of the judiciary in Ireland, for which the national jurisprudence on the Convention is extremely limited due to the poor access to justice provisions, there are simply no proper enforcement measures taken by public authorities in Ireland. Instead, public authorities are obstructive of such enforcement measures taken by the citizen.

4.3 Article 4

As the ‘Aarhus Convention: An Implementation Guide’ Second Edition clarifies in relation to the information pillar:

[7] http://www.ocei.gov.ie/en/Decisions/Decisions-of-the-Commissioner/Mr-Pat-Swords-Department-of-Communications,-Energy-and-Natural-Resources.html

- *Under the Convention, access to environmental information ensures that members of the public are able to know and understand what is happening in the environment around them. It also ensures that the public is able to participate in an informed manner.*

This clearly is not happening. Both the EU and Irish administrations are refusing to provide access to environmental information as to what exact environmental protection is associated with this programme, such as what are the actual greenhouse gas emissions to be saved[8] and what are the environmental benefits associated with saving a tonne of greenhouse gases. For instance in their opening statement to the Compliance Committee meeting in September 2011 on Communication ACCC/C/2010/54 the EU stated:

- *The European Union does not believe that the Convention or EU law creates any obligation to collect and disseminate information that a member of the public would like to see disseminated. Article 5 of the Convention leaves significant discretion to authorities by using words such as "adequate" and "sufficient". In addition, it focuses on information on threats to the environment and does not require information to be collected on comparative costs.*

This has to be seen as a remarkable in the context of the European Court's own jurisprudence - in Case C-2/10[9] in relation to the prohibition of wind turbines in an area protected by the Natura 2000 legislation, the Court stated:

- *"In this regard, the principle of proportionality referred to in Article 13 of Directive 2009/28, which is one of the general principles of European Union law, requires that measures adopted by Member States in this field do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued".*

This comes back to the key area of proportionality. People in Ireland are expected to pay an enormous financial and environmental cost to support this renewable programme, but they are repeatedly denied any information on cost assessments and in relation to its environmental effectiveness. Of particular aggravation to the people of the Irish midlands are the huge wind energy export projects proposed for their area. The EU's Projects of Common Interest include:

- E156 Ireland – United Kingdom interconnection between Co. Offaly (IE), Pembroke and Pentir (UK): Element Power which includes approx. 40 individual onshore wind farms, totalling 3GW.

- E 304: Ireland – United Kingdom interconnection between the Irish midlands and Pembroke (UK). Mainstream Renewable Power - The cable will route

[8] Wind energy is highly intermittent and induces considerable inefficiencies on the grid. While both the EU and Irish authorities make financial provisions to compensate electricity companies for these inefficiencies, they ignore them in the performance claims (financial and environmental) for the wind energy programme.

[9] http://curia.europa.eu/juris/celex.jsf?celex=62010CJ0002&lang1=en&type=NOT&ancre=

large amounts of renewable electricity generated in a series of interconnected Irish wind farms directly into the UK market (onshore and offshore).

In addition to the two huge projects above, involving more than two thousand giant 175 m high turbines, the State semi-state company Bord na Mona plans a further 2 GW of wind energy for export to the UK to be built in the Irish midlands, mostly on its cut away bogs[10].

Indeed, on the 24th January 2013, a Memorandum of Understanding was signed by the UK and Irish Governments signalling their joint interest in developing the opportunity for trading in renewable energy[11]. However, at no stage prior to this were the people, who actually live in the environment where this massive infrastructure was to be built, actually consulted or provided with an opportunity to participate in this decision-making. Even worse, when they went seeking information to justify these projects, there was a flat out refusal to provide it. Furthermore, as the people in the midlands were to find out, not only had they been not informed about the project, but the two main developers Element Power and Mainstream Renewable Power had been contacting numerous farmers in the area and signing land options for turbine developments with them. These land options had confidentiality clauses in relation to disclosure to others in the surrounding communities.

As regards the legislative implementation of Article 4 of the Convention in Ireland, this is through Directive 2003/4/EC, which was finally transposed into Irish legislation, two years after it should have been, by S.I. No. 133 of 2007[12]. This then was amended by S.I. No. 662 of 2011[13] as there had been a failure to transpose the sections of Directive 2003/4/EC in relation to both dissemination of environmental information and its quality, i.e. Article 5 of the Convention. In theory requests for environmental information can be made under S.I. No. 133 of 2007, the reality as to actually receiving the environmental information requested is very different, as the following examples demonstrate.

On the 21st May 2013 two months after Andrew Duncan of the Lakelands Windfarm Information Group had requested under S.I. No. 133 of 2007 the cost benefit study prepared for the renewable export programme, he received the following reply from Nathalie Sheridan Legal & Contracts Executive of Sustainable Energy Authority of Ireland (SEAI):

I refer to your email request of 21st March 2013 under the European Communities (Access to Information on the Environment) Regulations 2007 (S.I. 133 of 2007) for the environmental information held by SEAI in relation to the above study.

In 2011, Department of Communications, Energy and Natural Resources (DCENR), SEAI, EirGrid and Commission for Energy Regulation (CER) together decided that a study should be commissioned to examine the costs and benefits of Ireland becoming an exporter of renewable electricity using the co-operation mechanisms in

[10] http://www.bordnamona.ie/news/latest/bord-na-mona-launches-e1billion-wind-energy-export-business/

[11] http://www.dcenr.gov.ie/Energy/Sustainable+and+Renewable+Energy+Division/Renewable+Energy+Export/

[12] http://www.irishstatutebook.ie/2007/en/si/0133.html

[13] http://www.irishstatutebook.ie/2011/en/si/0662.html

the Renewable Energy Directive 2009/28/EC. On that basis, the above study was commissioned and funded by SEAI through a competitive tendering process.

The nature of the study was one of a preliminary strategic scoping and exploratory examination of the landscape of opportunity and overall viability for Ireland of exporting renewable electricity to other EU member states under the said mechanisms, taking into account a variety of economic, regulatory, environmental and technological factors.

The study was overseen by a Steering Committee drawn from DCENR, CER, Eirgrid and SEAI.

The final report was completed in July 2012. By that time the Governments of Ireland and of the UK had entered a process of negotiation aimed at establishing a framework agreement, and consequent detailed conditions, in order to facilitate the export of renewable electricity from Ireland to Britain under the provisions of Directive 2009/28/EC. In these circumstances of international negotiations and associated commercial sensitivity, it was decided by DCENR that it was not appropriate to publish the report of the study.

Those negotiations are ongoing. A memorandum of understanding was signed in January 2013 between Ireland and the UK setting out in broad terms an agreement that will allow Irish-based wind farms to supply directly into Britain's electricity system. It is intended that this will lead to a full intergovernmental agreement, with a possible need for supporting legislation and accompanying provisions.

The report remains unpublished.

Our decision is to refuse your request for information, on the following grounds:

No.	***Reference***	***Grounds for refusal***	***Context***
1.	*SI 133 of 2007, Article 8(a)(iv)*	*Disclosure of the information requested would adversely affect the confidentiality of the proceedings of public authorities, where such confidentiality is otherwise protected by the Freedom of Information Acts 1997 and 2003 with respect to exempt records within the meaning of those Acts.*	*In the context of negotiations between Ireland and the UK within the aegis of the Co-operation Mechanisms in Directive 2009/28/EC, disclosure of confidential information informing the Irish Government's negotiating position would be against the national economic interest.*
2.	*SI 133 of 2007, Article 9(1)(c)*	*Disclosure of the information requested would adversely affect commercial or industrial confidentiality, where such confidentiality is provided for in national or Community law to protect a legitimate economic interest.*	*In the context of negotiations between Ireland and the UK within the aegis of the Co-operation Mechanisms in Directive 2009/28/EC, disclosure of confidential information informing Ireland's negotiating position and associated terms and conditions would be against the legitimate economic interest of commercial or industrial parties.*
3.	*SI 133 of 2007,*	*The request for information is manifestly unreasonable having*	*The request includes, but is not limited to, all correspondence,*

No.	Reference	Grounds for refusal	Context
	Article 9(2)(a)	*regard to the volume or range of information sought.*	*documentation and comments from the public interest bodies and trade bodies held by SEAI in relation to or associated with the study and report.*
4.	*SI 133 of 2007, Article 9(2)(d)*	*The request for information concerns internal communications of public authorities, taking into account the public interest served by the disclosure.*	*In the context of negotiations between Ireland and the UK within the aegis of the Co-operation Mechanisms in Directive 2009/28/EC, disclosure of confidential information informing Ireland's negotiating position and associated terms and conditions would be against the legitimate economic interest of commercial or industrial parties.*
5.	*FoI Act, 1997, Section 20(1)*	*Pursuant to point no. 1 above: The request for information concerns records containing matter relating to the deliberative processes of the public bodies concerned (including opinions, advice, recommendations, and the results of consultations, considered by the body, the head of the body, or a member of the body or of the staff of the body for the purpose of those processes), and the granting of the request would be contrary to the public interest.*	*In the context of negotiations between Ireland and the UK within the aegis of the Co-operation Mechanisms in Directive 2009/28/EC, disclosure of confidential information informing the Irish Government's negotiating position would be against the national economic interest.*
6.	*FoI Act, 1997, Section 21(1)(c)*	*Pursuant to point no. 1 above: Access to the records concerned could be expected to disclose positions taken, or to be taken, or plans, procedures, criteria or instructions used or followed, or to be used or followed, for the purpose of any negotiations carried on or being, or to be, carried on by or on behalf of the Government or a public body.*	*In the context of negotiations between Ireland and the UK within the aegis of the Co-operation Mechanisms in Directive 2009/28/EC, disclosure of confidential information informing the Irish Government's negotiating position would be against the national economic interest.*

In regard to points 3d and 3e of your request, apart from the stakeholder forum of 7 December 2011 at which the parameters and approach of the study were outlined, disclosure of the findings of the study has been restricted to the public sector organisations comprising the Steering Group for the study or party to the above negotiations. Contrary to the import of points 3d and 3e, it has not extended to either trade bodies representing the renewable energy industry nor to individual renewable energy developers.

I trust that you will understand the basis for refusal of your request on this occasion.

I am also to inform you of your rights of internal review and appeal of this decision in accordance with article 11 of SI 133 of 2007, namely, that you may within one month following receipt of this decision request SEAI to review the decision, in whole or in part.

An Internal Review under S.I. No. 133 of 2007 was requested on the 22nd May. It was replied to on the 24th June by the same Nathalie Sheridan of SEAI in the same manner. This in itself was a breach of the regulations, which require for an Internal Review that:

- *The public authority concerned shall designate a person unconnected with the original decision whose rank is the same as, or higher than, that of the original decision-maker to review the decision*

The matter has since gone to appeal to the Commissioner for Environmental Information. Nearly a year later nothing has been done on the appeal, which is a recurring problem with this office and will be addressed further with respect to the Section of the Communication on Article 9(1).

However, one of the fundamental recurring themes with the renewable programme in Ireland is the role of the State as the developer and profiteer in the renewable energy programme. Clearly, deals are being done without involvement of the communities in rural Ireland, who were to be presented with a *fait acompli*, involving projects with both huge financial cost and environmental impact. In this respect a large number of Irish State and Semi-State companies are engaged in renewable investments and associated massive subsidy programmes, such as:

- Electricity Supply Board (ESB) – operator and developer of an extensive number of wind farms[14]

- Bord Gais – operator of 15% of the wind farms in Ireland with further developments in progress[15]

- Bord na Mona – operator of a number of existing wind farms and project promoter in the huge 2 GW wind energy export project on its cut away bogs[16]

- Coillte – the Irish forestry company, which is not only a developer of wind farms, but also involved in selling a considerable portion of its forestry portfolio, held in the national trust, to wind energy development companies[17]

- Eirgrid – the national grid company which has been provided with €4 billion to expand the high voltage grid to facilitate new wind farm connections[18]

Requests for information on these developments are simply refused. As Element Power, one of the developers of the massive export wind energy programme in the

[14] http://www.esbi.ie/our-businesses/engineering/renewables/wind-energy.asp

[15] http://www.bordgaisenergy.ie/energy-efficiency/environmental-commitment/windfarms.php

[16] http://www.bordnamona.ie/our-company/our-businesses/power-generation/wind/

[17] http://www.coillte.ie/coillteenterprise/renewable_energy/wind_energy/

[18] http://www.eirgridprojects.com/grid25/what-is-grid25/

Irish midlands, had entered into multiple arrangements with land owners on a confidential basis without informing local communities in the region, Oliver Cassidy of Lakelands Windfarm Information Group made the following access to information request to Coillte on the 26th April 2013:

- *Request: "Location of land held by Coillte identified and agreed for use by Element Power in relation to wind energy export projects"*

The refusal from Coillte on the 28th June was based on the following:

- *Coillte entered into Land Option Agreements in 2012 with Element Power in respect of locations that Element Power wish to include in study areas, to assess the feasibility of including certain lands in a potential windfarm planning application in relation to wind energy export projects. (see further information in Appendix. 1 Press Release).*

- *Whereas Coillte has entered Option Agreements in relation to certain sites, the agreement for use of these sites in relation to wind energy export projects is subject to certain criteria being met, including the achievement of planning permission. Coillte understands that a decision on the submission of a planning application in respect of specific sites will be made by Element Power upon completion of the relevant feasibility studies.*

- *It would be premature at this stage for Coillte to provide information on potential sites selected as part of study areas that may ultimately not be included in the project planning application, should they prove unfeasible following the study period.*

An Internal Review was requested, this was refused on the basis that:

- *The request affects commercial or industrial confidentiality. The request refers to a Land Option Agreement between Coillte and Greenwire Limited which contains a confidentiality clause. Coillte is anxious to respect the commercial sensitivity around this transaction and indeed the long-term implications of other similar Option Agreements into the future.*

- *The request relates to material still in the course of completion. As outlined in Mr Byrne's reply dated 28 June 2013, at this stage Coillte is engaged in the process of an Option Agreement with Element Power (Greenwire Limited) that has yet to be exercised / completed. To furnish information on the sites at this point in time may be misleading, as the Option may not be exercised and particular sites may not ultimately not be included in the outcome of feasibility studies (yet to be completed) and ultimately the achievement of planning permission with respect to particular sites.*

- *The request relates to internal communications of the public authority. As outlined above, the matter is still in the course of completion and the subject of internal discourse within the company.*

This clearly makes a mockery of what is outlined with regard to Article 4 of the Convention in the 'Aarhus Convention: An Implementation Guide' second edition. For example, reference to "*materials in the course of completion*", when it is already admitted that option agreements had been entered into with respect to certain sites. In this regard the 'Implementation Guide' is clear in that *once particular information*

has been disclosed by the public authority to a third party, it cannot be claimed to be an "internal communication". Clearly the information was fully available to Element Power (Greenwire), with whom the commercial arrangements had already been made. If we consider the previous request in relation to the cost benefit study, it was admitted that the "*findings of the study has been restricted to the public sector organisations comprising the Steering Group for the study or party to the above negotiations"*. Clearly in this case also third parties were involved or at the very least, a wider group.

If we consider both the SEAI and Coillte replies within the context of the exemption under Article 4 of the Convention in relation to: *"the confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest",* then neither public authority, SEAI or Coillte, provided any reference to national law with respect to why the information was protected by confidentiality. In addition neither of the two public authorities provided any information on how the grounds for refusal were interpreted in a restrictive way, taking into account the public interest served by disclosure. In this regard one has to note the guidance in the 'Implementation Guide':

- *The balancing test that authorities must go through to weigh the public interest served by disclosure against an interest protected under one of the exceptions in subparagraphs (a) to (h) was noted by the Compliance Committee in its findings on communication ACCC/C/2007/21 (European Community). In that case the Committee rejected the position of the Party concerned that the identification of any harm to one of the protected interests would be sufficient to keep the information from being disclosed. As the Committee stated, "in situations where there is a significant public interest in disclosure of certain environmental information and a relatively small amount of harm to the interests involved, the Convention would require disclosure."*

While the Coillte example was not appealed to the Commissioner for Environmental information, the following example with respect to Bord na Mona demonstrates how ineffective that office is. In Appeal CEI/12/0003[19] an access to information on the environment request was made by an Environmental NGO to Bord na Mona on the 13th January 2012. Bord na Mona refused to comply with the regulations claiming that it was not a public authority. Instead it emphasised that it was a commercial body which had no licensing or regulatory role and that, due to its established Employee Share Ownership Plan (ESOP), not all of its shares were owned by or on behalf of a Government Minister. It was not until 23rd September 2013, a year and a half later, that the matter was resolved by the Commissioner for Environmental Information, who found that "*Bord na Mona is in fact a public authority within the meaning of both Article 3(1)(b) and (c) of the Regulations".*

Yet at the same time this had already been clarified in the Commissioner's presentation to the Irish Environmental Law Association back in 2008[20], one of the limited number of documents in the 'news' section of the Commissioner for Environmental Information's website:

[19] http://www.ocei.gov.ie/en/Decisions/Decisions-of-the-Commissioner/Mr-Andrew-Jackson-and-Bord-na-M%C3%B3na.html

[20] http://m.ocei.gov.ie/en/News/Access-to-Information-on-the-Environment-Regulations-2007-.html

- *Clearly, the term "public authority" includes Government Departments, local authorities, the Health Service Executive and many semi-state bodies - including commercial state bodies such as, for example, the ESB, Bord Gáis, BIM, **Bord na Móna**, Bus Éireann, Iarnród Éireann, Coillte, Port Companies (e.g. Dublin, Drogheda, Cork, Dún Laoghaire), Dublin Airport Authority and Dublin Docklands Development Authority.*

On the 24th October 2013, a month after the decision above, an access to information on the environment request was made by John Joseph Dooley seeking environmental information from Bord na Mona in relation to their new Clean Energy Hub. This was refused as they were engaged in an appeal to the High Court on the Commissioner's decision. The matter went to Internal Review. Bord na Mona then responded on the 7th February 2014:

- *As you know, we appealed the findings of the Commissioner for Environmental Information that Bord na Mona was subject to the requirements of the Regulations. Following receipt of a relevant European Court of Justice decision in late December 2013, and after due consideration of that decision, Bord na Mona has decided not to challenge the findings of the Commissioner for Environmental Information. Accordingly, we are currently reviewing our internal procedures in light of the requirements of the Regulations.*

- *You will appreciate that the Regulations are very complex and it is necessary to put in place comprehensive arrangements to deal with access requests. In this regard, we would respectfully request that you would allow us a short period to establish the process and procedures necessary to ensure compliance with the Regulations. We expect to have completed our internal review by early March.*

- *At that stage, we will revert to you regarding your original request and how we may deal with your access request in accordance with the Regulations.*

As this was considered completely inadequate, the Commissioner for Environmental Information was contacted and the following reply received on the 10th February 2014:

- *I refer to your e-mail dated 10 February 2014 concerning your request to Bord na Mona under the AIE Regulations.*

- *I note that your appeal to Bord na Mona was made on 7 January 2014 and as the decision is overdue, you are within your rights under the Regulations to make an appeal to the Commissioner for Environmental Regulations on the basis of deemed refusal.*

- *However I should advise you that this Office has a significant backlog of cases on hand and it could be up to two years before your appeal is dealt with. In the circumstances you may wish to consider giving Bord na Mona the opportunity it has requested to deal with the matter directly itself before an appeal is made to this Office.*

- *In the circumstances it is suggested that you make a new AIE request for the environmental information so that your rights to appeal are preserved in the event that you are ultimately dissatisfied with the outcome.*

- *Please note that our role under the AIE Regulations is limited to reviewing the decisions of public authorities on appeal under Article 12, we have no other enforcement role under the Regulations.*

Note: As at the end of April 2014, Bord na Mona had never reverted as to how they would deal with the original request, as they stated they would in their reply of 7th February 2014. In other words, in practice the regulations simply don't work. As regards public authorities in Ireland engaged in the renewable energy programme, no account is taken of the preamble to the Convention:

- *Recognizing that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns.*

4.4 Article 5

A constant source of frustration to the environmental NGOs in Ireland is the failure to publish information which is transparent, in particular the emission savings and fuel savings claimed for wind energy in official documentation are grossly inaccurate, as they ignore the very significant inefficiencies induced on the grid. While this is a failure in relation to Article 5(2) of the Convention and the transparency of environmental information, the Compliance Committee has already clarified in ACCC/C/2012/68:

- *As the Committee has already stated in previous findings (ACCC/C/2010/54 concerning compliance by the EU, ECE/MP.PP/C.1/2012/12, para. 89), "the Committee is not in a position to ascertain whether the technical information disseminated by the Party concerned, or the communicant for that matter, is correct." In the present case, the communicant seems to advocate a method for the calculation of the merits of wind energy that is different from what the decision-making bodies accept. The Committee has neither the mandate nor the capacity to assess the environmental information in question as to its accuracy or adequacy.*

However, Article 5 (7)(a) requires that each Party shall:

- *Publish the facts and analyses of facts which it considers relevant and important in framing major environmental policy proposals.*

As the second edition of the 'Aarhus Convention: An Implementation Guide' clarifies:

- *Paragraph 7 (a) requires Parties to publish background information underlying major environmental policy proposals. If a Party considers that certain facts and analyses of facts are relevant and important in framing such proposals, it must publish them. "Facts" may be interpreted to cover factual information like water and air quality data, natural resource use statistics, etc. "Analyses of facts" includes cost-benefit analyses, EIAs and other analytical information used in framing proposals and decisions. Since article 7 provides for public participation during the preparation of policies relating to the environment, the publication of facts and analyses of facts under article 5, paragraph 7 (a), will help to ensure that the public has the relevant information it needs to make its participation in policymaking as effective as possible.*

On the 23rd October 2013, the Department of Energy, Communications and Natural Resources' website states published a press release in relation to the Public Consultation on Renewable Energy Export Policy and Development Framework[21]:

- *Written submissions or observations are being sought from all interested parties, including individuals and organisations, to assist in the preparation of the policy and development framework and the scoping of the Strategic Environmental Assessment Environmental Report and the Habitats Directive Natura Impact Statement which will accompany the proposed policy and development framework.*

Clearly this Renewable Export Policy and Development Framework, for which a Strategic Environmental Assessment was being prepared, fell under Article 7 of the Convention. Note: The Aarhus Convention National Implementation Report for Ireland, (ECE/MP.PP/2011/2/Add.1), states in Section XIX in relation to *appropriate practical and/or other provisions made for the public to participate during the preparation of plans and programmes relating to the environment, pursuant to Article 7:*

- *Strategic Environmental Assessment (SEA) legislation provides for strategic environmental consideration at an early stage in the decision making process and is designed to complement project based EIA. Irish legislation implementing the SEA Directive (2001/42/EC) provides for public consultation in relation to plans and programmes across 11 specific sectors, in development and local area plans, as well as regional planning guidelines and strategic development zones.*

If we refer to the information provided previously with respect to Article 4, the study completed by the Irish authorities, including the Department of Communications, Energy and Natural Resources, for examining *the costs and benefits of Ireland becoming an exporter of renewable electricity* was clearly "Facts" with regard to Article 5 (7)(a). The refusal to publish them or indeed make them available on request (Article 4) is a clear breach of the requirements under Article 5 (7)(a). How can the public participate in the decision-making if they are denied the core information in relation to cost and benefits? Indeed this raises a serious question mark over the whole public participation exercise on the Renewable Energy Export Policy and Development Framework, if the public are not provided with the 'necessary information' related to costs and benefits, then surely Article 7 of the Convention on public participation on plans and programmes related to the environment is rendered invalid. Instead the whole secrecy and behind closed doors approach taken by the Irish authorities deliberately defeats the purpose of this section of the Convention, "*which is to publish information which will help members of the public, as well as public authorities, understand what goes into government decisions, to monitor how those decisions are implemented and to make more effective contributions to decision-making*".

[21] http://www.dcenr.gov.ie/Press+Releases/2013/CONSULTATION+ON+NATIONAL+RENEWABLE+EXPORT+POLICY+BEGINS.htm

4.5 Article 6

4.5.1 General

As the "Aarhus Convention: An Implementation Guide" second edition clarifies:

- *The articles in the second pillar serve as a reminder to public authorities that it is vitally important to allow public participation to do its job fully. While it may be tempting to cut corners to reach a result that might appear on the surface to be the best, there are countless cases where unexpected or hidden factors became apparent only through a public participation process, with the result that potentially costly mistakes were avoided.*

- *Furthermore, even where the original proposal is not substantially changed as a result of public participation, the successful implementation of the final decision can be promoted through the active and real participation of the public during the decision-making. Conversely, public participation that is merely pro forma — i.e., that takes place when options are already closed — can injure the chances for successful implementation of a decision because of the questionable legitimacy of the process.*

- *It must be emphasized that public participation requires more than simply following a set of procedures; it involves public authorities genuinely listening to public input and being open to the possibility of being influenced by it. Ultimately, public participation should result in some increase in the correlation between the views of the participating public and the content of the decision. In other words, the public input should be capable of having a tangible influence on the actual content of the decision. When such influence can be seen in the final decision, it is evident that the public authority has taken due account of public input.*

The core of the non-compliance issues regarding public participation associated with the implementation of the renewable programme in Ireland, and this runs as well through Articles 7 and 8, is that it is actually a pro forma exercise in which the options are already closed. In other words, the national policy at central government level related to the EU renewable programme is the sole decision criterion; the public participation is just an exercise in 'window dressing'. Unfortunately the failure to assess the renewable programme and subject it to proper public participation, in particular the adoption of the NREAP in a manner bypassing Article 7 of the Convention, as per the findings and recommendations of the Compliance Committee in Communication ACCC/C/2010/54, is leading to glaring problems when it comes to public participation on downstream projects (Article 6) and programmes (Article 7) associated with renewable energy in Ireland.

4.5.2 Article 6(4)

As the authorities document in their decision making, their function is to implement National Policy and not consider other factors, no matter how valid they may be. This clearly raises question marks with regard to Article 6(4) of the Convention below

- *Each Party shall provide for early public participation, when all options are open and effective public participation can take place.*

As the 'Implementation Guide' clarifies:

- *In its findings on communication ACCC/C/2008/24 (Spain), the Compliance Committee held that "entering into agreements relevant to the Convention that would foreclose options without providing for public participation may be in conflict with article 6 of the Convention".*

In *Swords v Minister for Communications, Energy and Natural Resources, 2012/920JR*, the affidavit of the 7th March 2013 of Una Dixon, Assistant Principal Officer, Renewable Division of the Department of Communications Energy and Natural Resources clarified.

- *I say and believe that Mr Swords is mistaken in his contention that the NREAP decided policy on wind energy. I say that new renewable energy projects cannot be built without a grid connection and the process for ensuring sufficient grid connection to meet the 2020 target and the type of renewable energy concerned was decided well in advance of and before the submission of Ireland's NREAP in July 2010.*

- *The statutory function relating to grid connections is vested in the CER and I say that it was the CER Gate 3 direction, including Appendix 1 of that decision, which set out the type of renewable generation would be developed to meet the State's 2020 target[22].*

- *The Appendix 1 to the CER decision[23] contains the list of those specified projects to be offered a grid connection and the technology confirmed, the large majority being wind energy projects. This reflects the applications for grid connections by the developers and the manner in which the CER decided to allocate the grid connections, which was by date order of application. As set out in its decision document, the CER decision was specifically made with the intent of providing sufficient grid connections to meet 40% renewable energy connections by 2020.*

- *Thus I say and am advised that the technology breakdown of the NREAP was largely determined by earlier processes in that it had already been decided which technologies were to received grid connections offers commensurate with the achievement of 40% renewable electricity.*

In other words the whole process has been completely developer led and decided well in advance of any public participation process. For instance the two week public consultation on the NREAP, already criticised by the Compliance Committee as being of an unreasonable short timeframe, was held in the middle two weeks of June 2010, while the NREAP was then adopted on the 30th June 2010. In this regard, not only had the State entered into agreements with the developer's back in 2008 through the CER Gate 3 process, but it had, as was also documented in the Department of Communications, Energy and Natural Resources press release of 2nd

[22] Note: In 2008 the Irish Government announced a target that 40% of Ireland's electricity consumption should come from renewable sources by 2020. On foot of this the CER launched its Gate 3 policy for renewable and non-renewable ("conventional") generator connections in 2008 and 2009.

[23] CER/08/260 – CER Direction on Criteria for Gate 3 Renewable Generators Offers and Related Matters: http://www.eirgrid.com/media/CER_08_260.pdf

December 2009[24], allocated considerable funds to Eirgrid to pursue the Government policy in expanding the national grid to accommodate the new wind energy investment:

- *Investment of €4 billion by EirGrid to allow Ireland's electricity infrastructure carry 60% more renewables than current levels. Announced October 2008: http://www.eirgrid.com/media/Grid%2025.pdf*

Indeed the financial benefits to the semi-state sector were simply huge.

- *Semi-state investment in energy: The following table demonstrates the already announced investment plans by the semi-state companies in sustainable energy generation / building of smart grids. Total €30 billion.*

ESB	*€22 billion*
Bord Gais	*€2.5 billion*
EirGrid	*€4 billion*
Bord na Mona	*€1.5 billion*

As the press release further clarified:

- *The Government target is 40% renewables by 2020, although Minister Ryan has consistently said this will not be the limit of our ambitions.*

- *The Government target is based on the All-Island Grid study, which is the most advanced and comprehensive analysis of its kind in the world electricity sector. This Study, says that Ireland could feasibly have 42% of its electricity generated from renewables by 2020. The Study was the recipient of the Annual Achievement award from the American Wind Utility Integration Group in 2008 and is the central 'due diligence' basis of Government policy on renewables.*

None of these decisions, the All-Island Grid Study, the Gate 3 process and the adoption of the 40% renewable electricity target, were subject to prior public participation in accordance with the Convention. Neither was there any assessment of environmental impacts or consideration of alternatives. For instance, Ireland's published annual energy balance[25] demonstrates that as much energy input goes into thermal heating in residential homes and industrial / commercial users as goes into the generation of electricity. While the NREAP contains a target of 40% electricity consumption from renewable sources by 2020, there is only a target of 12% renewable heat by 2020. The programme is clearly biased and unbalanced. Yet in the public participation on individual projects, there is a point blank refusal by the decision makers to address these issues – they are now firmly closed. The 'zero option' has never been considered and there is a refusal to consider it.

[24] http://www.dcenr.gov.ie/Press+Releases/2009/The+Green+Economy+is+here+%E2%80%93+Minister+Eamon+Ryan.htm

[25] http://www.seai.ie/Publications/Statistics_Publications/Energy_in_Ireland/Energy-in-Ireland-Key-Statistics-2013.pdf

See for instance the assessment by the planning inspector in Appendix A on Bord Pleanala Appeal PL 05E.241596 in relation to the wind farm by GDNG Renewables in Glenties, Co. Donegal[26].

- *Non-compliance with EU Directives: The appeal by Ms Sharkey raises issues concerning the failure of the Irish State to complete SEA and associated public participation in the context of its renewable energy programme. As noted by the First Party, the planning authority or the Board in their decision making process has no jurisdiction in these matters and this is comprehensively demonstrated in the High Court judgment in Cosgrove v An Bord Pleanala [2004] IR435[27].*

One has also to consider this within the context of Article 3(1) of the Convention in relation to 'proper enforcement measures'. The failures of the NREAP to comply with Article 7 of the Convention and the Directive on Strategic Environmental Assessment has been repeatedly highlighted to public authorities responsible for public participation on specific activities falling under Article 6 of the Convention; this is either ignored or the citizen is instead directed to the Courts. These public authorities have abdicated their own responsibilities to ensure legal compliance of the framework they are using.

As regards the specific legal framework, the EU's Environmental Impact Assessment Directive requires in Article 6(2) of the consolidated version 2011/92/EC that:

- *The public shall be informed, whether by public notices or by other appropriate means such as electronic media where available, of the following matters* ***early in the environmental decision-making procedures*** *referred to in Article 2(2) and, at the latest, as soon as information can reasonably be provided.*

The Irish Planning and Developments Acts are extremely difficult to follow, due to their multiple disjointed amendments, although an unofficial consolidated version is available[28]. However, Section 171 A prescribes:

- *'Environmental impact assessment' means an assessment, which includes an examination, analysis and evaluation, carried out by a planning authority or the Board, as the case may be, in accordance with this Part and regulations made thereunder, that shall identify, describe and assess in an appropriate manner, in light of each individual case and in accordance with Articles 4 to 11 of the Environmental Impact Assessment Directive, the direct and indirect effects of a proposed development on the following.*

This may be taken as implying that Article 6(2) of the Directive has to be complied with, but only as it relates to the assessment process and not the public participation process.

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[26] Also available at: http://www.pleanala.ie/search/quicksearch.php

[27] Note: As to the validity of this: In Cosgrave v. An Bord Pleanála it was held that a simple claim that the Directive had not been properly transposed into Irish law was not sufficient to form the basis of a challenge in judicial review, where an order was sought to quash the decision of a planning authority.

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

4.5.3 Article 6(8)

It is also necessary to highlight that Article 6(8) of the Convention requires that:

- *Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.*

As the 'Implementation Guide' clarifies: *In its findings on communication ACCC/C/2008/24 (Spain), the Committee found that:*

- *It is quite clear to the Committee that the obligation to take due account in the decision of the outcome of the public participation cannot be considered as a requirement to accept all comments, reservations or opinions submitted. However, while it is impossible to accept in substance all the comments submitted, which may often be conflicting, the relevant authority must still seriously consider all the comments received. The Committee recalls that the obligation to take "due account" under article 6, paragraph 8, should be seen in the light of the obligation of article 6, paragraph 9, to "make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based". Therefore the obligation to take due account of the outcome of the public participation should be interpreted as the obligation that the written reasoned decision includes a discussion of how the public participation was taken into account. ... The Committee notes that a system where, as a routine, comments of the public were disregarded or not accepted on their merits, without any explanation, would not comply with the Convention.*

In Ireland planning decisions generally occur at Local Authority level, with a right of appeal to the planning appeal board, An Bord Pleanala, where the planning application is generally considered '*de novo'*. For large infrastructural developments, the planning application goes direct to An Bord Pleanala. Appendix A of this Communication documents a number of public participations in relation to wind farms, from September 2012 onwards, at which point Ireland had ratified the Aarhus Convention and the findings and recommendations on Communication ACCC/C/2010/54 had been published. Frequently, with local authorities the input from the public was at best summarised with no written analysis or consideration as to how it was addressed in the decision-making process. With the Inspector's reports produced by An Bord Pleanala, the summary of the public input was recorded, but frequently documented as of being no relevance as the decision criterion was solely the national policy / plan.

From a legislative perspective, the EU's Directive on Environmental Impact Assessment, 2011/92/EC, requires in Article 9(1)(a) that the following information shall be made available to the public:

- *Having examined the concerns and opinions expressed by the public concerned, the main reasons and considerations on which the decision is based, including information about the public participation process*.

Section 172 (1J) of the Irish Planning and Development Acts requires in relation to Environmental Impact Assessment that:

When the planning authority or the Board, as the case may be, has decided whether to grant or to refuse consent for the proposed development, it shall inform the applicant for consent and the public of the decision and shall make the following

information available to the applicant for consent and the public:

(c) having examined any submission or observation validly made,
(i) the main reasons and considerations on which the decision is based, and
(ii) the main reasons and considerations for the attachment of any conditions, including reasons and considerations arising from or related to submissions or observations made by a member of the public;

One could deduce from this that only matters related to the chosen, i.e. valid, 'reasons and considerations' are of relevance to both the decision making and subsequent documentation of the same.

4.5.4 Article 6(9)

This then leads to Article 6(9) of the convention in which:

- *Each Party shall make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based.*

The position of the Compliance Committee on decision making by the Parties to the Convention is clarified in the 'Implementation Guide':

As to what the public authority, after taking the public participation into account, should ultimately decide, Article 6 is silent. As observed by the Compliance Committee in its findings on communication ACCC/C/2007/22 (France):

- *In many national laws, the question of whether an application for a permit concerning an activity that is potentially harmful to the environment should be approved may, at least in part, depend on the usefulness of the project, this is not a requirement of the Convention. The Convention Parties may apply different criteria for approving and dismissing an application for authorization, for instance with regard to the standard of technology, the effects on health and the environment, and the usefulness of the activity in question. However, these issues are not addressed by the Convention.*

At the same time, the preamble to the Convention documents the importance of environmental considerations in such decision-making.

- *Recognizing the importance of fully integrating environmental considerations in governmental decision-making and the consequent need for public authorities to be in possession of accurate, comprehensive and up to date environmental information.*

It is therefore clear that the 'reasons and considerations' for decision making should address environmental considerations relevant to the application for approval. In this regard the legal framework of the European Union in relation to approval of wind farm developments engages the Directive 2011/92/EC on Environmental Impact Assessment[29] and Directive 2009/28/EC on renewable energy. In the first instance, the March 2011 European Court ruling against Ireland in case C-50/09 for failure to properly transpose the Environmental Impact Assessment Directive[30], stated in Points, 37, 38 and 40:

[29] 2011/92/EC is the consolidated form of Directive 85/337/EC as amended: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:026:0001:0021:EN:PDF
[30] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CJ0050:EN:NOT

- *37. "In order to satisfy the obligation imposed on it by Article 3, the competent environmental authority may not confine itself to identifying and describing a project's direct and indirect effects on certain factors, but must also assess them in an appropriate manner, in the light of each individual case".*

- *38. "That assessment obligation is distinct from the obligations laid down in Articles 4 to 7, 10 and 11 of Directive 85/337, which are, essentially, obligations to collect and exchange information, consult, publicise and guarantee the possibility of challenge before the courts. They are procedural provisions which do not concern the implementation of the substantial obligation laid down in Article 3 of that directive".*

- *40. "However, that obligation to take into consideration, at the conclusion of the decision-making process, information gathered by the competent environmental authority must not be confused with the assessment obligation laid down in Article 3 of Directive 85/337. Indeed, that assessment, which must be carried out before the decision-making process (Case C-508/03 Commission v United Kingdom [2006] ECR I-3969, paragraph 103), involves an examination of the substance of the information gathered as well as a consideration of the expediency of supplementing it, if appropriate, with additional data. That competent environmental authority must thus undertake both an investigation and an analysis to reach as complete an assessment as possible of the direct and indirect effects of the project concerned on the factors set out in the first three indents of Article 3 and the interaction between those factors".*

Where the factors in Article 3 comprise:

> *(a) human beings, flora and fauna,*
> *(b) soil, water, air, climate and the landscape,*
> *(c) material assets and the cultural heritage, and;*
> *(d) the interaction between the factors mentioned in paragraphs (a), (b) and (c).*

Following this European Court ruling, this requirement is now transposed into Irish law by Sections 171 and 172 of the Planning and Development Acts (2000 to 2011). In relation to Directive 2009/28/EC proportionality, as clarified by the European Court in case C-2/10, has already been referred to in the section on Article 4 of the Convention. Indeed Article 13 of Directive 2009/28/EC defines:

1. Member States shall ensure that ***any national rules concerning the authorisation, certification and licensing procedures*** *that are applied to plants and associated transmission and distribution network infrastructures for the production of electricity, heating or cooling from renewable energy sources, and to the process of transformation of biomass into biofuels or other energy products,* ***are proportionate and necessary.***

2. Member States shall, in particular, take the appropriate steps to ensure that:

(d) rules governing authorisation, certification and licensing ***are objective, transparent, proportionate,*** *do not discriminate between applicants and take fully into account the particularities of individual renewable energy technologies;*

This then leads to the conclusion that the reasons and considerations for approval of a wind farm should demonstrate transparency and proportionality. The environmental impact assessment process is a procedure in which the impacts, both negative and beneficial, of the proposed development have been weighed up by the competent authority for the planning procedure and these considerations should be available as part of the reasons and considerations of the decision. Indeed, this overlaps with Articles 5(1) and 5(2) of the Convention in which:

- *Each Party shall ensure that: Public authorities possess and update environmental information which is relevant to their functions;*

- *Each Party shall ensure that, within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible*

This is a crucial issue as the large scale deployment of wind energy has hugely negative impacts, not least financial, but also environmentally in terms of landscape, noise, biodiversity, etc. Furthermore, as Ireland has a both a modern fleet of conventional generating stations and excess capacity, it doesn't require any of additional renewable generation for operational or economic reasons. So given that the only real benefit of these projects to offset these negative impacts, i.e. proportionality, is the alleged positive impacts on climate, then how has this benefit been assessed and quantified? If we consider the case law of An Bord Pleanala[31] in approving recent wind farms:

PL16. 241592: The development of 21 wind turbines near Ballina Co. Mayo for which planning was granted on 1st August 2013. As the inspector's report stated in Section 12.1.2.8.2 Climatic Factors, i.e. the Environmental Impact Assessment:

- *With regard to the operational impact of the proposed development, I would concur with the findings of the EIS that the generation of renewable electricity by the proposed turbines* ***will have a wider positive impact on climatic considerations*** *in terms of reducing carbon emissions thereby contributing to the achievement of national and international emission reduction objectives through the displacement of traditional methods of energy generation by the unsustainable combustion of fossil fuels such as coal and oil.*

PL16. 241506: The development of a 12 wind turbines, again in a location near Ballina Co. Mayo for which planning was granted on the 13th December 2013. In the inspector's report in Section 11.2.8.2 on Climatic Factors, i.e. the Environmental Impact Assessment, the statement above is repeated.

PL27.241827: The development of six wind turbines at Tinahely, Co. Wicklow for which permission was granted on the 12th August 2013. In Section 10.15 of the Inspector's report on Environmental Impact Assessment (Climate) it is stated:

- *Section 7, Part 7 of the EIS relates to Air and Climate Assessment. The benefits of electricity generation from wind are considered to be its contribution to environmentally sustainability and displacement of fossil fuels. A figure of 46,673 tonnes/year of carbon dioxide displacement is given. This section concludes that the proposed wind farm will have no adverse impact*

[31] See search at: http://www.pleanala.ie/search/quicksearch.php

on the quality of air and climate in the locality while the indirect effects of substitution of fossil fuel burning and reduced emissions of atmospheric pollutants ***are a major positive.***

So clearly we have an opinion in relation to 'positivity' made to justify these quite considerable developments, which would be very typical of the approval of a considerable number of similar developments by planning authorities in Ireland. One may well consider such statements to be acceptable when thrown around in general conversation, but in no uncertain terms do they meet the requirements of assessment, which is inherently connected with quantification of the environmental impact and is obligatory under the legislation.

In reality in 2011 the global emissions of carbon dioxide[32] were 34,000 million tonnes, while Ireland's carbon dioxide emissions were 57 million tonnes per annum and those from electricity generation nearly 12 million tonnes. As was pointed out on many submissions to the authorities, with the inefficiencies induced on the grid by wind power, one would, with a 40% renewable target derived predominately from wind energy, save not much more than 2 million tonnes of carbon dioxide; in other words less than 0.01% of the global amount. This also has also to be taken into account with the 'cold fact' that global temperatures have not risen since the EU initiated its renewable energy programme in 1998[33]. The only rational conclusion to be drawn, in relation to the above statements by An Bord Pleanala justifying their approval of the above developments on the basis of 'wider' or 'major' positive climatic impacts, is that they are irrational statements. Furthermore, they completely contradict the below:

PL05B.240166: The development of 25 wind turbines at Straboy Co. Donegal for which permission refused on the 14th May 2013 due to proximity of watercourses rated at or close to "pristine" condition (Special Area of Conservation), which hosts Annex II species including the freshwater pearl mussel. In Section 10.16 on Inspector's report (Environmental Impact Assessment) in relation to Carbon Emissions it was stated:

- *A range of submissions have been made by appellants and observers with regard to carbon emissions arising from the proposed development and they question the benefits resulting from the scheme.*

- *To some extent, there has to be a degree of validity in some of the supporting arguments around this issue, whereby there are significant drawbacks in the reliability of wind power generation and there is the consequent need for conventional capacity to be provided elsewhere to sustain the supply of electricity. Providing the system to accommodate wind energy generation is also a significant infrastructural investment, as has been seen by the development of the 110kV line from Binbane to Letterkenny. In conclusion, this is an issue that merits greater policy consideration and is one not readily resolved by the assessment of one wind farm development proposal. There are significant planning and environmental issues revolving around the sustainability of the principle of wind farm development, with carbon emissions being only one component demanding comprehensive analysis and assessment.*

[32] Expressed as carbon dioxide equivalent, i.e. greenhouse gases
[33] See fig 1.4:
http://www.climatechange2013.org/images/report/WG1AR5_Chapter01_FINAL.pdf

PL05E.242074: The addition of four additional turbines to the existing wind farm in Corkermore, Co. Donegal. Permission was awarded on the 16/10/2013. In Section 11.12 of the Inspector's report on assessment of climate and air it is stated:

- *The applicant and the appellant dispute the extent to which the development would obviate the need to burn fossil fuels and so reduce the emission of greenhouse gases. However, even if the more sanguine estimates provided by the applicant are accepted, the impact of this particular development on air quality and climate change will be marginal and insignificant. Its benefits would only arise in cumulation with other similar developments, which is why the matter is better addressed as a matter of general policy rather than in relation to an individual application for permission.*

So yet again the matter comes back to one of policy, where in Section 11.2 of the Inspector's report on the assessment of policy it was concluded:

- *The appeal extensively criticised public policy that governs consideration of proposals for wind energy development. Planning policy is made by elected politicians, either the minister or local councillors. Energy and climate change policy is made by the government or its members, who are accountable to the Dáil for their decisions. The policies set down by European legislation have to be adopted by representatives of national governments and endorsed by European Parliament. None these decision makers are accountable to the board and none of their policies are open to review by the board. Therefore much of the content of the appellant's submission is not relevant to the consideration of the appeal. The board may have to decide how to apply a planning or government policy in a specific case, or it may have to weigh one policy provision against another, or against some clear public interest or established planning principle. It cannot decide, however, that a particular policy is wrong and so set it aside when considering a planning appeal. If some illegality, unreasonableness or gross unfairness arises from a policy, then it can be challenged and set aside by a court. If the appellant is of the opinion that a particular policy is wrong, then he can lobby elected representatives or the people who elect them to change that policy. The board may not change or set aside policy on wind energy. It must apply the policy as best it can.*

However, environmental considerations were never taken into account in the development of that policy, nor were any assessments done; the NREAP template set by the EU had a Section 5.3 on Impacts[34].

[34] http://ec.europa.eu/energy/renewables/doc/nreap_adoptedversion_30_june_en.pdf

5.3. Assessment of the impacts (Optional)

Table 13: Estimated costs and benefits of the renewable energy policy support measures:

Measure	Expected renewable energy use (ktoe)	Expected cost (in EUR) – indicate time frame	Expected GHG reduction by gas (t/ year)	Expected job creation

Ireland's NREAP went from Section 5.2 to Section 5.4. There was zero information in relation to impacts, such as costs and benefits. Therefore when it comes to approving actual wind farm developments in Ireland; the environmental information provided in the 'reasons and considerations' is non-transparent, irrational and contradictory, which is not surprising, as it simply never generated in the first place by the relevant public authorities in Ireland or the EU, i.e. the 'zero option' was never assessed and the associated environmental information generated.

As point 78 of the Final Draft of the Recommendations on Public Participation in Decision-making in Environmental Matters of February 2014 clarifies in relation to: Early public participation when all options are open (Article 6, paragraph 4)

- *Information about the decision-making in the earlier tiers should be available in order for the public to understand the justification of those earlier decisions – including the rejection of the zero option and other alternatives.*

This didn't happen and in reality the Irish renewable programme is not about environmental considerations; it's simply an application of an arbitrary and disproportionate policy, which by-passed the necessary legal checks and balances.

4.6 Article 7

As the Department of the Environment, Community and Local Government's publication on "Development Plans – Guidelines for Planning Authorities" explains[35]:

- *Members of City, Borough, Town and County Councils are entrusted by law to make a development plan every six years. The development plan sets the agenda for the development of the local authority's area over its six year lifespan. Development, whether it be residential, industrial, commercial or amenity, must generally take place in accordance with the development plan. The plan is therefore a blueprint for the economic and social development of the city, town or county for which it has been made.*

[35] http://www.environ.ie/en/Publications/DevelopmentandHousing/Planning/FileDownLoad,14468,en.pdf

It is therefore clear that Article 7 of the Convention, as it is applied to plans and programmes related to the environment, is engaged in the development of these local authority development plans. In order to implement the Government's National Renewable Energy Action Plan, it was necessary to update these development plans to include the provision of wind energy. County Westmeath is one of the twenty six counties in Ireland and is located in the midlands area, where the major export wind energy projects, already referred to previously, were to be built.

The Draft Westmeath County Development Plan 2014-2020[36] was prepared and made available for public participation from the 1st February 2013 to the 12th April 2013. The Draft Plan was accompanied by a Strategic Environmental Assessment Report and an Appropriate Assessment / Natura Impact Report. A total of 895 submissions were received in relation to the Draft Plan during this period. This must be seen as a very high participation given that the adult population in the county is about 50,000. Note: Wind Energy Policy was addressed in Section 10.5 of the Draft County Development Plan.

A report was prepared on the submissions received; summarising the issues raised and outlining the response of the County Manager to the same[37], including the recommendations for changes to the Draft Development Plan where considered appropriate. Repeatedly the public submissions highlight their concerns and objections to massively obtrusive wind farm developments planned for the county. In particular their concerns related to noise and visual impact. In this regard the Irish National Renewable Energy Action Plan was adopted without any consideration of environmental impacts. Specifically, it adopted a figure of some 7,145 MW of installed wind energy, representing some three thousand turbines, without taking account of the highly scattered rural housing profile in Ireland. As a result, unlike other countries, where rural housing is clustered into villages, etc, it is not possible in rural Ireland to maintain adequate separation between housing units and wind turbines. Instead Irish guidelines allow turbines to be built within 500 m of homes, which has resulted in a significant number of rural dwellers suffering unacceptable noise and health impacts.

However, despite this being constantly raised in the submissions on the development plan, the reply by the County Manager consistently followed the same format:

- *The Council is bound by National Energy Policy, which in the context of Wind Turbines is the Wind Energy Development Guidelines 2006. These guidelines set out standards in relation to the size, appearance and physical properties of any proposed structures.*

- *Noise limits from Wind Turbines are prescribed in the Wind Energy Development Guidelines 2006. These guidelines are currently being reviewed by the Department and any revised requirements /standards in relation to noise levels will be taken into account in planning policy.*

As highlighted already in relation to Article 6(4), which is also engaged by Article 7, there is a point blank refusal by the decision makers to address the negative environmental impacts associated with the renewable programme. The national

[36] http://www.westmeathcoco.ie/en/ourservices/planning/westmeathcountydevelopmentplanreview/draftcountydevelopmentplan2014-2020/

[37] http://www.westmeathcoco.ie/en/media/CDP%20Managers%20Report.pdf

policy is effectively the sole decision criterion and the public participation is merely pro forma, i.e., takes place when options are already closed.

This report and the draft development plan were then distributed to the Elected Members of Westmeath County Council on the 5th July 2013. These local authority public representatives (County Councillors) then resolved that the Draft Development Plan be amended, voting unanimously to adopt three amendments (P-Win2, P-Win3 and P-Win6). These included a definition of industrial scale wind energy projects and a technical specification for windfarm development; for which a minimum separation distance from residential developments would apply, in the case of larger turbines a separation distance from housing of up to 2 km. As these were considered to constitute a material alteration of the Draft Development Plan, public participation on the proposed material alterations occurred between the 18th October and 15th November 2013.

Quite remarkably given the adult population of County Westmeath, 3,500 submissions were received in this public participation and in a similar fashion a County Manager's Report was prepared on the submissions received; summarising the issues raised and outlining the response of the County Manager to them, including recommendations for changes to the Draft Westmeath County Development Plan where appropriate, to address the issues raised[38]. As the County Manager's report summarised:

- *The submissions set out concerns of individuals and organisations across the county and beyond in relation to Industrial Scale Wind Energy development. Most of the submissions express support for the amendments. These submissions in general express sincerely held opinions, concerns and in some instances fears of individuals and communities in relation to the potential for impacts of Industrial Scale Wind Energy Projects on human health and quality of life, environment, heritage, ecology, landscape, visual and recreational amenities. Many submissions refer to the attractiveness of the county as a location of distinctive visual character and high quality environment with considerable potential for development of the tourism sector.*

- *The Department of the Environment, Community and Local Government's submission, as commented upon at Section 2.3 above is relevant to the overall consideration of these issues.*

- *The Council is legally obliged to take account of National Guidelines in the formulation of Planning Policy. The setback requirements proposed in P - WIN6 are considered to be an inappropriate means of regulation in this area, which directly contravene National Guidelines. The outcome of the ongoing review of the Wind Energy Guidelines 2006 will be available to inform policy in this area and subsequently will be brought forward for formal incorporation into the Plan. It is anticipated that issues raised in many of the submissions such as noise and shadow flicker will be addressed in the aforesaid Guidelines review. The preparation by the Government of a Renewable Energy Planning Framework for Export is also necessary to inform local policy formulation.*

[38] http://www.westmeathcoco.ie/en/media/Managers%20Report%20on%20Amendments%20to%20Draft%20CDP%202014-2020.pdf

- *In the overall consideration of these matters, account must also be taken of obligations in relation to meeting Renewable Energy targets which apply both nationally and locally. It is not considered appropriate in this regard to introduce policies which may unilaterally restrict consideration of almost the entire county for Wind Energy projects. Having regard to the ongoing review of National Policy, to the submission of the Department of the Environment, Community and Local Government, and the Council's legal obligations to adhere to National Policy, it is recommended that P - WIN2 and P - WIN6 not be proceeded with pending the finalisation of both the review of the National Guidelines on Wind Energy and the Planning Policy Framework for Renewable Energy Export.*

Yet again, matters had already been decided at national level. It is also important to note that this document was submitted for review by the County Council on the 14th December 2013 and, as above, stated clearly: *It is anticipated that issues raised in many of the submissions such as noise and shadow flicker will be addressed in the aforesaid Guidelines review.* The development of these Guidelines is discussed in the next section on Article 8 of the Convention. This development process had already commenced on the 30th January 2013, at which time it was clear that the review of the Guidelines did not address the considerable range of issues raised in the public submissions above.

On the 21st January 2014 the County Councillors met to adopt the draft plan with the above amendments. On February the 15th, Jan O'Sullivan, TD, Minister for Housing and Planning at Department of the Environment, Community and Local Government used her powers (Section 31 Notice of Intent) to direct Westmeath County Council to remove restrictions on wind farm developments in this county development plan. In a letter to the council, the Minister of State described this measure as being "*significantly inconsistent with . . . national targets for the generation of energy from renewable sources*" and called on the council to review it. She claimed that the councillors did not "*take sufficient account*" of her department's wind energy guidelines, which set a minimum distance of 500m between a turbine and a house – a figure repeated in draft revised guidelines.

As was pointed out to Westmeath Council and the Department of Environment, Local Government and Planning by the Lakelands Wind Information Group in the two week consultation which followed this Notice of Intent:

- *Notwithstanding the extraordinary pressure Minister Jan O'Sullivan is applying on the Council to delete P-WIN6 expeditiously, the two week consultation period provided to the community is inadequate, which is a position upheld by UNECE against Ireland (ACCC/C2010/54).*

On the 29th April 2014 the Minister of State appointed an independent inspector to examine the case for Westmeath being allowed to have a 2 km set back distance in their county development plan (P-WIN6). This inspector's report was made available on the 20th May 2014, see Attachment 2. Two weeks has since been provided by the Department of the Environment for the relevant groups to make submissions. As regards the 'issues arising' it was stated:

- *It is argued that the main document containing the national target, i.e. the National Renewable Energy Action Plan is somewhat flawed or unlawful. It appears that challenged have been made on the basis of non-compliance with the Aarhus Convention and it has also been argued that a strategic*

environmental assessment was required. The action plan has, however, been sent to the EC in compliance with the requirements of EC Directive 2009/28/EC. I am not aware of any decision in the Irish Courts or in the European Court of Justice which has found it to be unlawful or invalid. It appears to have been accepted by the European authorities as in compliance with the Directive. In the circumstances I consider that it must be accepted as lawful setting out Government and national targets.

Yet again in this case, it is somebody else's problem when issues of non-compliances with the legislative framework are raised, such as the public to bring the matters themselves to the courts. Indeed, the above is completely farcical, the issues raised in the submissions were not whether the NREAP was compliant with Directive 2009/28/EC, but that there has never been a Strategic Environmental Assessment of the renewable energy programme completed or compliance ensured with the Aarhus Convention. He as an inspector had a duty to ascertain, as to whether that legal framework in relation to proper planning procedures had been complied with, and instead he completely abdicated that responsibility.

Furthermore, his report was inconsistent. While acknowledging that "*it is generally accepted the Wind Energy Guidelines of 2006 need to be updated in certain aspects*", see the next Section on Article 8 for further details, he then defends the deletion of P-WIN6, as it would be in conflict with those very same guidelines. In other words, the sole decision-making criterion was yet again national policy, i.e. the Minister should issue a Direction to overrule P-WIN6 in the Draft County Development Plan.

Note: The above situation with regard to County Westmeath is not an isolated issue. In the adjoining and similarly sized county of Offaly, when it released a draft of its development plan for the years 2014-2020 for public consultation, 2,223 submissions were received, of which 2,168 related to wind energy development. In the *Draft Offaly County Development Plan 2014-2020 Manager's Report to Members Circulated 18th March 2014* it was clarified:

- *At this point, it should be noted that many issues raised in the submissions relate to matters that are more appropriately dealt with in different fora. Because of the broad nature of their implications, some issues must be dealt with at a national level; these include the overall effectiveness of wind energy in reducing carbon emissions, economic benefits and costs, subsidies, how wind contributes and is accommodated in the national grid and the overall impact on human health.*

- *In determining this wind energy strategy the Members are required to be consistent with national policy in relation to wind energy development, and you cannot act contrary to the stated national guidance. Consideration must be limited to national policy where it pertains to County Offaly only, and even in this it is limited to the land-use considerations as they apply*

- *In December the Department of the Environment, Community and Local Government issued Circular letter PL 20/13. The Circular concerns "the preparation or review of renewable and/or wind energy strategies, whether as part of the preparation of a new Development Plan or a variation of an existing plan". As such it is relevant to this on-going review.*

- *The legal advice states that the Circular must be considered to be a representation of relevant policies or objectives for the time being of the Government or of any Minister of the Government and it would appear clear that there is an obligation on the elected members of the Council to consider the Circular Letter PL 20/13.*

- *Ultimately enacting a development plan which is diametrically opposed to or fundamentally incompatible with relevant current Government or Ministerial policy would be in breach of the obligation to 'take account' of such policies under s. 11 and 12 of the PDA and to have 'regard to' such policies under s.69(1)(e) of the Local Government Act 2001.*

On the 28th April 214 a 3.2km buffer was included in the new draft county development plan which was adopted by the elected members of the Council. It is now expected that the County Council is likely to be ordered by central Government to remove those restrictions. As can be seen the whole public participation was once again pro forma where the decision criteria was the national policy and neither the public participation nor the actions of their elected representatives were to influence it otherwise.

4.7 Article 8

On the 30th January 2013 the following was published in the national press and on the Department of Environment, Local Government and Community Affairs website:

- *The Department of the Environment, Community and Local Government in conjunction with the Department of Communications, Energy and Natural Resources–intends to undertake a technical update of the guidance on noise (including separation distance) and shadow flicker in the Wind Energy Development Guidelines 2006.*

- *This update is intended to ensure that the Wind Energy Guidelines are supported by a robust and up to date evidence base on these issues to support wind energy development in a manner which* ***safeguards residential amenity*** *consistent with EU and National Policy.*

- *Comments are invited on these aspects of the Guidelines only before February 15th, 2013. Submissions on other matters will not be considered at this time. The updated Guidelines will be issued as soon as possible thereafter, taking into account the views expressed during the public consultation process.*

There are a number of issues to be noted with this public participation. Firstly it was restricted to a two week period, which is breach of the requirement of Article 8 that:

- *Time-frames sufficient for effective participation should be fixed*.

As already determined in Communication ACCC/C/2010/54 two weeks is not a reasonable timeframe for the public to prepare for a public participation on a complex issue. Secondly, the scope of the public participation was very limited, i.e. only to the noise and shadow flicker aspects of the Wind Energy Development Guidelines. There has no review of any other aspects of these Guidelines since, which demonstrates how the Westmeath County Manager's analysis of the public consultation on the amendments to the draft county development plan 'were very

wide of the mark''; the scope of the review above most certainly did not address the extent of the issues raised by the public participation.

Thirdly, while 'residential amenity' is a common planning terminology, understood within the concept of Common Law, is not rigidly defined, but certainly includes an assessment of the potential effects on 'living conditions', i.e. to turn an otherwise satisfactory dwelling into one that is an unsatisfactory place in which to live. For instance in the Spittal Hill Wind Farm Application in Scotland[39], which was refused, in part, on the grounds of residential impact:

- *"Although the number of people whose residential amenity would be affected to the extent that their homes would become unpleasant to live in is small, this is an imposition of the sort the planning system is designed to prevent, unless the national interest is so overridingly important".*

Finally as the "Aarhus Convention: An Implementation Guide second edition" in relation to Article 8 defines: *Generally applicable legally binding rules include decrees, regulations, ordinances, instructions, normative orders, norms and rules*. In the planning appeal to An Bord Pleanala to the Corkermore a wind farm extension in County Donegal, see PL05E.242074, previously, the Planning Inspector's report summarised in relation to the noise impacts as presented by the two appellants:

- *There is a negative impact on human beings from the low frequency audible noise that would be emitted by proposed wind turbines. This can lead to fatigue, headache, impaired concentration, sleep disturbance and physiological stress. The submissions to the planning authority form the Glenties Windfarm Information Group and the Heatley Mulhall family pointed out the problems associated with noise nuisance. It was not considered in the Environmental Impact Statement (EIS) or by the planning authority. It should have been addressed in an Strategic Environmental Assessment (SEA) carried out before the National Renewable Energy Action Plan (NREAP) was made. Certain aspects of German noise regulations are described. The profile of noise emitted by wind turbines means that it should be measured with a 'C weighting', rather than the A rating used for traffic and industrial noise. The former does not discount low frequency noise to the same extent as the latter. A measure of noise emissions from a 2.5MW wind turbine at 305m yielded a result of 54dB under the C weighting, compared to 38.4dB under the A weighting. The sound power outputs provided by manufacturers of turbine can be inaccurate. The Irish guidelines refer only to A weighted measurements and are inadequate in that they abjectly fail to measure low frequency noise. Given the scattered nature of the Irish rural population, it is simply not possible to adequately maintain separation between the existing population and such strong outputs of low frequency noise as wind turbines. This should have been worked out before the NREAP was adopted. Under the German regulations a nightime noise level of 40dB(A) should be maintained in an area such as that containing the site. This would require a separation distance of 740m according to a sample calculation carried out of a windfarm of 7 turbines by the state of North Rhine – Westphalia. There are nine houses within that distance of the proposed windfarm. An analysis by the state of Saxony indicated that a separation distance of 950m would not be unreasonable. The proposed development would not be legal in Germany due to the impact of noise on residents.*

[39] Para. 9.114, DPEA ref. Spittal Hill: http://www.dpea.scotland.gov.uk/CaseDetails.aspx

- *The observer lives within 520m of the existing windfarm. That development has caused problems with shadow flicker and noise at the observer's house. He is aghast that the planning authority decided to approve an extension to it.*

When the environmental impact on Human Beings is assessed by the Planning Appeals Board, it follows as:

- *The noise emitted by the proposed wind turbines could have a negative impact on human beings occupying houses in the vicinity of the site. This impact must be considered in cumulation with that from the 5 existing turbines in the wind farm. The EIS contains predictions of the noise that would arise from the proposed development that take into account the existing turbines as well as the background noise in this rural area. The predictions indicate that the development would not cause exceedance of the noise emission limits recommended in the wind energy guidelines at the nearby houses, the closest of which is 516m from turbine no. 9. The predictions are based on survey data taken around the site, the known characteristics of the proposed turbines and a widely accepted forecasting model for noise emissions. The predictions are therefore considered acceptable. The appeal denies the appropriateness of the noise limits recommended in the guidelines, and gives extensive reasons for this denial. These reasons may or may not be persuasive. However whether the recommended limits are appropriate is a matter for the policy maker who gave us the guidelines, i.e. the minister. It would be arbitrary and unreasonable for the board to decide in this particular case not to apply the relevant statutory guidelines. The board is therefore advised that the proposed development is not likely to have a significant negative effects on human beings by virtue of the noise that it would emit.*

There are two important issues here. Firstly, the only consideration used in the planning decision was the output from Irish guidelines, i.e. they are the sole decision making criterion. This then confirms that the Guidelines are in terms of the Convention "*generally applicable legally binding rules that may have a significant effect on the environment*", i.e. Article 8 applies. It also demonstrates once again in relation to Article 6 that options are no longer open and public participation is pro forma. In particular, as there never was a Strategic Environmental Assessment complete for the renewable energy programme, these guidelines have essentially determined all wind farm planning applications in Ireland.

Of direct relevance as to the progression of this public participation was the briefing note prepared for the Minister for Environment in 18th December 2012 before he met the Minister for Communications, Energy and Natural Resources to discuss the revision of the new wind energy guidelines. This was obtained under an Access to Information on the Environment Request (AIE/2013/031) on Jan 6th 2014. Firstly it was acknowledged that the reason for the review was related to "*growing opposition – particularly in rural settings – to wind energy development*". It was then stated:

- ***The issue of wind energy development is, obviously, not just one for planning (in fact, it is not even primarily a planning concern).*** *The Minister for CENR is responsible for delivery of Ireland's renewable energy targets. Under the renewable energy directive, Directive 2009/28/EC, Ireland was set a binding national target by the European Union of ensuring that 16% of all energy consumed will be from renewable sources by 2020.*

- *Indeed, increasing the provision of onshore wind is one of the 5 strategic goals set out in the Government's Strategy for Renewable Energy 2012 – 2020, responsibility for which rests with the Minister for Communications, Energy and Natural Resources. The strategy states that "Ireland's onshore wind, offshore wind and ocean energy resources are an export opportunity therefore and that is the context in which the Government intends to create the conditions for its development". In the context of Minister Rabbitte and the Government's targets, it is essential that unnecessary brakes on wind energy development be avoided. Imposition of mandatory separation distances will make the assessment of planning applications much more straight forward but will render Ireland's renewable energy targets wholly unattainable.*

- *In addition, an Bord Pleanala uses a modified and slightly stricter version of the noise limits set out in the Department's Wind Energy Guidelines in the conditions which are attached to relevant permissions. The Department has written to the Board requesting the rationale for the amended noise limits used by the Board as the use of these stricter limits might be helpful in addressing some of the concerns expressed by the public in regard to noise nuisance. It is considered at this stage that the Board's more stringent noise criterion –* ***which is based on a threshold level which must not be breached for more than 10% of turbine time rather than the existing approach based on an average noise level*** *– could provide the basis for revised noise limits in any review of the guidelines.*

Yet again one sees that planning process and associated public participation is being treated as a simple pro forma approach. Issues are already decided and closed, regardless of what adverse environmental impacts arise during the actual assessment of the project.

Following the closure of this consultation phase on the 2006 Wind Energy Guidelines in February 2013, an Access to Information on the Environment request was made to the Department seeking access to:

- *"All submissions, meetings or other lobbying efforts made from 1 January 2011 regarding the guidelines."*

In the response by the Department (AIE/2103/014) it was stated that there were 914 records covered by the request and a "list of file names" was also provided. It was clear that the overwhelming majority of submissions from the public expressed deep concern about the intrusive nature of large scale wind turbines on their environment and in particular the impact of noise on human health.

On the 11th December 2013 the Department published[40] its outcome to the above public participation process, which was the "Proposed Revisions to Wind Energy Development Guidelines 2006: Targeted Review in relation to Noise, Proximity and Shadow Flicker – December 11th 2013[41]". A further consultation process was

[40] http://www.environ.ie/en/DevelopmentHousing/PlanningDevelopment/Planning/News/MainBody,34777,en.htm

[41] http://www.environ.ie/en/Publications/DevelopmentandHousing/Planning/FileDownLoad,34769,en.pdf

announced on the outcome of these, where it was also stated that:

- *"**Concerns of possible health impacts in respect of wind energy infrastructure are not matters which fall within the remit of these guidelines as they are more appropriately dealt with by health professionals.** However, the Department of Health has been made aware of the on-going review of the Wind Guidelines and any perspectives that they may have, relevant to the planning process, will be taken into account in finalising the revisions to the guidelines".*

A second access to information on the environment request was made to the Department as to how it took 'due account of the public participation'. The following reply was obtained (AIE/2013/031):

- *As you are aware, the Department of the Environment, Community and Local Government is currently conducting a targeted review of its Wind Energy Development Guidelines in relation to noise, proximity and shadow flicker. This Department and the Department of Communications Energy and Natural Resources commissioned a desk based study to review, and provide advice on, international best practice in relation to onshore wind farm noise.*

- *The report, by Marshall Day Acoustics and available on this Department's website at http://www.environ.ie/en/Publications/DevelopmentandHousing/Planning/FileDownLoad,34768,en.pdf, summarises the findings of the desktop study and concludes with comments about the effectiveness of the existing Guidelines.*

- *It includes a discussion and an overview of the submissions received by this Department as part of the preliminary consultation process. An analysis of the findings from these submissions can be found in Section 8.0 of the report.*

- *This Report formed a key input into this Department's review of the existing Guidelines and informed the production of the proposed revisions document which can be found at http://www.environ.ie/en/Publications/DevelopmentandHousing/Planning/FileDownLoad,34769,en.pdf. Submissions are now being invited in relation to the proposed revisions.*

As all that occurred in the above report was a short summary of the submissions from the public without any written analysis of how they had been taken into account, see Appendix B of this Communication, an Internal Review of this response was requested for which the reply stated that the Department were: *satisfied that all the records in the Department in this matter have been identified and/or supplied to you.*

The fact that the only documentation the Department had on the outcome of the February 2013 public participation was produced by an obscure private company is of relevance; the Department as the statutory decision maker has to provide the written analysis. Indeed despite this lack of written analysis or evaluation of the public submissions in relation to the decision making, the summary of the submissions in Marshall Day report had to conclude: "*The potential negative health impacts from wind farms were a common issue of concern raised in a significant number of the submissions*". There is also no section of their report which deals with how people react to noise generally or how they react in particular to wind farm noise. In section 5 of their report on 'control methods for wind farm noise', which is the only section

where that might have been discussed, the word “people” occurs only once.

In a further Access to Information on the Environment request (AIE/2014/001) to the Department of the Environment in relation to these wind energy guidelines, the correspondence from the Department of Health to the Department of the Environment of 23rd December 2013 in relation to wind turbines and health including noise shadow flicker was obtained. This referred to Deputy Chief Medical Officer (DCMO), who had concluded based on a literature review that:

- *“Wind turbines do not represent a threat to public health. However, there is a consistent cluster of symptoms related to wind turbine syndrome which occurs in a number of people in the vicinity of industrial wind turbines. There are specific risk factors for this syndrome and people with these risk factors must be treated appropriately and sensitively as these symptoms can be very debilitating”.*

As the correspondence then went on to explain:

- *I understand the that the DCMO has also discussed the matter with you and has suggested that you might consider engaging experts in this field along the lines of the approach adopted when the issue of health effects of electromagnetic fields was being considered by your Department. In that case, an expert group was established and reported on the matter in 2007.*

Clearly the Department of Health has expressed genuine concerns, as has several hundred citizens in their submissions to Department of the Environment, yet the same Department of the Environment continues to refuse to address the issue of health impacts in the analysis of the public participation and resulting content of its decision, i.e. the “Proposed Revisions to Wind Energy Development Guidelines 2006”. In this regard the initial scope of the public participation in February 2013 on these prosed revisions was related to ‘residential amenity’, the key component of which is to have a ‘healthy home environment to live in’. However, that key aspect was now clearly excluded in the publishing of these ‘proposed revisions’.

It is also relevant that the Department of the Environment delayed in writing to the Chief Medical Officer until the latter end of 2013, which was immediately prior to the publication of the Draft Guidelines, when on the 25th of October 2013 it requested: “*If the Department of Health has a National position on noise / shadow flicker from wind turbines from a health impacts perspective”* and stipulated a response was required by the “*12th November 2013*”.

In addition, the “Proposed Revisions to the Wind Energy Development Guidelines” have maintained a setback distance of 500 meters: “*because of the lack of correlation between separation distance and wind turbine sound levels.*” The inadequacy of this conclusion can not only be seen in the escalating number of noise complaints from the members of the public, but also when compared to noise standards applied in other countries. In this regard it is necessary to point out that in the “Proposed Revisions to Wind Energy Guidelines 2006”:

- *Noise limits are expressed in terms of dB L_{A90} 10min as determined in accordance with the Best Practice Technical Appendixes (to be developed).*

In other words if we go back to the Minister’s briefing notes, this corresponds to

- *which is based on a threshold level which must not be breached for more than 10% of turbine time rather than the existing approach based on an average noise level*

This is not only unusual, as noise limits are generally expressed in terms of the average value L_{Aeq}, while for turbine noise it is commonly taken that L_{Aeq} is 2 dB more than L_{A90}. In other words, expressing the noise limit in terms of L_{A90} results in a higher permissible noise limit related to 10% of turbine time.

Article 8 of the Convention requires that the result of the public participation shall be taken into account as far as possible. As the Implementation Guide clarifies:

- *This provision establishes a relatively high burden of proof for public authorities to demonstrate that they have taken into account public comments in processes under Article 8.*

One can only conclude that this did not occur in the revision of these guidelines, indeed the matters had already been decided, prior to the public participation by the relevant Ministers. Once again the public participation was pro forma. While a second public participation in now ongoing on the published 'proposed revisions', the content to the new guidelines are now codified and there is a stated refusal to address the public concerns, which are related to the adverse noise and health impacts associated with these developments being too close to the residential developments.

4.8 Article 9

4.8.1 Article 9(1)

Article 9(1) requires that:

- *Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under Article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.*

Under the Irish Regulations on Access to Information on the Environment (S.I. No. 133 of 2007 as amended), the Office of the Commissioner of Environmental Information (OCEI) has been designated as responsible for this function[42]. In Section VIII of the Irish Aarhus Convention National Implementation Report on obstacles in relation to Article 4 it is stated:

- *Specific issues raised in the context of the submissions are:*
    - *Lack of resources of the OCEI*
    - *Time taken for appeals to be heard (average length of time for an appeal to date has been 12.3 months)*
    - *The appeal fee*

[42] http://www.ocei.gov.ie/en/

- *Lack of public awareness / awareness in public authorities*

- *As with the rest of the public service in Ireland, the OCEI has been required to maximise efficiencies and productivity and to provide an effective organisation that delivers maximum value for money. The complexity of the appeals received by the OCEI cannot be disregarded or minimised in considering the length of time taken to process appeals. The work of the OCEI is commendable for its thoroughness and the time applied by staff to each query.*

- *While the OCEI is funded through the general government allocation to the Office of the Ombudsman and it is a matter for that Office to allocate the funding to the various bodies under its remit as it deems appropriate, it is acknowledged that the significant economic challenges facing the State arising from the financial crisis have presented significant funding difficulties for all public service organisations, including the Office of the Ombudsman.*

The reality is that to all extents and purposes the OCEI has stopped processing appeals, as has been documented in already in relation to Article 4 and the situation of Bord na Mona. Appeal CEI/12/005[43] related to an access to information on the environment request made on the 7th March 2012, which was prior to the point that Ireland ratified the Convention. The appeal was not resolved until the 30th September 2013 and contained a section entitled: "Delay in processing the appeal":

In his submission dated 8 September 2013, the appellant refers to my duties under Article 9 of the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, which is more commonly known as the "Aarhus Convention." He notes that, under Article 9(4) of the Aarhus Convention, review procedures are required to be "fair, equitable, timely and not prohibitively expensive". He states:

"With regards to 'timely', it is abundantly clear that the Commissioner's office essentially sat on the appeal and did absolutely nothing for over a year. This is an outrageous non-compliance with regard to the Commissioner's legal obligations."

As I have highlighted in my Annual Reports, since its inception, the OCEI has encountered a number of practical difficulties arising from the operation of the AIE regime. One problem is the matter of resources. Although the OCEI is a legally independent Office, to date, it has not received any funding allocation from the State and must rely entirely on the resources that can be made available from the very limited resources available to the Office of the Information Commissioner. Consequently, there generally are considerable delays in bringing AIE appeals to completion. The delays are certainly regrettable and arguably not in keeping with the State's obligations under the Aarhus Convention, and I apologise for any inconvenience caused. However, it must be acknowledged that the delays will be difficult to overcome given the demands of the AIE regime as it currently operates in Ireland on the one hand and the dearth of available resources on the other.

One can only contrast the situation where semi-state companies have billions of Euros given to them to progress renewable energy programmes, while the OCEI in relation to the citizens' rights gets zero funding.

[43] http://www.ocei.gov.ie/en/Decisions/Decisions-of-the-Commissioner/Mr-Pat-Swords-and-the-Department-of-Environment-Community-and-Local-Government-.html

4.8.2 Articles 9(3) and 9(4)

In 2012/2013 the European Commission contracted professor Jan Darpö, chair of the Aarhus Convention Access to Justice Task Force and a number of renown national experts in the field to draw up the state of play of implementation by 28 Member States on the implementation of Articles 9 (3) and (4) of the Aarhus Convention[44]. The report on Ireland was prepared by Professor Aine Ryall and concluded:

- *The Irish authorities' response to the access to justice obligations arising under the Aarhus Convention and EU environmental law has been largely reactive, piecemeal and minimalist. A coherent, forward-looking strategy, that involves all interested parties, is urgently required if fundamental problems in the system are to be tackled, including the fragmented legislative framework, high legal costs and the ongoing absence of accessible and user-friendly information about environmental rights and obligations.*

Despite ratification by Ireland of the Convention in 2012, the situation has not significantly improved since then. Klohn V An Bord Pleanala [2011] IEHC 196[45] is noteworthy for two things. Firstly in that a High Court judge concluded that

- *With regard to the Aarhus Convention, this convention is not applicable as Ireland has not formally ratified it.*

This was despite the fact that the Convention had been part of Community legal order since its ratification in February 2005. In regards to the costs for the four day High Court hearing, Volkmar Klohn being left to carry both his costs and those of the respondent, the respondents costs being determined as:

- *The Taxing Master's allowances to the respondent's legal team came to approximately €86,000.00, which can be apportioned as follows: Solicitors fees €32,579.62, Sundries €800.00, Senior Counsel's Fees €20,000.00, Junior Counsel's fees €14,250.00, VAT €14,202.24, Stamp Duty €5,013.00. The Master deemed fees for Senior and Junior Counsel to be reasonable but reduced the solicitor's fee from €45,000.00 to €32,000.00. In these proceedings the applicant has lodged objections against every single item of costs identified in the bill.*

The High Court Judge then concluded:

- *Moreover, it seems to me that the Taxing Masters allowance is not excessive in the context of the extensive Judicial Review of four days that took place before the High Court in this case. The costs, as assessed, appear to reflect economic reality for litigants in the State.*

In Section XXIX of Ireland's National Implementation Report in relation to "obstacles encountered in the implementation of Article 9" it is stated:

[44] http://ec.europa.eu/environment/aarhus/studies.htm

[45] http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-54/Correspondence%20with%20communicant/frCommC54Annex_Klohn_V_An_Bord_Pleanala_5Sept2011.pdf

- *Prior to ratification of the Convention, obstacles were encountered in the transposition of the costs elements of the access to justice provisions in Directive 2003/35/EC. These issues were dealt with through amendments to the Planning and Development Act 2000 (as amended) and the Environmental (Miscellaneous Provisions) Act 2011.*

- *It is not possible to provide details of case law in all scenarios due to the relative recent passing of the legislation in question some elements have not been tested in case law to date.*

Essentially these legislative changes relate to the fact that in Aarhus related litigation, each side bears its own costs, with the proviso that:

- *The costs of proceedings, or a portion of such costs, as are appropriate, may be awarded to the applicant to the extent that the applicant succeeds in obtaining relief and any of those costs shall be borne by the respondent or notice party, or both of them, to the extent that the actions or omissions of the respondent or notice party, or both of them, contributed to the applicant obtaining relief.*

However, as has been dealt with extensively by the Compliance Committee with regard to legal costs in the UK, such as through Decision IV/9i, the costs there to be borne by the plantiff are still excessively high and an obstacle to access to justice. Note; the cost of litigation in Ireland is recognised as being higher than in the UK.

Following the August 2012 findings and recommendations of the Compliance Committee in ACCC/C/2010/54, there was a refusal by planning authorities to address these issues with respect to the non-compliance of the NREAP. Instead submissions in this regard were ignored and planning permission granted. The only option for the Communicant on ACCC/C/2010/54, Pat Swords, was to then take the matter to the High Court, which he did as a lay litigant, the following Order of the High Court being obtained on the 12th November 2012.

THE HIGH COURT
Monday the 12th day of November 2012 BEFORE MR JUSTICE PEART

PAT SWORDS – Applicant
-AND-
DEPARTMENT OF COMMUNICATIONS ENERGY AND NATURAL RESOURCES
Respondent

JUDICIAL REVIEW 2012/920JR
Upon Motion of the Applicant in person made ex parte unto the Court this day for leave to apply by way of an application for judicial review for the following reliefs

Relief 1: Order of Certiorari
Order of "certiorari" of the Irish National Renewable Energy Action Plan (NREAP) adopted under Directive 2009/28/EC and the Renewable Energy Feed In Tariff (REFIT) scheme (State Aid N57 l /20006 and its extension)

Relief 2: Declaration
An order of Declaration by way of an application for Judicial Review in relation to the current implementation of the renewable energy programme and its associated funding arrangements. Is it lawful vis a vis Directive 2001/42/EC and Article 7 of the

Aarhus Convention to grant planning permission for such developments and award funding under the R EFIT scheme when no proper and legally compliant environmental considerations and public participation in decision-making have occurred in the development of this programme. In particular, as a requirement of Annex I of Directive 2001/42/EC, the main environmental protection objectives of the plan or programme should be clearly defined and the alternative measures considered to achieve them.

Relief 3: Order for Protective Costs
An order for Protective Costs in my favour by way of an application for Judicial Review and under Section 50B (2A) of the Planning and Development Act 2000 (as amended by the Environment Miscellaneous Provisions Act 2011). As applicant I seek said leave for Judicial Review pursuant to the law of the State that gives direct effect lo the provisions of Directive 2001142/EC and the UNECE Aarhus Convention, as set forth in paragraph (d) of the Statement of Grounds herein signed by the Applicant on the Grounds set forth therein.

Whereupon and on reading the Statement and the Affidavit of the Applicant filed on the 8th day of November 2012 verifying the facts set out in the said Statement and the exhibits referred to in said Affidavit
And on hearing said Applicant IT IS ORDERED that:

1. *The Applicant do have leave to apply by way of application for judicial review for the reliefs set forth at paragraph (d) in the aforesaid Statement on the grounds set forth at paragraph (e) therein.*

2. *The said Applicant do serve an originating Notice of Motion returnable for the 15th day of January 2013 together with copies of the aforesaid Statement and verifying Affidavit and of this Order on the Chief State Solicitor on behalf of the Respondent.*

3. *The costs of this application and Order be reserved*

DAYID NEENAN REGISTRAR
13th November 2012

It is generally recognised that the preparatory work for taking a case to the 'leave' stage in Ireland is about €20,000, but this was avoided in this case as the plaintiff had some knowledge in the preparation of the legal affidavits, which he did himself and thereby avoided this cost element. However, this would not be an option available to the typical Irish citizen. There was also a discussion held with Justice Peart as to 'not prohibitively expensive'. It was clarified by the plaintiff that the cost rules in Section 50B, i.e. each side paid their own, did not give effect to Article 9(4) of the Convention in relation to 'not prohibitively expensive'. There was then a discussion about the Edwards's case C-260/11 in the European Court, the decision on which was imminent, and as to how this would be addressed when the matter resumed in the New Year.

On the 29th January 2013 instead of preparing a Statement of Defence, contrary to the rules of the Superior Courts, the State Solicitor lodged a Pleading Notice of Motion:

1. *An Order to have the within proceedings dismissed in limine on the grounds that the Applicant's claim is barred pursuant to Order 84, Rule 21 of the Rules of the rules of the Superior Court, 1986 as amended and/or, if necessary or*

appropriate, to set aside grant of leave to institute Judicial Review proceedings.

2. *Such further or other Order or direction as this Honourable Court may consider just or necessary.*
3. *An Order providing for costs and expenses of this application.*

This second motion of undue delay was heard over three days in April 2013, a day and a half of which was in front of the President of the High Court Justice Kearns. Legal representation for this hearing had to be paid by the plaintiff, in line with what had been determined to be the economic reality in the Klohn case. Justice Kearns determined that the Aarhus Convention had effect from when ratified by the European Union in 2005, which was a reversal of the position adopted by his High Court colleague Justice Heddigan in the Klohn case. As such he determined that as Article 7 of the Convention was not time limited and he had to give effect to it through Irish law, he concluded that the matters arising were more suitable to be commenced by way of plenary summons. Leave was therefore given to commence proceedings by means of plenary summons in substitution for the application for judicial review.

As regards the issues of cost, these were reserved till the later hearing. No written judgement on this hearing was produced by Justice Kearns, which has to be taken within the context of the requirements of Article 9(4) for written decisions.

The plenary summons was issued on the 24th April, record 2013/4122P. A Statement of Claim on the plenary summon was prepared and delivered to the defendant on the 17th June 2013. The defendant did not prepare its statement of defence until the 18th November 2013, a year after Judicial Review proceedings had commenced. On the 19th November, when the matter came in front of the Court for the seventh time for directions, the Court ordered the proceedings to be adjourned generally by consent. The Court did not make any subsequent order.

The Statement of Defence raised a considerable number of issues, some already documented in the previous Section on Article 3.1, which included:

- Justiciability, non-implementation of the Aarhus Convention by the Oireachtas (parliament) and separation of the powers under the Constitution
- Competence, in that the defendant was not the competent authority in the State for the application and enforcement of the Aarhus Convention
- Inapplicability of the Aarhus Convention, SEA Directive and EIA Directive to the NREAP and REFIT renewable energy funding programme
- Categorisation, as to whether the NREAP and REFIT were a plan or programme related to the environment
- Approval by the European Union of the NREAP and REFIT
- Responsibility, that any breach of the Aarhus Convention was committed by the European Union
- Technicalities with regard to choice of renewable energies, which require expert evidence
- Being a stranger to requests for information

- Whether the Aarhus Convention is an instrument of European Law

The plaintiff was very concerned by the number and issues raised by the State in its defence, in particular as it indicated that the length of the resulting trial would stretch to ten days, the cost implications of which would be simply enormous, i.e. potential legal fees of €200,000. In contrast the plaintiff was of the opinion that a trial on the core issues of the proceedings, i.e. whether the respondent is in breach of the Aarhus Convention in adopting the NREAP, Energy Policy Framework and REFIT scheme without allowing for public participation and dissemination of information with regard to same, would last a little over two days and therefore the costs would be considerably less. Additional costs related to in excess of two days should be funded by the State, i.e. an indemnity for costs above €30,000.

On this basis the State Solicitor was formally written to 28th March 2014, as the matter was clearly prohibitively expensive and the State and judiciary had not made adequate arrangements for dealing with such circumstances. The reply of the State Solicitor to this letter of the 4th April is provided in Attachment 1. Not only did the State reject these matters completely, but stated that they required considerably longer than ten days for the Court proceedings. Furthermore, on the 28th March the State also lodged a Notice of Motion and Grounding Affidavit once again seeking undue delay and repeating the same arguments that had been documented in January 2013 and dealt with in the resulting High Court hearing in April 2013.

1. *An order to have the within proceedings dismissed for reasons of laches and/or unreasonable, inordinate and or inexcusable delay in commencing Judicial Review proceedings under Record No 2012/920JR and in bringing these proceedings.*

2. *Such further or other Order or directions as this Honourable Court may consider just or necessary.*

3. *An Order providing for the costs and expenses of this application*

Currently, and as of late May 2014, a date is to be set by the High Court for the hearing on the above Notice of Motion and a Protective Costs Order which would include the indemnity arrangement documented above.

In conclusion, the State clearly has no arrangements to ensure that access to justice is not prohibitively expensive and when challenged in judicial proceedings, such as documented above, will obstruct and draw out the proceedings to the maximum extent possible to ensure that they are no longer affordable to the plaintiff.

4.8.3 Article 9(5)

Article 9(5) requires that each Party:

- *Shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.*

The previous sections demonstrate that this has not happened. Indeed the fact that the State solicitor has been obstructive when it came to the substantive issues on ACCC/C/2010/54 and the NREAP being raised in Court and additionally repeatedly seeking costs and expenses, is indicative of a vindictive approach being taken to those seeking access to justice.

5. PROVISIONS OF THE CONVENTION RELEVANT FOR THE COMMUNICATION

As the previous section documents, there are systematic failures to comply with the Convention. These can be summarised in the following table:

Article of the Convention	Remarks
Article 3.1	See Section 4.2 of the Communication and reference in Section 4.5.2
Article 4	See Section 4.3
Article 5	See Section 4.4
Article 6(4)	See Section 4.5.2, with additional references in Section 4.5.4, Section 4.6 and Appendix A
Article 6(8)	See Section 4.5.3 and Appendix A
Article 6(9)	See Section 4.5.4
Article 7	See Section 4.6
Article 8	See Section 4.7 and Appendix B
Article 9(1)	See Section 4.8.1
Articles 9(3) and 9(4)	See Section 4.8.2
Article 9(5)	See Section 4.8.3

6. USE OF DOMESTIC REMEDIES OR OTHER INTERNATIONAL PROCEDURES

As regards domestic remedies, it has been previously documented that environmental groups and individuals have utilised domestic remedies, such as the Commissioner for Environmental Information, an Bord Pleanala, the Irish Ombudsman and the Irish High Court.

On an international level the EU also bears responsibility for implementation of the Convention in Ireland. In the findings on ACCC/C/2010/54 it was pointed out:

- *The Party concerned cannot deploy its obligation to monitor the implementation of article 7 of the Convention in the development of Ireland's NREAP by relying on complaints received from the public, as it suggested it does during the public hearings conducted by the Committee.*

Furthermore, at the Compliance Committee meeting of September 2011 it was clear that the EU as a Party to the Convention had no structured method of dealing with complaints from the public and was insisting on its absolute discretion as to what to enforce. Since then representatives of groups in Ireland campaigning against the wind energy programme have met representatives of the EU Commission in Brussels, but each time there is a refusal to deal with the issues raised in relation to non-compliances with the Convention.

In relation to the content of the appeal on CEI/12/005 in relation to climate change information, as the matter was not being addressed by the authorities in Ireland, including the Commission for Environmental Information, the relevant questions were directed instead to the EU Commission along with a narrative relating to the failures in Ireland with regard to access to information. While the questions were answered, although in a manner which was not considered satisfactory, i.e. the accuracy of information being related to 'political consensus', the EU Commission in turn opened on the 16th May 2013 a complaint file CHAP(2013) 1323. This stated:

- *"The lengthiness of the appeals process has also been raised in the framework of the EU PILOT and we have asked the Irish authorities to clarify the reasons for these delays".*

In the Submissions on the Irish Aarhus Convention National Implementation Report this EU Pilot 4694/13/ENVI was raised and replied to that:

- *Ireland has responded to communication from EU and received no further correspondence on this matter.*

This once again demonstrates the lack of enforcement related to the EU's obligations under Article 3(1) of the Convention.

It is also necessary to highlight that a formal complaint was lodged by the European Platform Against Wind Farms (EPAW) to the EU Ombudsman in September 2012[46]. This dealt not only with the failures of the Irish NREAP to comply with Article 7 of the Convention, as per the findings and recommendations in ACCC/C/2010/54, but also to enforce the necessary provisions related to the Strategic Environmental Assessment Directive in Ireland. In December 2012, the EU Ombudsman responded to EPAW:

- *Whilst the complaint contained a number of allegations, it appeared useful to first seek clarifications from the Commission on the following allegation only:*

- *Allegation: The Commission has failed to ensure that the Republic of Ireland carried out a strategic environmental assessment pursuant to Directive 2001/42/EC, prior to adopting its National Renewable Energy Action Plan based on Directive 2009/28/EC.*

[46] http://www.epaw.org/legal.php?lang=en&article=c4

On the 30th September 2013 the EU Ombudsman reached his decision on case 1892/2012/VL[47]. There were a number of unsatisfactory issues with this. Firstly with regard to compliance with the Aarhus Convention:

- *With regard to Case ACCC/C/2010/54, the Aarhus Compliance Committee issued its findings to the Commission on 16 August 2012. On 31 August 2012, the Commission informed the complainant that it had commenced to reflect on how to address these findings. The Aarhus Compliance Committee, on 15 July 2013, asked the European Union for information to its follow-up, which is still to be assessed further. Therefore, given that the Aarhus Compliance Committee currently continues dealing with this matter, an inquiry into how the Commission has complied with the Aarhus Compliance Committee's findings would, at this stage, be premature.*

A ruling of non-compliance with the Convention, which is part of Community Legal Order is maladministration. However, the EU Ombudsman decided to do nothing about it and leave it instead to UNECE and the Communicant / Irish Public to enforce Community Law.

The EU Ombudsman further concluded:

- *The Commission essentially explained that due to the general character of the Irish NREAP, the SEA could be carried out at the subsequent stages, which would entail the adoption of specific mandatory measures to comply with and which would be setting the framework for future development consent of projects, such as, in the case of Ireland, county development plans or other specific plans. The Ombudsman notes that Article 3(2)(a) of Directive 2001/42/EC, invoked by the complainant, requires that an SEA be carried out for energy plans or programmes "which set the framework for future development consent of projects". Thus, if the Irish NREAP does not set the framework for future development consent of projects, it would appear indeed reasonable and sensible to carry out a SEA at the (later) stage where that condition would indeed be met. The complainant also put forward, by reference to the Directive 2009/28/EC, that it was surprising for the Commission to claim that "specific mandatory measures" did not need not to be included in the NREAP. It is indeed true that Directive 2009/28/EC requires Member States to include in their NREAPs adequate measures to be taken to achieve national overall targets. Nevertheless, the issue as to how specific these measures have to be would seem to be a matter of interpretation of Directive 2009/28/EC. In any event, the Ombudsman notes that this Directive does not appear to require, as regards the measures to be adopted, a level of specificity that would "set the framework for future development consent of projects" and, as a result, give rise to an obligation to carry out an SEA.*

This related to a clarification from the EU Commission to the Member States that a Strategic Environmental Assessment on the NREAP was not necessarily obliged at this stage of the process. Their position being that "*if a Member State had decided not to include in its NREAP 'specific mandatory measures' to comply with, then a Strategic Environmental Assessment was not required at this stage".*[48] The EU

[47] http://www.ombudsman.europa.eu/de/cases/decision.faces/de/51946/html.bookmark
[48] http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-54/Correspondence%20with%20communicant/Response_08.01.2012/frCommC54LetterIrishAd2ECreNREAP.pdf

Ombudsman's position can only be described as complete nonsense, as the NREAPs implement the 'Mandatory Targets' defined in Article 3 of Directive 2009/28/EC and as such, as was pointed out to the EU Ombudsman, inherently contain 'specific mandatory measures'.

The EU Ombudsman also chose to ignore the jurisprudence of the European Court, where as regards setting the framework for future development consent of projects falling under the Environmental Impact Assessment Directive[49], the Opinion of Advocate General Kokott, as delivered on 4 March 2010 in *Terre wallonne ASBL (C-105/09) and Inter-Environnement Wallonie ASBL (C-110/09) v Région wallonne*[50], where it was necessary to consider the meaning of the terms "plan" and "programme" and the circumstances in which they set a 'framework for development consent' of projects, the Advocate General was very clear:

- *67. To summarise, it can therefore be said that a plan or programme sets a framework in so far as decisions are taken which influence any subsequent development consent of projects, in particular with regard to location, nature, size and operating conditions or by allocating resources."*

The NREAP defines the requirements for the electricity infrastructure development in Section 4.2.6 and the support schemes in Section 4.3. Sectoral targets are laid out in Section 3 and the measures for achieving those targets are defined in Section 4. In Section 5, the contribution of each renewable technology is defined, as the template states: "*For the electricity sector, both the expected (accumulated) installed capacity (in MW) and yearly production (GWh) should be indicated by technology",* while Table 10 in Section 5 of the Irish NREAP specifies for 2020 in the Republic of Ireland, 4,649 MW of installed wind energy on the non-export scenario, rising to 7,145 MW of wind energy on the export scenario.

In summary, the EU Ombudsman simply doesn't want to deal with this matter.

7. CONFIDENTIALITY

There is no requirement to keep matters confidential

8. SUPPORTING DOCUMENTATION

While public authorities in Ireland have been responsible for systematic failures in relation to the Convention, as previously documented, it must also be recognised that the electronic dissemination of planning documentation, both at local authority level and at that of An Bord Pleanala, is very good. Indeed as it is readily available from the links in the footnotes to this document it is not considered necessary to attach these documents, such as inspector's reports, to this communication. However, the reply of the State of the 4th April 2014 to Pat Swords' legal team in relation to the refusal to address cost issues, i.e. 'not prohibitively expensive' and the State's requirement for more than ten days in the High Court is included as Attachment 1. Attachment 2 contains the Report of the Inspector appointed by the Minister for State in relation to the County Westmeath draft Development Plan.

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[49] Article 3(2) of the SEA Directive and Section 9(1)(a) of S.I. No. 435 of 2004

[50] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CC0105:EN:NOT

9. SUMMARY

This comprehensive submission related to the implementation of the renewable energy programme in Ireland shows systematic failures of multiple public authorities to comply with the following provisions of the Convention:

- Article 3(1)
- Article 4
- Article 5
- Article 6, especially paragraphs 4, 8 and 9
- Article 7
- Article 8 and
- Article 9, especially paragraphs 1, 3, 4 and 9

Some of these issues have a historical basis, such as an inherent reluctance of Ireland to ratify the Convention even though it had been an established part of Community legal order since ratification by the EU in 2005. This resulted in a piecemeal and fragmented approach being taken, especially with regard to access to justice and the costs related to same. Furthermore, the manner in which the Irish authorities adopted their renewable energy programme, without any proper environmental or economic assessment or engagement with the Irish public, has left a legacy in which resulting downstream decisions can only be justified by essentially sole reference to the same Government policy. Time and time again on projects and programmes related to renewable energy, any form of public input raising issues of concern relating to this policy are ignored, as these matters are deemed firmly closed and no longer open to effective public participation. As a result public participation is a facile pro forma exercise just used to tick the boxes, in which the public are simply not allowed to influence decisions adopted already at central Government level.

10. SIGNATURES

Oliver Cassidy

Oliver Cassidy
Group Member
Lakelands Windfarm Information Group

Jackie Carroll
Secretary
Wind Aware Ireland
19th May 2014

David Malone,
Environmental Development Officer,
Environmental Action Alliance-Ireland (EAA-I).
Sig: David Malone Dated: 19th May 2014

MICHAEL MULDOON

Michael Muldoon

Chairman
Kingscourt Residents Against Local Windfarms
19th May, 2014

Meath Wind Turbine Information Group ("MWIG")
c/o Rosaleen Dolan, Secretary,
[redacted]

Meath Wind Information

Signed Rosaleen Dolan
(Rosaleen Dolan)

Secretary of the above group.

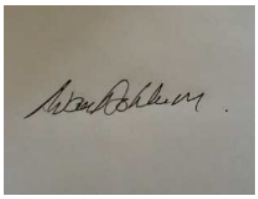
Date: 14th May, 2014.

EUROPEAN PLATFORM AGAINST WINDFARMS

Val Martin

VAL MARTIN
SPOKESMAN FOR THE REPUBLIC OF IRELAND
19th May, 2014

epaw



Neil van Dokkum, for and on behalf of Rethink Pylons, Blue House, Lismore, Co Waterford.
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RETHINK PYLONS

Appendix A

Summary of Public Participation on Planning Decision

1. FOYLATALURE WIND FARM, COUNTY KILKENNY

An original Submission was made to Kilkenny County Council on Application 12/378 dated 1st September 2012[51] in relation to a windfarm comprising of four turbines with a maximum blade tip height of 121 m. The planning report of 15th October 2012 documented that a lengthy submission was received from Mr Joseph Caulfield, *which the salient points raised can be summarised as follows.*

- *Renewable energy programme in Ireland is proceeding without proper authority*
- *16th of August 2012 the compliance committees issued its recommendations in relation to compliance by the EU with terms of the Aarhus Convention which applies to the implementation of the renewable energy programme in Ireland- has recommended that the EU is now required to put in place the necessary measures to ensure that arrangements for public participation in a member state are transparent and fair within those arrangements the necessary information is provided to the public*
- *Arhaus convention is clear with regard to the importance of fully integrating environmental considerations in governmental decision making and the consequent need for public authorities to be in possession of accurate, comprehensive and up to date environmental information.*
- *The Irish NREAP contained no environmental information outside references to planning legislation. NREAP was rushed through in a two week period . NREAP us therefore proceeding without proper authority and therefore guidelines cannot be legally used .*
- *No data exists in relation to the justification for these wind farms*
- *For each MWH of wind energy input to the grid the emission related to the same MWh of fossil fuel power plant generation is displaced no allowance is made for the fact that the fossil fuel plants have to kept running to balance the volatile and intermittent input of wind energy*
- *EU's and member states in relation to fuel and emissions savings are not transparent*
- *The proposed green house gas savings associated with the EUs renewable energy programme have not been documented in a transparent manner*

[51] http://planning.kilkennycoco.ie/

- *Do not know what tonnes if greenhouse gases are saved what the costs and alternatives area, nor what the environmental impact of those emission savings will be.*

- *Sole justification of the proposed windfarm is that it provides alleged benefits in terms of environmental l benefits. The Planning Authority has a defined legal obligation to assess these in individual cases it cannot rely on references to National and EU policies which have by passed legally required assessments and public participation*

- *Cannot rely on the developer's documentation to assess environmental impact of development, the competent authority must assess them in an appropriate manner.*

- *States if granted and connected to the grid it will result in increased emissions and fossil fuels requirements*

- *Given the significant environmental impacts associated with wind farms such as landscape, noise, impact on biodiversity etc the proposed windfarm should be refused*

The planners report then concluded with regard to the above:

- *All issues raised were considered in reaching my recommendation.*

No other written analysis related to the matters raised and neither was there an assessment of the alleged climate benefits of the projects, the sole justification for it. The Windfarm was approved on essentially the sole basis of compliance with the County Development Plan.

The Final Draft of the Recommendations on Public Participation in Decision-making in Environmental Matters of February 2014, as prepared by the UNECE Task Force on Public Participation in Decision-Making, as referred to previously, states in Section 130 in relation to *Evidence of taking due account of the outcome of public participation:*

- *With respect to evidence of taking due account of the outcome of the public participation, the obligation to take 'due account' under article 6, paragraph 8, should be seen in the light of the obligation in article 6, paragraph 9, to 'make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based'. This means that the statement of reasons accompanying the decision should include a discussion of how the public participation was organized and its outcomes were taken into account. It is recommended that the legal framework should therefore include a clear requirement that the statement of reasons include, as a minimum:*
  a) A description of the public participation procedure and its phases;
  b) All comments received;
  c) How the comments received have been incorporated into the decision,[52] *identifying clearly which comments have been accepted in the final decision, where and why, and which not and why not*.

[52] Compliance with regard to Spain, ECE/MP.PP/C.1/2009/8/Add.1, para.100.

This clearly did not occur. A formal Access to Information on the Environment request was made requesting the documentation in which due account of the outcome of the public participation had been taken in the final decision and the written Environmental Impact Assessment in accordance with Article 3 of the Environmental Impact Assessment Directive. The reply received from Breda Strappe of Kilkenny County Council on the 26th October was simply a copy of the same Planner's Report.

An appeal to An Bord Pleanala was prepared, but unfortunately arrived a day late in respect of the appeals period of four weeks from the date of decision. A complaint was lodged to the Irish Ombudsman Ombudsman concerning Kilkenny County Council's failures to carry out an environmental assessment and to provide written documentation of how due account of public participation was taken into account in the decision making process. The position of the Ombudsman's Office was that they were of the opinion that the examination of the impact statements formed part of the planning decision and therefore was not within the remit of this Office. However, it was clarified to them that the complaint, registered as L22/13/0105[53] was related to the breach of procedures and hence infringements of rights.

Finally on the 17th December 2013, a year later, the decision was made on the complaint:

Section 5 of the Ombudsman Act provides:

" (1) Subject to subsection 2, the Ombudsman shall not investigate any action taken by or on behalf of a person -
(a) if the action in one in relation to which-
....(iii) the person affected by the action has a right of appeal, reference or review to or before a person, other than a reviewable agency, who is independent in the performance of his or her functions in relation to the appeal, reference or review,

....(2) Notwithstanding subsection (1), the Ombudsman -
....(b) if it appears to the Ombudsman that special circumstances make it proper to do so, may investigate an action to which paragraph (a) or (d) of that subsection applies."

It is your complaint that the Council did not adhere to all relevant statutory requirements in making a decision in respect of Planning Register Ref. 12/378. I note that you maintain that you are not seeking to have the Ombudsman examine the decision reached in respect of the planning application but rather to examine the procedures followed in making the decision. However, it remains the view of this Office that it was open to you to refer such matters to An Bord Pleanála, although it seems that you did not exercise your right of appeal in this instance. Having regard to the existence of an alternative statutory right of appeal, reference or review the Ombudsman would not be in a position to examine this matter.

I have also considered whether the Ombudsman should exercise the discretion afforded to him in section 5(2)(b) above and set aside the provisions of section 5(1)(a) in this case. In doing so I have had regard to the fact that you had a right of appeal to An Bord Pleanála in respect of the matters about which you complained, that you were aware of the existence of your right to appeal the matter to the Board, the possible impact of any such examination on the rights of third parties, the lack of statutory authority available to the Ombudsman to set aside or amend planning

[53] https://www.ombudsman.gov.ie/en/Make-a-Complaint/My-complaint-status/

decisions and the nature and scale of the adverse affect which you claim you have suffered as a result of the Council's actions. Having considered the matter, I have concluded that there do not appear to be special circumstances which would make it proper for the Ombudsman to exercise his discretion to set aside the provisions of section 5(1)(a) in this case.

In the circumstances, this Office does not propose to examine your complaint and I will now close my file on the matter. I apologise again for the delay in finalising this matter.

2. GDNG RENEWABLES COUNTY DONEGAL

This wind farm, Donegal County Council Planning Application 12/50757, comprised 16 wind turbines with a maximum height of 152 meters. A submission was made by Patricia Sharkey on the 10th of December 2012 to Donegal County Council, which was similar in content to that outlined for the previous wind farm. In the Planner's report approving the decision it was stated:

- *A submission was received from Ms Patricia Sharkey on the 14th December 2012. This submission sets out a lengthy commentary and legal argument that the windfarm policy and legislative context at EU and National level is legally flawed on the basis that required assessments and public participation were not either followed or provided for and that, therefore, by consequence the decision making process on such policy is also legally compromised. In addition Ms Sharkey points to the obligations of the Planning Authority as competent authority in respects of Environmental Impact Assessment.*

This was then followed by the following response:

- *In Response the Planning Authority would contend that the argument in relation to any shortcomings or failures on behalf of the EU, the DoECLG or of other in respect of policy, guidelines and legislation concerning wind energy development, is not a material consideration in the determination of the subject application. The Planning Authority in determining the subject application is required to have regard to, inter alia; the County Development Plan, 2012-2018, Regional and National Guidelines, the applicable and existing legislative context and principally the proper planning and sustainable development of the area. It is respectfully contended that the making of a submission in respect of the determination of a planning application is not the appropriate forum within to challenge the legality of the applicable policy and legislative context, and consideration to any such argument is beyond the remit of the Planning Authority in determining a planning application. Should Ms Sharkey wish to challenge the legality or the validity of the applicable policy, legislation and guidance in respect of wind energy be that at a national or European level then the Planning Authority is satisfied that recourse to other appropriate options and the courts exist.*

As the planner's report contained no environmental assessment of the alleged benefit of the project, the climate change impacts, nor an evaluation of the content of the submission in this regard, an Access to Information on the Environment Request was made to Donegal County Council on the 23rd January 2013 in relation to:

- *(a) The documentation in which 'due account of the outcome of the public participation was taken in the decision' and;*

- *(b) The Environmental Impact Assessment completed by Donegal County Council (the competent authority) to comply with Article 3 of the Environmental Impact Assessment Directive (85/337/EC as amended).*

The Reply from Paul Kelly of the Donegal County Council Planning Department on the 25th January 2013 stated:

> *I wish to advise you that your submission was indeed taken into account by the Planning Authority in the determination of planning application Plan.Reg.No. 12/50757. I also wish to advise you that in its consideration, assessment and determination of planning application Plan.Reg.No. 12/50757 the Planning Authority completed an Environmental Impact Assessment. Both of these matters are dealt with in the Executive Planners report, a copy of which I have attached for your information.*

An Internal Review request was then made on the 28th January 2013. While according to the regulations the response should come from a separate official at the same or higher level, in reality the reply on the 29th January from same Paul Kelly of Donegal County Council stated:

- *Otherwise I would advise you that the Council is satisfied that (i) an Environmental Impact Assessment was carried out in respect of planning application Plan.Reg.No. 12/50757 and that same is evident in the Planners Report at Section 6.0 "Assessment of the Development" and sub-section 6.3 "Environmental Impact", which has already been furnished to you, and (ii) that the Council has fully complied with the legislation in this regard.*

This project was then appealed to An Bord Pleanala, appeal PL 05E.241596. See the Section of the Communication on Article 6(4) and evaluation of the issues raised by Ms Sharkey. The final conclusion of the Board in refusing planning permission was related to unacceptable visual impact in an area of sensitive landscape, which is actually a term which could be rightly applied to the majority of the island of Ireland.

3. CORKERMORE WIND FARM COUNTY DONEGAL

Donegal CC Planning Application 12/50188[54] related to the addition of four additional turbines to the existing wind farm in Corkermore, Co. Donegal, a comprehensive submission was made on this application in August 2012. In the Donegal County Council's Planner's Recommendation, which is the only assessment document on the internet relating to the decision, it was stated that the *"submission raised several issues, summarised below:*

- *A Strategic Environmental Assessment is required for plans and programmes in the area of energy – such an assessment has not been carried out.*

- *Legally required environmental assessments and public participation procedures in relation to Ireland's renewable energy programme and the*

[54] Available at: http://www.donegal.ie/DCC/iplaninternet/internetenquiry/rpt_querybysurforrecloc.asp

National Renewable Energy Action Plan (NREAP) have been bypassed and as such Ireland's renewable energy programme is proceeding without proper authority.

- *Wind power is an intermittent source of generation and it is unclear as to what extent greenhouse gases will be reduced as a result of wind energy. It is contended that the proposed development would in fact contribute towards increased emissions and fossil fuel requirements.*

- *The Planning Authority has a defined legal obligation to assess each individual case and cannot rely on references to National or EU policies which have by-passed legally required assessments and public participation procedures.*

- *The proposed development would have significant environmental impacts inclusive of impacts on landscape & biodiversity and noise impacts".*

There was however no record of how due account of the public participation was taken in the final decision, just the summary of the Submission as above and a note that:

- *All third party comments have been noted and considered.*

Secondly, there was no Environmental Impact Assessment of the project completed by the Competent Authority. Furthermore, the Planner's Recommendations was an unprofessional document with scrawled handwriting, etc.

Since the decision of Donegal County Council on the 15th May 2013, the following were requested under the Access to Information on the Environment Regulations:

- *All documentation and other environmental information in which Donegal County Council took due account of the public participation on the planning process for this wind farm and;*

- *All documentation and environmental information in which Donegal County Council completed their own Environmental Impact Assessment of the project in accordance with Article 3 of Directive 85/337/EC (as amended) on Environmental Impact Assessment.*

The response finally received from Donegal County Council on the 9th July 2013 closing this issue stated:

- *I understand that you have been advised of the information held by the Council in relation to the processing of this application and how the same can be accessed. I can confirm that the Council's Environment Department does not have any additional environmental information relevant to the processing of this application which is not available for review under the planning code, or which could have been taken into consideration in the decision making process on this proposal for development.*

An appeal was lodged to An Bord Pleanala, which became PL05E.242074. This has been discussed previously in the section on Article 6(9) of the Convention.

4. CLOGHAN WIND FARM COUNTY OFFALY

Cloghan Wind farm Planning Application number 12293 was lodged with Offaly Co. Council[55] in December 2012 and related to ten turbines with a rotor height of 170 m. A similar submission was submitted as on the previous wind farm, with the same approach taken in the Inspector's report in which Offaly County Council approved this wind farm on the 22nd July 2013, i.e. while the content of the submission was recorded in short bullet points in the planners report, it was completely ignored thereafter. Furthermore, the planning authority failed to complete its own Environmental Impact Assessment, the only reference to such being Section 10.04 of the Planner's report which sets out what was in the submitted developer's Environmental Impact Statement, which in itself was deficient in many respects.

As a result the following were requested under the Access to Information on the Environment Regulations:

- *All documentation and other environmental information in which Offaly County Council took due account of the public participation on the planning process for this wind farm and;*

- *All documentation and environmental information in which Offaly County Council completed their own Environmental Impact Assessment of the project in accordance with Article 3 of Directive 85/337/EC (as amended) on Environmental Impact Assessment.*

No additional documentation was obtained. An appeal was lodged with An Bord Pleanala PL 19.242354. As it turned out the December 2013 decision on this appeal was to refuse planning based on the unacceptable height of the turbines. However, there were some points of relevance in the inspector's report, such as the environmental impact assessment, Section 11.4.5 Air, Climate, where it was stated:

- *Given the nature of the proposed development, it is considered that the wind farm would be expected to have a positive impact on the global climate by reducing the emission of greenhouse gases (mainly carbon dioxide) and emissions contributing to acid rain (sulphur dioxide and oxides of nitrogen) that would otherwise be released to the atmosphere through the burning of fossil fuels. It is estimated that the development will benefit the environment, due to the fact that 91.43GWh of renewable energy will be generated which displaces fossil fuel energy, which will lead to an annual avoidance of 49,108 tonnes of CO2, 56.14 tonnes of NOx and 1.99 tonnes of CH4 in terms of emissions. Given the nature of the proposed development, I consider that development will impact positively on air quality, and through supporting the reduction in the emission of greenhouse gases,* ***will impact positively on climate.***

In Section 13.1.2 on assessment it was stated:

- *In terms of policy, much of the content of the appellant's submission might be considered as not being relevant to the consideration of this appeal. The board must decide how to apply a planning or government policy in a specific case, or it may have to weigh one policy provision against another, or against some clear public interest or established planning principle. It cannot decide,*

[55] http://www.offaly.ie/eplan/SearchExact.aspx

however, that a particular policy is wrong and so set it aside when considering a planning appeal. If some perceived illegality, unreasonableness or gross unfairness arises from a policy, then it can be challenged and set aside by a court. Regardless of the appellants opinion on the adopted policies the board may not change or set aside adopted policies. It must apply the policy as best it can.

Appendix B

Summary of Submissions in Marshall Day Report

8.4 Submissions review

Earlier in 2013, the DECLG announced that it was going to undertake an update of the guidance on noise (including separation distance) and shadow flicker in the WEDG06, in consultation with the DCENR. As the starting point to this process, submissions were invited as part of a preliminary public consultation process. Over 550 submissions were received from private individuals, the wind industry, professional institutes and local authorities.

Three key noise related topics have been identified as discussion points in the submissions:

• Setbacks
• A-weighted noise levels
• Special audible characteristics

For these three topics, a cross section of issues raised in the reviewed submissions is noted:

· Setbacks
A significant number of submissions supported mandatory setbacks and where distances were mentioned they were generally significantly higher than the 500 m separation referenced in WEDG06. Some submissions suggested that setback distance be proportional to turbine size, for example, a separation equating to a certain number of rotor blade diameters or multiples of turbine blade tip height.

Industry submissions were commonly not in favour of mandatory setbacks, suggesting that they did not provide a means of control which was directly linked to actual noise levels. These submissions also expressed concern that mandatory setbacks set at relatively high levels would prohibit the location of wind farms which were otherwise acceptable from the perspective of noise generated at dwellings or other noise sensitive locations. Some industry submissions stated that setting a fixed mandatory distance would not account for changes in the size or sound generation levels of turbines.

· A-weighted noise levels
The suitability of A-weighted noise limits such as the nominal 43 dBA night-time noise limit applied by ETSU-R-97 was discussed in some submissions. In some cases the A weighting was noted to not provide adequate emphasis on low frequency noise. In others the 43 dBA limit was considered to be inconsistent with recent changes in WHO recommended indoor noise levels.

· Special audible characteristics
Infrasound and low frequency noise were mentioned in some submissions, with an emphasis on amenity and possible health impacts which could arise from these types of sound. A general point was that WEDG06 did not take these types of sound into account. Amplitude modulation was not commonly raised.
For further discussion of these issues, refer to Section 5.3 for setbacks, for a review of noise limits applied internationally and Section 3.4 and Section 5.5 for a discussion of special audible characteristics.

Other issues noted from the submissions include concerns raised in relation to the perceived deficiencies in the process of assessment of planning applications for wind farms by planning authorities. Issues were also raised in regard to noise measurement, a lack of information available to the public about proposed wind energy and developments and also a lack of adequate public consultation by wind farm developers. The potential negative health impacts from wind farms was a common issue of concern raised in a significant number of the submissions.